The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Deborah B. Goldberg
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

NO. 25E-1294
M.S. WALKER, INC.,
PETITIONER
v.
CONSTELLATION BRANDS, INC.,
RESPONDENT
HEARD: 06/10/2015

MEMORANDUM AND ORDER
ON PETITIONER'S MOTION
TO MODIFY AMENDED SCHEDULING ORDER

The Commission hereby issues this Order in response to M.S. Walker's May 22, 2015, Motion to Modify Amended Scheduling Order. The Commission has fully considered the Motion and other discovery-related matters of legal substance and issues the following Order as it is necessary to move this case forward.

PROCEDURAL BACKGROUND

This case arises under M.G.L. c. 138, §25E. Petitioner, M.S. Walker Inc. (M.S. Walker) is a Massachusetts wholesaler aggrieved at the refusal of Constellation Brands Inc. (Constellation), a Massachusetts manufacturer of alcoholic beverages, to ship Mark West Wines (Brand Items) to M.S. Walker. On or about September 13, 2012, pursuant to the mandate in M.G.L. c. 138, §25E, the Commission issued an order to Constellation to make sales of the Brand Items to M.S. Walker pending the Commission's determination of the petition on the merits. The Commission also authorized discovery to take place.

On February 7, 2014, Constellation filed a Motion for Summary Decision. In response, on February 20, 2014, M.S. Walker filed a Motion to Enlarge Time to Respond to Constellation's Motion for Summary Decision. On February 27, 2014, M.S. Walker filed a further Motion to Strike and to Compel Further Discovery Responses. On February 28, 2014, Constellation filed a Partial Opposition to Walker's Motion to Enlarge Time. The Commission allowed M.S. Walker's Motion to Enlarge Time and set a new pre-hearing timeline on July 29, 2014. The next day, on July 30, 2014, the Commission ordered Constellation to produce several documents, including certain electronic records.

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Constellation filed a Motion for Clarification and Reconsideration on August 8, 2014, which resulted in the Commission amending its pre-hearing timeline on November 3, 2014. On November 5, 2014, Constellation provided M.S. Walker with a disc containing email discovery, containing over 120,000 documents. Less than two weeks later, on November 18, 2014, M.S. Walker filed a Motion for Discovery Sanctions Against Constellation.

A hearing was held before the Commission on December 9, 2014, to address M.S. Walker's Motion for Discovery Sanctions. The Commission held another hearing on December 15, 2014, regarding M.S. Walker's Motion for Discovery Sanctions and Motion to Revise Scheduling Order. At this hearing, Constellation agreed that its produced discovery was not responsive to M.S. Walker's requests and would go back and search again.

The Commission scheduled a status conference for December 23, 3014, to hear further on the ongoing discovery dispute but the parties jointly requested that the status conference be postponed, which the Commission allowed.

At some point following the Commission hearing on December 9, 2014, in an attempt to narrow the prior production of 120,000 emails, Constellation hired a third party vendor, Target Litigation Consulting, to search its email system for agreed-upon search terms.[1] As a result, on March 11, 2015, Constellation provided M.S. Walker with a thumb-drive containing 24,638 emails, complied by Target Litigation Consulting. At another status hearing on March 18, 2015, the Commission heard the parties on the Motion for Discovery Sanctions and other discovery-related matters.

The Commission issued an order denying M.S. Walker's motion for discovery sanctions along with an amended scheduling order on May 6, 2015. In its order, the Commission ordered Constellation to "re-produce the documents it provided to M.S. Walker via thumb-drive in a usable fashion . . . including the production of an index or other orderly listing of the documents presented so that M.S. Walker can reasonably locate documents responsive to its specific discovery requests." The following day, the Commission denied without prejudice Constellation's motion for summary decision, on May 7, 2015. M.S. Walker filed a motion to modify the amended scheduling order on May 22, 2015, and Constellation filed an opposition on May 29, 2015.

