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United States District Court, N.D. Illinois.
In re BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION.
Nos. 94 C 897, MDL 997.

June 15, 1995.

KOCORAS, District Judge.

MEMORANDUM OPINION

***1** This matter is before the Court on Class Plaintiffs' motion to compel CIBA-Geigy Corporation ("CIBA") to produce responsive, computer-stored electronic mail ("e-mail") at its own expense. For the reasons that follow, Class Plaintiffs' motion is granted, subject to the limitations set forth below.

DISCUSSION

At issue is the production of CIBA's e-mail, which is intra-corporate correspondence generated and stored within CIBA's computer system. CIBA does not dispute that it has responsive e-mail that is discoverable. Rather, CIBA contends that Class Plaintiffs' request is untimely, overly-broad and overly-burdensome such that the plaintiffs' request should be denied. In the alternative, CIBA asks that if Class Plaintiffs' request is granted, then we should require the plaintiffs to narrow the scope of their request, and further require the plaintiffs to bear the costs of production.

First of all, we agree with Class Plaintiffs that CIBA's e-mail is discoverable. Rules 26(b) and 34 of the Federal Rules of Civil Procedure instruct that computer-stored information is discoverable under the same rules that pertain to tangible, written materials.

CIBA argues that the plaintiffs have "waived" their right to seek e-mail by failing to diligently pursue their request. In support, CIBA tracks the parties' ongoing correspondence on the e-mail issue and argues that Class Plaintiffs' motion should be denied because they have been dilatory in pursuing their e-mail request. While we agree that Class Plaintiffs' performance in pursuing the e-mail issue has been less than exemplary, their conduct is not as egregious as CIBA suggests, and does not constitute an abuse of the discovery process. Accordingly, we reject CIBA's "waiver" argument.

We likewise reject CIBA's argument that the Class Plaintiffs should bear the costs for retrieving responsive e-mail. CIBA estimates that it has at least 30 million pages of e-mail data stored on its technical back-up tapes. CIBA states that in order to search the e-mail data for names of particular individuals and to eliminate duplicate messages CIBA will incur an estimated cost of $50,000 to $70,000 in compiling, formatting, searching and retrieving responsive e-mail. It is CIBA's position that the Class Plaintiffs should be required to reimburse CIBA for its costs because (a) the plaintiffs agreed to do so; and (b) the *Manual for Complex Litigation* contemplates reimbursement in circumstances such as these.

We find no support for CIBA's position that the plaintiffs somehow agreed to compensate CIBA for the $50,000 to 70,000 estimated retrieval costs. CIBA has failed to come forward with any express agreement where the Class Plaintiffs agreed to incur the estimated retrieval and production costs. At best, CIBA has shown that the parties discussed the issue of compensation, and that it was CIBA's "understanding" that the Class Plaintiffs would pay for the estimated retrieval costs. However, the correspondence leading up to this motion belies the notion that the parties agreed to *anything* regarding the e-mail issue.

***2** The *Manual for Complex Litigation* lends some support to CIBA's position that Class Plaintiffs should be forced to incur the e-mail retrieval and production costs.[FN1] Nevertheless, relevant case law instructs that the mere fact that the production of computerized data will result in a substantial expense is not a sufficient justification for imposing the costs of production on the requesting party. Rather, in addition to considering whether the amount of money involved in producing the discovery is inordinate and excessive, the court may consider factors such as whether the relative expense and burden in obtaining the data would be greater to the requesting party as compared to the responding party, and whether the responding party will benefit to some degree in producing the data in question. *See* Bills v.

Kennecott Corp., 108 F.R.D. 459, 464 (D.Utah 1985).

Central to any determination of whether a cost should be shifted to a producing party is the issue of whether the expense or burden is "undue." In the context of the retrieval and production of computer-stored information issues of "undue burden" become complicated. On the one hand, it seems 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. Faced with considerations similar to the ones presently confronting us, the United States Court of International Trade remarked:

It would be a dangerous development in the law if new techniques for easing the use of information became a hindrance to discovery or disclosure in litigation. The use of excessive technical distinctions is inconsistent with the guiding principle that information which is stored, used, or transmitted in new forms should be available through discovery with the same openness as traditional forms.

The normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship.

Daewoo Electronics Co. v. United States, 650 F.Supp. 1003, 1006 (Ct.Int'l Trade 1986).

Here, CIBA argues that devising and paying for a retrieval program is an extraordinary hardship which it should not be forced to bear. While we agree that an estimated retrieval cost of $50,000 to $70,000 is expensive, we do not believe that it is a burden that the Class Plaintiffs should bear, particularly where, as here, "the costliness of the discovery procedure involved is ... a product of the defendant's record-keeping scheme over which the [plaintiffs have] no control." *Delozier*, 109 F.R.D. at 164 (*citing Kozlowski v. Sears Roebuck & Co.*, 73 F.R.D. 73 (D.Mass.1976)). CIBA essentially admits that part of the burden attendant to searching its storage files results from "the limitations of the software CIBA is using." Affidavit of Paul G. Keegan, Exhibit H to [CIBA's] Memorandum of Law in Opposition to Class Plaintiffs' Motion to Compel ..., at ¶ 7. Class Plaintiffs should not be forced to bear a burden caused by CIBA's choice of electronic storage. Moreover, we find it interesting that at least four other manufacturer defendants have produced e-mail without insisting that the Class Plaintiffs first agree to pay retrieval costs; at least two of these manufacturers had to conduct computer searches to retrieve the e-mail.

***3** Based on the foregoing, we will not require the Class Plaintiffs to assume the costs associated with retrieving, formatting and electronically manipulating CIBA's e-mail data tapes and copying responsive e-mail documents. We will, however, require Class Plaintiffs to pay CIBA a $0.21 per page fee for e-mail that the Class Plaintiffs select for copying; this is consistent with the agreement already existing among counsel under which plaintiffs pay $0.21 per page for copies of documents selected from defendants' productions.

We will further require the Class Plaintiffs to narrow their request. Throughout its memorandum filed in opposition to Class Plaintiffs' motion CIBA asserts that its programming costs will be particularly time-consuming and burdensome because of the size of the data set requested by Class Plaintiffs. Therefore, for the purpose of containing costs we will require the parties to consult with each other and agree upon meaningful limitations on the scope of any e-mail search.

CONCLUSION

For the foregoing reasons, Class Plaintiffs' Motion to Compel is, for the most part, granted. CIBA will be required to produce its responsive, computer-stored e-mail at its own expense, with the exception that the Class Plaintiffs will pay CIBA the $0.21 per page fee for e-mail that the Class Plaintiffs select for copying. Class Plaintiffs are instructed to narrow the scope of their request. To that end, the parties are instructed to consult and agree upon meaningful limitations on the scope of any e-mail search.

FN1. The Manual for Complex Litigation Second, § 21.446 (1993) provides as follows:

Parties sometimes request production in a form that can be created only at substantial expense for additional programming; if so, payment of such costs by the requesting party should be made a condition to

> production.
> Indeed, parties obtaining information from another's computerized data typically are required to bear any special expense incident to this form of production.

N.D.Ill.,1995.
In re Brand Name Prescription Drugs Antitrust Litigation
Not Reported in F.Supp., 1995 WL 360526 (N.D.Ill.)

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