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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PHILIPS NORTH AMERICA LLC,

Plaintiff,

v.

ADVANCED IMAGING SERVICES, et
al.,

Defendants.

No. 2:21-cv-00876 DAD AC

ORDER

This action was filed on May 13, 2021. ECF No. 1. Presently before the court is the fourth motion to compel discovery that has been filed in this case, which is a reopening of plaintiff's third motion to compel (ECF No. 115, order at ECF No. 126). ECF No. 140. The parties filed the required joint statement, along with exhibits. ECF No. 151. A hearing was held on January 11, 2023, before the undersigned with counsel for both plaintiff and defendants present. Both sides presented extensive oral argument. All parties involved are familiar with the case history, and the legal standards that apply to discovery are familiar and need not be repeated here. See Rule 26(b)(1), Fed. R. Civ. P.

I. Motion to Compel

On June 3, 2022, the undersigned denied plaintiff's motion to compel a forensic examination of defendants' computers and other devices that were used to interface with, or that

1 were used in connection with, defendants' servicing of Phillips systems. ECF No. 124 at 3; ECF
2 No. 126 at 4. The two interrogatories at issue read as follows:

3 RFP No. 10:

4 A forensic copy of, or the opportunity to inspect, any and all
5 hardware or other physical devices that you have used or have
6 provided to third parties for attachment to or interface with Philips
7 Systems in connection with or related to your or third-party access to
8 or service of Philips Systems, and all documents regarding such
9 hardware or other physical devices.

8 RFP No. 11:

9 A forensic copy of, or the ability to inspect, any laptop or other
10 computer utilized by you to gain access to, copy files to, or otherwise
11 modify files on, or provide services to a Philips System.

11 ECF No. 124-2.

12 The court denied the motion to compel without prejudice, noting that defendants
13 "vehemently deny that any such devices exist" and that they had submitted an affidavit from Sean
14 Wang, Chief Operating Officer of Advanced Imaging Services, in which Mr. Wang makes a
15 sworn statement that "Neither Advanced Imaging nor myself have at any point remotely accessed
16 Philips's equipment, or used any of our computers or any other electronic devices to remotely
17 access Philips equipment." ECF No. 124-10 at 2. The order denying the motion noted that the
18 matter could be re-opened if additional information called Mr. Wang's statement in to doubt, but
19 ruled that absent "clear, concrete evidence to the contrary, the court will accept the defendants'
20 sworn statements that no responsive documents/devices exist and will not compel production."

21 ECF No. 126 at 5.¹

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23 ¹ In that order, the court used language indicating that Mr. Wang's state of mind with respect to
24 the truthfulness of his affidavit would be at issue in the decision as to whether further evidence
25 warranted re-opening this discovery dispute. ECF No. 126 at 5 ("Thus, denial is without
26 prejudice should concrete evidence that Mr. Wang has perjured himself with respect to this
27 motion emerge.") That language was inappropriate and is hereby disavowed. Mr. Wang's state
28 of mind regarding the accuracy or completeness of his previous affidavit is immaterial. The only
question before the court is whether plaintiff has now identified a factual basis for its belief that
defendants' computers may contain information relevant to its claims. The undersigned neither
makes nor implies any findings here regarding Mr. Wang's truthfulness or any misconduct by any
party.

1 In the motion presently before the court, Philips contends it has obtained additional
2 information warranting a forensic inspection of defendant’s computers. ECF No. 151 at 3.
3 Defendants oppose the motion, arguing that Philips failed to present “concrete, specific evidence
4 of concealment,” which they assert is required for forensic imaging of computers to be
5 appropriate. Id. at 20.

6 Having reviewed the unredacted joint statement and its exhibits, and the exhibits and
7 demonstrative aids presented at hearing on the motion, the court finds that Philips has adequately
8 demonstrated that forensic examination of the computer used by Sean Wang is appropriately
9 conducted by its own expert under Rule 26(b)(1). Philips has explained why it believes the
10 computer may contain evidence of unauthorized access of Philips systems, see ECF No. 158-1,
11 and the court finds this showing to adequately support the motion as to Sean Wang’s computer.
12 Inspection of the computer may or may not ultimately reveal information supporting plaintiff’s
13 claims, but plaintiff may undertake discovery—under the stringent privacy protections of the
14 operative protective order—to find out. Wholesale access to all defendants’ computers, however,
15 would be grossly disproportionate to the needs of the case. The RFPs as written, seeking access
16 to any and all computers, devices and hardware, are overbroad and compelled production is
17 denied as to devices other than the Sean Wang computer.²

18 The court disagrees with defendant that a heightened standard categorically applies to all
19 compelled computer forensics. While it is certainly true that concerns of proportionality and
20 confidentiality are heightened in this context, as the cases reflect, the standard governing
21 discovery does not vary. Defendants rely on a series of unpublished orders from other district
22 courts, which use language that originates in a 2006 discovery order out of the Northern District
23 of California, Advante Int’l Corp. v. Intel Learning Tech., No. C-05-01022 JW(RS), 2006 WL
24 1806151, at *1 (N.D. Cal. June 29, 2006). In Advante, the court ruled in favor of the non-moving

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26 ² Should the results of the forensic examination authorized here provide a basis, in plaintiff’s
27 view, for further such examination of other computers, plaintiff must make a new and narrowly
28 tailored request for production. This order concludes litigation of Plaintiff’s RFP Nos. 10 and 11,
but does not preclude further discovery requests regarding electronically stored information or
computing devices.