The Commission held a hearing on June 8, 2015, in order to discuss M.S. Walker's motion to modify the amended scheduling order. However, it devolved into a discussion regarding whether Constellation had complied with the Commission's May 6, 2015, order. The Commission ordered that M.S. Walker make a good faith effort to search the thumb drive provided by Constellation, and to report back to the Commission its efforts.

On June 18, 2015, the Commission held another status conference to hear from counsel for M.S. Walker regarding his good faith efforts. Since the parties reached an impasse, the Commission ordered the parties to confer with the Commission's general counsel so that Commission counsel

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[1] Search terms included: SWC, sonomawines, Sonoma wines, markwest, mark west, derekbenham, derek benham, benham, purple wine, purple, projectpioneer, project pioneer.

could evaluate whether what has been produced is reasonably searchable and report back to the Commission.

DISCUSSION

The discovery in this case has taken on a life of its own. The Commission is again being forced into the middle of a discovery dispute between the two parties, some three years after the commencement of this action under M.G.L. c. 138, §25E, to resolve the issue of discovery of Constellation's emails. All remaining documentary discovery has long since been completed and all that remains is this dispute.

To clarify its past orders for the parties, the Commission has always understood the production of the emails at issue to involve a two-step process. First, the parties were to agree on search terms for Constellation's email system.[2] These search terms were merely to assist Constellation in limiting its review of emails to only those emails containing these search terms rather than looking at every email ever sent or received by Constellation, which could easily number in the millions. See Da Silva Moore v. Publicis Groupe & MSL Group, 287 F.R.D. 182, 190-191 (S.D.N.Y. 2012) ("lawyers frequently have turned to keyword searches to cull email down to a more manageable volume for further manual review"). Constellation has performed step one in that it narrowed its volume of emails down to 24,000 or so emails. However, step two has not yet taken place. Step two involves reducing the 24,000 or so to only relevant documents so that M.S. Walker "can reasonably locate documents responsive to its specific discovery requests" (Comm'n Order May 6, 2015).

While Constellation may disagree, it has not performed step two. No doubt the spreadsheet Constellation provided to M.S. Walker has taken time and expense to compile, but it does not assist M.S. Walker in its ability to *reasonably* locate emails *responsive* to its discovery requests. "A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b) runs the risk that the requesting party can show that the produced form is not reasonably usable . . . ." Branhaven, LLC v. BeefTek, Inc., 288 F.R.D. 386, 391-392 (D.Md., Jan. 4, 2013), citing Advisory Committee Notes to Fed. R. Civ. P. 34.[3]

The Commission in no way finds that Constellation has made anything other than good faith efforts to comply with Commission orders. However, as it stands, what Constellation has produced for M.S. Walker is largely a "document dump." See, e.g., Feldman Production, Inc. v. Industrial Risk Insurers, 2010 WL 2944777 (S.D. W. Virginia, July 23, 2010) (where 30% of produced documents were admittedly irrelevant, and included car and camera manuals, personal photographs, and irrelevant offensive materials, the production was considered a document dump); Venture Corp. Ltd. v. Barrett, 2014 WL 5305575 *3 (N.D. Cal. Oct. 16, 2014) ("there is

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[2] The Commission is well aware of M.S. Walker's objection to this process as it has been made on June 8 and 18, 2015.

[3] The Commission wants to make clear that while the Federal Rules of Civil Procedure and the Massachusetts Rules of Civil Procedure are useful guidance, the Commission is not bound to the discovery rules of the state or federal courts. Therefore, the Commission is only citing e-discovery cases as they provided guidance to its orders.

no serious question that a grab-bag of PDF and native files is neither how [the responding party] ordinarily maintained the documents and [electronically stored information] nor is 'in a reasonably usable form'"). Branhaven, 288 F.R.D. at 389 (document dump where it appears that counsel has done "little, or nothing, in terms of a reasonable inquiry" and may not have "knowledge of the number and identity or responsive documents"). Therefore, Constellation has "failed to make a 'reasonable effort to assure that [Constellation] has provided all the information and documents responsive to the discovery demand.'" Id., quoting Poole v. Textron, Inc., 192 F.R.D. 494, 503 (D.Md. 2000).[4]

