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Submitted: August 22, 2008
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Re: *Kinexus Representative LLC, et al. v. Advent Software, Inc.*
Civil Action No. 1161-CC

Dear Counsel:

I have read the briefs before me and I conclude that plaintiffs' motion to compel defendant to supplement its responses to interrogatories and to the request for production of documents, dated May 30, 2008, should be granted in part and denied in part. Defendant's request for expenses related to opposing plaintiffs' motion is denied. Defendant's motion to compel plaintiffs to produce documents, dated August 13, 2008, is granted, except that the timetable for production will be set for thirty days from the issuance of the Order implementing this letter decision.

For the reasons described briefly below, I conclude that: (1) within thirty days defendant must respond to interrogatories 1 and 2; (2) within sixty days defendant must specify by Bates number[1] the documents that are responsive to each of the interrogatories, 3 through 6, or directly answer these interrogatories; (3)

[1] Bates numbering is used in document production to identify documents as they are processed.

defendant must specify within sixty days the documents by Bates number that are responsive to each of the agreed document requests within plaintiffs' first set of document requests; (4) defendant shall provide plaintiffs with searchable "extracted text" from the TIFF-formatted documents already produced, but only if plaintiffs pay for the process; (5) within thirty days plaintiffs must produce all documents responsive to the agreed requests within defendant's first request for production of documents; and (6) plaintiffs must pay reasonable expenses related to defendant's motion to compel plaintiffs to produce documents.

I. Plaintiffs' Motion to Compel Defendant to Supplement Responses to Interrogatories.

Plaintiffs complain that responses to the interrogatories are incomplete or nonexistent. Regarding interrogatories 1 and 2, plaintiffs request information regarding actions taken by defendant's board of directors. Defendant merely responded that it was gathering information with which to respond and that these answers could also be obtained through other means.[2] To date, defendant has not supplemented its responses. I find the information requested in the interrogatories to be uniquely situated within the possession of defendant and necessary for plaintiffs to ascertain the proper individuals to depose.[3] As such, I will require defendant to specifically respond to interrogatories 1 and 2 within thirty days from the date of the accompanying Order.

Regarding interrogatories 3 through 6, defendant only "refer[red] plaintiffs to [defendant's] document production."[4] Chancery Court Rule 33(d) provides:

> Where the answer to an interrogatory may be . . . ascertained from the business records of the party upon whom the interrogatory has been served[,] . . . it is a sufficient answer to such interrogatory to *specify the records* from which the answer may be derived or ascertained.")[5]

This Court requires a specific designation of the documents pertaining to each interrogatory when Rule 33(d) is employed.[6] Therefore, within sixty days

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[2] Pls.' Mot. to Compel Ex. C at 3-5.
[3] Pls.' Mot. to Compel Ex. A at 1-2.
[4] Pls.' Mot. to Compel Ex. C at 6-8.
[5] Ch. Ct. R. 33(d) (emphasis added).
[6] *Andresen v. Bucalo*, C.A. No. 6372, 1982 WL 17824, at *3 (Del. Ch. Dec. 2, 1982) ("[D]efendants must particularize the specific records from which adequate answers may be

defendant must either (1) supplement their answers by specifying by Bates numbers the document or categories of documents associated with each interrogatory, or (2) specifically answer the interrogatories.

I am not persuaded that defendant will be unduly burdened by having to specifically respond to interrogatories 3 through 6. It is true that defendant first answered the interrogatories on August 15, 2005[7] and finished document production in December of 2005.[8] Nevertheless, defendant's August 15th answer was oblique and simply referred plaintiffs to the document production. Given defendant's oblique response, plaintiffs could not have known that upon completion of production no final index would be prepared or that defendant would fail to specify which documents were responsive to individual interrogatories. Whatever time defendant may have expended in producing responsive documents, the production only resembled "making all of the records available for inspection"[9] and, as such, did not constitute a proper response.

II. Plaintiffs' Motion to Compel Defendant to Supplement Requests for Production of Documents.

Plaintiffs also request that defendant specify the documents, by Bates number, that are responsive to each of the agreed document requests. Court of Chancery Rule 1 requires that all Rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every proceeding." In keeping with this directive, it is unreasonable for defendant to simply produce over 288,000 documents without specifying which documents or categories of documents are responsive to each specific document request. [10]

Plaintiffs' inexplicable delay in objecting to the document production has not, however, imposed an undue burden on defendant. It seems likely that defendant's

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extracted and not . . . just mak[e] all of the records available for inspection."); *Boxer v. Husky Oil Co.*, C.A. No. 6261, 1981 WL 15479, at *4 (Del. Ch. Nov. 9, 1981) ("[T]he option afforded by Rule 33(c) [predecessor to Rule 33(d)] . . . does not shift to the interrogating party the obligation to find out whether sought after information is ascertainable from the files tendered, but only permits a shift of the burden to dig it out once the respondents have specified the records from 'where the answer' can be derived or ascertained . . . . Thus, the interrogated party must be specific in order to protect against any abusive use of the Rule 33(c) option.").

[7] Notice of Def.'s Resp. to Pls.' First Set of Interrogs. to Def., Aug. 15, 2005.

[8] Bower Decl. ¶¶ 3, 5, July 23, 2008.

[9] *Andresen*, 1982 WL 17824, at *3.