1 party on a motion to compel in which the movant made vague accusations of misconduct and
2 argued that this warranted a full examination of all the non-movant's computers. Id. The
3 relevant language appears in Advante as follows:

4 The mere fact that this case involves electronic data does not change
5 the basic concepts or rules of the discovery process. Had Mintel
6 made the same basic accusations in an earlier age, its claims of
7 incomplete document production, inconsistencies, or even perjury
8 and destruction of evidence, would not automatically entitle it to an
9 order permitting it to enter Advante's offices to rummage through
10 filing cabinets and desks. The relief Mintel is asking for here is no
11 different and no more warranted. Furthermore, notwithstanding the
12 breadth of accusations Mintel has leveled, it has not presented
13 specific, concrete evidence of concealment or destruction of
14 evidence sufficient to conclude that a forensic examination of the
15 vast scope it proposes is warranted at this juncture, even under an
16 examination protocol that would protect the other parties' legitimate
17 privacy and other interests.

18 Id. Advante simply cannot be read to create a "specific, concrete evidence of concealment"
19 requirement for the forensic examination of computers under all circumstances; indeed, it affirms
20 that the "basic concepts [and] rules of the discovery process" apply.

21 On the facts of this case, which are materially distinct from the cases cited by defendants,³
22 proportionality is adequately assured by limiting discovery to Sean Wang's computer, and
23 confidentiality is adequately addressed by the protective order already in place. The court will
24 impose the following additional requirements: (1) the authorized forensic copy of the Sean Wang
25 computer shall be produced to plaintiff as "attorneys' eyes only" material, to include the retained
26 expert of plaintiff's choice; (2) plaintiff shall disclose to defendants the examination protocol to
27 be used by its retained expert *before* the examination is undertaken, and defendant shall have
28 seven days thereafter to object. Details of this requirement are specified below.

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³ Here, plaintiff seeks digital evidence of the alleged conduct giving rise to its claims, which may have been accomplished using the computer at issue. This is not a case, like Advante or Sophia & Chloe, Inc. v. Brighton Collectibles, Inc., 2013 WL 5212013 (S.D. Cal. Sept. 13, 2013), where forensic examination of computers is sought to test the non-moving party's assertion that certain other materials, such as emails or business records that might be stored on a computer, do not exist. Discovery is ordered here not on the issue of discovery misconduct, which was the basis of the disputes in Advante and Sophia, but in relation to plaintiff's theory of its case.

1 **II. Fees, Costs, and Sanctions**

2 Defendants raised the issue of fees and potential motions for sanctions multiple times in
3 their briefing and at oral argument. As the non-prevailing parties, they are of course not entitled
4 to fees, nor does the court find that Philips' discovery conduct warrants sanctions of any kind at
5 this juncture.

6 Federal Rule of Civil Procedure 37(a)(5)(A) requires that a prevailing movant on a motion
7 to compel generally be awarded reasonable fees and expenses incurred in making the motion.
8 The court can decline to order such fee shifting under certain circumstances, including where "(ii)
9 the opposing party's nondisclosure, response, or objection was substantially justified; or (iii)
10 other circumstances make an award of expenses unjust." Id. The court finds that defendant's
11 position on the merits of this dispute was substantially justified, although the factors supporting
12 compelled discovery ultimately weigh in plaintiff's favor. The motion is being granted only in
13 part, and counsel on both sides appear to have contributed to the stalemate that made the motion
14 necessary.

15 Accordingly, no sanctions will issue and each party will bear its own fees and costs. The
16 court reiterates its expectation that both parties will take reasonable positions with respect to
17 discovery and will endeavor to cooperate in the discovery process. Should the examination of
18 Mr. Wang's computer lead to further requests by Philips for examination of ASI computers, the
19 court trusts that the parties will put forth best efforts to reach agreement before bringing
20 additional disputes to the court. Nothing in this order should be read to suggest that fees will not
21 issue in connection with future discovery motions.

22 **III. Conclusion**

23 It is hereby ORDERED that plaintiff's motion at ECF No. 140 is GRANTED IN PART,
24 as follows. A neutral technician shall make a forensic copy of Mr. Sean Wang's computer only,
25 at plaintiff's expense. Defendants shall make Mr. Wang's computer available for imaging
26 without undue delay. The full forensic copy shall be made available to both plaintiff's counsel
27 and defendants' counsel, subject to the provisions of the existing stipulated protective order (ECF
28 No. 49); the disclosure as to plaintiff's counsel shall be for review by counsel and retained experts

1 only. Prior to submission of the forensic copy to plaintiff's expert for examination, plaintiff shall
2 disclose to defendants the protocol to be followed by the examining expert to protect defendants'
3 legitimate privacy and other interests by identifying and excluding from examination any
4 electronically stored information not related to potential access of Philips systems. Defendants
5 shall have seven days to object in writing to the protocol and initiate the meet and confer process.
6 Should any meet and confer process as to the protocol fail to result in agreement, defendants may
7 seek resolution of the dispute on shortened time by making an appropriate motion. Plaintiff's
8 examination shall not commence until any objection to the protocol has been resolved.
9 Objections to the fact of examination or its scope as authorized herein, in the guise of objections
10 to the protocol, will not be entertained.

11 All parties shall bear their own fees and costs.

12 IT IS SO ORDERED.

13 DATED: January 19, 2023

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15 ALLISON CLAIRE
16 UNITED STATES MAGISTRATE JUDGE
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