The Commission is sympathetic to the potential cost and time it will take Constellation to comply with step two of this process. However, generally speaking, unless the task of producing or answering discovery is *unusual*, *undue* or *extraordinary*, the general rule requires the entity answering or producing the documents to bear that burden. The "mere fact that the production of computerized data will result in substantial expense is not a sufficient justification for imposing the cost of production on the requesting party" or to refuse compliance with discovery requests. In re: Brand Name Prescription Drugs Anti-Trust Litigation, 1995 WL 360526 *2 (N.D. Ill. June 15, 1995).

From the time the Commission ordered the parties to create search terms to the date of this Order, Constellation has never made a showing that performing this second step creates an *extraordinary* hardship. "On the one hand, it may seem unfair to force a party to bear the lofty expense attendant to creating a special computer program for extracting data responsive to a discovery request. On the other hand, if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk." In re: Brand Name Prescription Drugs Anti-Trust Litigation, 1995 WL 360526 at *2. The fact that compliance with discovery will be costly or time consuming, especially if the problem is exacerbated by the responding party's own manner of keeping records, is not sufficient to prove an *undue* or *extraordinary* hardship. See, e.g., Kozlowki v. Sears, Roebuck & Co., 73 F.R.D. 73 (D.Mass. 1976).

On the other hand, asking M.S. Walker to do Constellation's work involves a huge outlay of time and money and constitutes an undue hardship by any definition. See SEC v. Collins & Aikman Corp., 2009 WL 94311 (S.D.N.Y. 2009) (where SEC dumped 1.7 million records on defendant saying the defendant could search them for the relevant evidence and asserting that it did not maintain a document collection relating specifically to subjects addressed, court ruled it would be an undue hardship of defendants and this violated prohibition against "simply dumping large quantities of unrequested materials onto the discovering party along with the items actually sought").

While Constellation must perform step two, it is not required to identify which emails fall in each discovery request; it is only required to produce documents responsive to any of M.S. Walker's discovery requests. See United States v. Perraud, 2010 WL 228013 *9 (S.D. Fla. Jan.

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[4] Indeed, while Constellation Brands engaged the services of Target Litigation to compile the emails on the thumb drive at issue, Constellation ignored Target Litigation's own disclaimer that "In most cases, the next step is an attorney review of the potentially responsive documents."

14, 2010), and cases cited (responding party not required to categorize relevant materials based on individual discovery requests).

The Commission therefore orders Constellation to perform the second step of this two-step process by reviewing the emails on the thumb drive and producing on a new thumb drive only those emails that are relevant to M.S. Walker's discovery requests. It is not required to identify which email goes with which specific discovery request, but it must make a good faith effort to produce only those emails responsive to M.S. Walker's discovery requests and remove all nonresponsive content.

CONCLUSION

M.S. Walker's Motion to Amend the Scheduling Order is **ALLOWED**. Furthermore, Constellation is ordered to review the emails that have already been produced to M.S. Walker and to re-produce on a new thumb drive only those emails that are relevant to M.S. Walker's discovery requests. It is not required to identify which email goes with which specific discovery request, but it must make a good faith effort to produce only those emails responsive to M.S. Walker's discovery requests and remove all nonresponsive content.

An Amended Scheduling Order will be issued forthwith after the parties confer on Thursday, July 2, 2015, at 11:00 a.m. regarding the estimated amount of time it will take Constellation to comply with this Order.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim Gainsboro, Chairman _____

Kathleen McNally, Commissioner _____

Dated: June 30, 2015

You have the right to appeal this decision to the Superior Court under the provisions of Chapter 30A of the Massachusetts General Laws within thirty days of receipt of this decision.

cc: William F. Coyne, Jr., Esq. via email
Mary O'Neal, Esq. via email
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