[10] Fleischer Aff. ¶¶ 5-6.

document review process required consideration of the individual document request to which a document was responsive.[11] Since defendant has already categorized documents by responsiveness to each request, plaintiffs' lackadaisical approach to objecting to the lack of specificity will not impose an undue burden in reproducing that information. Even if the document categories do not exist, plaintiffs could not have foreseen that no key or index for the documents would be provided after document production was terminated. A timely objection made by a vigilant plaintiff immediately after defendant furnished the documents would not have changed defendant's lack of categorization by document request. The documents would still need to be recategorized. Finally, it is apparent that discovery has far from concluded and that plaintiffs' late objection is still timely. Defendant has only recently filed a request on plaintiffs for a response to interrogatories.[12]

Given the leisurely pace of discovery in this lawsuit, I will require defendant to specify, by Bates number, which documents are responsive to each particular document request to which defendant agreed to respond. This must be accomplished within sixty days of the issuance of the accompanying Order.

Plaintiffs also request defendant to comply with instruction F to "produce documents in electronic form in the most accessible, searchable, maneuverable and common medium available to [defendant]."[13] Plaintiffs contend documents must be provided in their native file format with metadata and, if not available in that format, must be in a searchable Optical Character Recognition ("OCR") format.

Defendant's general objection and objection to the instructions and definitions, however, are sufficient (in my opinion) to demonstrate that the native file format or OCR format were not agreed delivery formats. Defendant generally objected to the instructions "to the extent they attempt to impose obligations extending beyond those imposed or authorized by the Rules of the Court of Chancery."[14] Defendant also objected "to *each* of plaintiffs' 'Instructions' to the extent they vary from, or are inconsistent with, the Delaware Court of Chancery Rules"[15] and these objections were incorporated into the specific responses.[16]

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[11] *See* Kellermann Decl. ¶ 8
[12] Notice Of Serv. of Def.'s First Set of Interrogs., Aug. 28, 2008.
[13] Pls.' Mot. to Compel Ex. B at 3, Instruction F.
[14] Bower Decl. July 23, 2008 Ex. C ¶ 1.
[15] *Id*. ¶ 7 (emphasis added).
[16] *Id*. ¶ 9.

I decline to hold that the Court of Chancery Rules governing document production in 2005 required an OCR format or native file format, including metadata, without a particularized showing of need.[17] Nevertheless, defendant's proposal to provide searchable "extracted text" amounts to an acceptable compromise. As such, defendant shall provide the "extracted text" format to plaintiffs, but only if plaintiffs agree to reimburse all of defendant's related expenses. Plaintiffs must pay these associated costs because they failed to timely object to the non-searchable TIFF format. It is the untimely objection that necessitates creation of the "extracted text." That plaintiffs have incurred delay due to employing new counsel is self-inflicted and immaterial, and is not a justification for shifting the costs to the defendant.

III. Award of Expenses Related to Plaintiffs' Motion.

Plaintiffs and defendant both request an award of expenses related to bringing or defending plaintiffs' motion. Both premise their request on Court of Chancery Rule 37(a)(4)(A).[18] In light of plaintiffs' delay in prosecuting their motion, and since plaintiffs were successful in only part of their motion to compel, I deny an award of expenses. Nor do I believe that defendant is entitled to costs incurred in defending against plaintiffs' motion.

IV. Defendant's Motion to Compel Plaintiffs to Produce Documents and Defendant's Request for an Award of Expenses.

Defendant asks that I order plaintiffs to immediately and completely respond to the fifteen document requests to which plaintiffs had previously agreed to respond on October 14, 2005.[19] A nearly three-year delay in responding to defendant's request for document production is beyond unreasonable. That defendant made no attempt before 2008 to spur document production by plaintiffs is not prejudicial given plaintiffs' evident lack of action on other aspects of this case. Plaintiffs lamely defend their lack of production by pointing to defendant's refusal to cure alleged defects in defendant's production. Defendant is not required

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[17] *See Ryan v. Gifford*, C.A. No. 2213-CC, 2007 WL 4259557, at *1 (Del. Ch. Nov. 30, 2007).

[18] Ch. Ct. R. 37(a)(4)(A) provides:

> If the motion is granted or the disclosure or requested discovery is provided after the motion was filed, the Court shall . . . require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order.

[19] Bower Decl. ¶¶ 3, 6, June 6, 2008; Ex. B.

to cure alleged defects in its own production as a prerequisite to plaintiffs' obligation to comply with their own document production.

Plaintiffs' failure to produce documents seems calculated to impose financial costs on defendant while allowing plaintiffs to avoid related discovery expenses. Defendant's production burden associated with reviewing over one million documents was far greater than plaintiffs' burden of reviewing 31,000 documents.[20] Worse still, plaintiffs' refused to produce any documents for more than two and one-half years[21] after defendant produced the majority of its 288,000 documents.[22]

Accordingly, I direct plaintiffs to respond completely to defendant's document discovery request within thirty days. In addition, I award defendant's expenses related to bringing the motion to compel in accordance with Rule 37(a)(4)(A). Plaintiffs produced no documents until nearly two months after the motion was filed.[23] I therefore find that the motion precipitated the initial production of the documents and is essential to ensuring the complete production of additional documents. Defendant shall submit an affidavit to the Court detailing the expenses related to its motion to compel discovery. The Court will then order plaintiffs to pay defendant's expenses.

An Order has been entered that implements this letter decision.

Very truly yours,

William B. Chandler III

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[20] Kellermann Decl. ¶ 6; Pls.' Answer to Def.'s Mot. to Compel ¶ 4.
[21] *See* Pls.' Answer to Def.'s Mot. to Compel ¶ 7; Def.'s Reply ¶ 1.
[22] Bower Decl. ¶ 5, July 23, 2008.
[23] *See* Def.'s Mot. to Compel; Pls.' Answer to Def.'s Mot. to Compel ¶ 7; Def.'s Reply ¶ 1.

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