IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JONATHAN LOVE; SHERI McWILLIAMS; TRACY KEEN; and ROBIN LOVE **PLAINTIFFS**

v. **No. 5:13-cv-292-DPM**

MICHAEL L. RETZER, Individually, and in his Capacity as an Owner, Officer and Manager of Retzer Resources, Inc. and the Retzer Group, Inc.; and RETZER LLC **DEFENDANTS**

ORDER

Former Retzer employee Donna Thornton's last minute overture to plaintiffs' counsel, her garage full of records, and the shadows her affidavit cast over the time change records that Retzer had provided—all this prompted the Court to take several steps. It continued the trial, ordered all the Thornton records copied and produced, and held an evidentiary hearing. *№ 196*. The garage records were well handled as directed. But Thornton sent new documents to plaintiffs' counsel after the production deadline. These were not revealed until the evidentiary hearing. This caused another tangle. The Court excluded the unproduced materials, but allowed plaintiffs to proffer them and question witnesses about them to make a complete record. The Court heard testimony from Thornton, Ezra Yildirim (a computer

technician involved in getting some records), Hal Burt (the Retzers' chief operating officer), and Keasha Jones (a Retzer supervisor who used to work for Thornton). The Court apologizes for its delay in ruling on plaintiffs' motion to sanction the Retzers by striking their answer and reinstating the collective action. Long story short, the motion is denied but the Court orders a further production by the Retzers before trial. Here are the Court's findings of fact.

1. The "Time Punch Change Approval Report[—]All Employees With Detail" materials gathered by Yildirim and produced to plaintiffs were unaltered. He was a credible witness—a computer guy with imperfect English, who explained what happened. He came across some unreachable payroll files on the POS server while working on another problem. He reported this to Thornton, which prompted her to contact McDonalds corporate for help. Only then did Retzer get codes and instructions about how to retrieve these reports—not from the POS server, but from back-up CDs created in the ISP server. Retzer (through Yildirim) faithfully printed these reports for plaintiffs. While it was possible for these PDFs (like most

PDFs) to have been altered, there's no evidence these reports were changed in any way before production.

2. Why didn't the back-up CDs surface earlier? The proof as a whole from Yildirim, Burt, Thornton, and Jones demonstrated uncertainty and confusion. This was true about the different restaurant computer systems and about how deep the records were archived on the back-up CDs. There was also some incomplete record keeping. Retzer's discovery responses and joint-report statements reflect mistakes resulting from this uncertainty and confusion, not an effort to hide the truth.

3. The email/letter exchange between counsel in late October 2014 is critical. Plaintiffs' counsel immediately recognized that the Yildirim production didn't come from the binders in Greenville. Retzer's counsel, at that point, explained about the incomplete paper records and Retzer's use of back-up CDs at the Sheridan, Stuttgart, and Helena locations. Retzer—through Donna Thornton—confirmed the correctness of counsel's explanation before it was given.

4. At that point, Retzer should have also produced the partial set of time punch change reports it had in the binders. Given all the fussing about

company reports that had already ocurred, and the related confusion, a full production would have been most helpful to everyone. Here again, though, more confusion: Burt testified at the hearing, for example, that he thought the binder records *were* produced and supplemented with records from the back-up CD. Not so. Thornton was managing the document production for Retzer, and some of the fault here is with her. There was also time pressure.

If Retzer had also produced copies of the admittedly incomplete binder reports, then everyone would have known about the second version of a key report—the "Time Punch Change Approval Report[—]Changed Employees Without Detail." The title of this record is a bit of a misnomer. Even though the other version has more details, the second version has a place for the manager and the employee to initial, showing joint approval of the time change. That's important. The absence or presence of initials on the report is relevant evidence from which reasonable inferences could be drawn. And Retzer must fill this gap by copying whatever reports exist in the binders for the remaining plaintiffs and providing those records now.

5. Retzer's stumble here was matched by plaintiffs'. There was no follow up on the back-up CDs and what other information they might

contain. There was no follow up on the binders. Plaintiffs should have at least reviewed the binders in Greenville or requested copies.* There was no further correspondence between counsel about the back-up CDs, a new records source. And the contents of the CDs weren't explored during the later Thornton or Burt depositions. It could have been.

6. Thornton's credibility is thin. She's bitter about being eased out of her job as an operations manager with Retzer in the summer of 2015. It's clear that Thornton had Keasha Jones in her sights, and the Retzers sided with Jones. Thornton's anger has colored her memory. The Court is unpersuaded that anyone at Retzer told Thornton to lie about anything. She contradicted her 2015 deposition testimony. She was mistaken about several things, such as whether Jones was reprimanded, the interaction of the two computer servers in the store, the best way to view "unedited" time punch changes, and whether Retzer gave plaintiffs unedited change records. On the Friday afternoon before trial, Thornton decided to return fire on the Retzers by

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*Based on the dates, the Court's hunch is that only records involving Tracy Keen exist in the binders. But Retzer should double check and produce every report in the binders that it has for Keen, the two Loves, and McWilliams.

contacting plaintiffs' counsel. She offered a mixture of truth, overstatement, and error.

7. For all the talk about the garage records on the morning of the canceled trial, they revealed only two new things: the existence of the second version of the time change report, which has the place for initials; and the "Labor Violation Report," which is generated by the R2D2 program. The title of this second report is unseemly. Though the Retzers did not choose the title, they use the report, and it reflects their attitude about overtime—if possible, Retzer doesn't want to pay any. This attitude was not a revelation. Beyond these two new reports, the garage records and Thornton's critique of Jones show what the plaintiffs have already demonstrated: Retzer tried hard to contain labor costs; and there was lots of adjusted time among the fluid workforce at these Retzer restaurants. What's still missing, though, is any common Retzer policy of shaving time that could be tried in a collective action. *№ 148.*

8. After the March 1st disclosure deadline, Thornton peppered plaintiffs' counsel with email and some more documents. They were excluded at the evidentiary hearing out of fairness to Retzer because they

weren't disclosed beforehand. The Court has, however, reviewed the proffered documents and proffered testimony. Everyone explored this information to some extent at the hearing. And in fairness, plaintiffs are entitled to a word about it. Here again, the materials show Retzer pushing hard to contain labor costs and discouraging overtime. But the additional reports and the emails do not cast doubt on the Court's earlier decisions. A collective action needed to be conditionally certified and then it needed to be decertified—when the Court was faced with no common policies (beyond a hard line against overtime) and a wilderness of single instances about lost time.

9. Retzer's responses to the formal and informal discovery requests, and the Court's orders on the joint reports, were imperfect but adequate. We all could have done better: the Court should have worked harder and sooner to understand Retzer's electronic records; plaintiffs should have looked into the back-up CDs, the universe of possible reports, and the binders; and Retzer should have puzzled through its record-keeping systems better and been more forthcoming about what could be dug out of them. The Court notes plaintiffs' good reference to Whittier. This latest dispute is partly a matter of

what might have been. In a deeper sense, though, unlike Maud Muller and the Judge, this case would be in about the same place even if no one had made discovery mistakes. Rule 37 sanctions are not appropriate.

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Motion for sanctions, *№ 186*, denied. Supplemental production by 19 August 2016 ordered. Trial remains set for 26 September 2016. The Court will know, and will advise, in late August whether any of its September criminal cases are going to trial. Amended pretrial disclosures due 2 September 2016 if we stay on track for trial. The Court has been able to reserve the Pine Bluff courthouse.

So Ordered.

D.P. Marshall Jr.

D.P. Marshall Jr.
United States District Judge

2 August 2016