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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE Justice PART 10

INDEX NO. 113108/09

MOTION DATE

MOTION SEQ. NO. 9

MOTION CAL. NO.

HANSHAW v COLBOURN

- v -

EXMARK TECHNOLOGIES INC

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 27 2012

NEW YORK COUNTY CLERK'S OFFICE

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

a status conference is scheduled for June 28, 2012 @ 9:30 am, 60 Centre St, Rm 232.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/26/12

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Hinshaw & Culbertson, LLP,

Plaintiff-Counterclaim Defendant,

-against-

e-Smart Technologies, Inc. and
IVI Smart Technologies, Inc.,

Defendants-Counterclaim Plaintiff.

---x

e-Smart Technologies, Inc. and IVI Smart Technologies, Inc.,

3rd Party Plaintiffs

-against-

Maranda E. Fritz and
Maranda E. Fritz, P.C.,

3rd Party Defendants.

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DECISION/ ORDER
Index No.: 113108/09
Seq. No.: 009

PRESENT:
Hon. Judith J. Gische
J.S.C.

T.P. Index No.:
591156-09

Pursuant to CPLR 2219(a) the following numbered papers were considered by the court on this motion and cross-motion:

PAPERS	**NUMBERED**
OSC	1
EKL affirm., exhibits	2
Notice of Cross-Motion, MLL affirm., MG "affid.", exhibits	3
EKL affirm. In further support and in opp. To X-motion, exhibits	4

Upon the foregoing papers the decision and order of the court is as follows:

The motion and cross-motion before the court raise various discovery disputes between the parties. In the underlying action, plaintiff Hinshaw & Culbertson LP ("H & C") are seek to recover fees for legal services rendered to defendants e-Smart

Technologies, Inc. and IVI Smart Technologies, Inc. (collectively "Smart"). Smart interposed counterclaims and asserted a third party claim against Maranda E. Fritz and Maranda E. Fritz, P.C. (collectively "Fritz"). H & C and Fritz are jointly represented. By decision and order of this court, dated March 8, 2011, the court narrowed Smart's counterclaims and third party claims to SEC and Wells notice based claims for malpractice and breach of fiduciary duty with respect to a single document.

Although thousands of documents have been produced, no depositions have yet taken place. The parties have reached an impasse on the issues addressed in these motions.

1. Disputes regarding the production of Meta-data

H & C requests that Smart reproduce, in "native format," the discovery already requested and provided. Most of the discovery already produced is in electronic format and H & C is seeking is the meta-data embedded in such documents. It argues that because Smart's principle, Mary Grace, altered highly relevant e-mails, it is entitled to such additional data. Smart denies that Ms. Grace altered any e-mails, but states that it is willing to provide such meta-data, provided that it also receives the meta-data associated with H & C's e-discovery production. Smart's prior document requests expressly request meta-data, which has never been objected to by H & C. Nonetheless the documents actually produced by H & C did not contain any meta-data. H & C is unwilling to provide such meta-data, arguing that because Smart cannot make a threshold showing that it altered any documents, production of e-discovery in its native format is not warranted.

For the reasons that follow, the court holds that the motion and cross-motion are

both granted to the extent that each party is directed to produce its document discovery in a format that includes the meta-data. The documents, in their native format, shall be re-produced by each party no later than 60 days after this decision appears on the Supreme Court Records On-line Library ("Scroll").

It is now recognized that nearly every electronic document contains meta-data, which is secondary information, not apparent on the face of a document, that describes an electronic document's characteristics, origins and usage. Irwin v. Onondaga County Resource Recovery, 72 AD3d 314 (4th dept. 2010). Meta-data can include such information as the name of a file, its location, file type, file size, the identity of its author, and file creation dates, including historical information about modifications or edits.

Meta-data is considered part of an electronic document and is discoverable. 150 Nassau Associates, LLC v. RC Dolner, 30 Misc3d 1224(A) (NY Co. Sup Ct. 2011); Dartnell Enterprises, Inc. v. Hewlett Packard Co., 33 Misc3d 1202(a)(Monroe Co. Sup. Ct. 2011); TA Ahern Contrs. Corp.v. Dormitory Authority, 24 Misc3d 416 (NY Co. Sup. 2009). Contrary to H & C's contention, there is no authority that any additional showing, that the electronic document has been altered or fabricated, is necessary before the production of meta-data should be ordered by a court. Buck Consultants, LLC v. Cavanaugh Macdonald Consulting, LLC, (2007 WL 3236192 [N.Y. Co. Sup. 2007]) relied upon by H & C does not stand for such proposition. While the manipulation of the electronic data provided the basis for the court ordering production of meta-data in that particular case, the court did not hold that meta-data is **only** producible when such manipulation or fabrication of electronic evidence occurs.

As that appellate division, first department noted in Tener v. Cremer, (89 AD3d

75 [1st dept. 2011]) discovery of electronically stored information is commonplace, and there are court rules that address its retention and production. The considerations about whether meta-data should be produced, however, are the same standards that apply to the production of all discovery in a case. The salient considerations are whether it is material and necessary in the prosecution or defense of an action. CPLR § 3101(a). Disclosure of meta-data is required if it "bears on the controversy and will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. Allen v. Crowell-Begin Collier Publ. Co., 21 N.Y.2d 403, 406 (1968).

While certainly meta-data is discoverable to determine if and when documents may have been altered, that is not the only reason for production. General information about the creation of a document, including who authored a document and when it was created, is pedigree information often important for purposes of determining admissibility at trial. Moreover, in this case, although plaintiffs clearly requested electronic information with meta-data, no timely objection was ever raised. Nor is any valid reason raised as to its production at this time. Consequently, both parties are obligated to re-produce the electronically stored documents they originally produced, but this time in a format that includes the meta-data.

Neither party has raised any issue about who bears the cost of such production. Accordingly, the usual rule, that the producing party bears the cost of production shall apply. US Bank National Association v. Greenpoint Mortgage Funding, Inc., __ AD3d __ (1st dept 2012).

2. Disputes regarding Claims of Attorney-Client Privilege

Smart claims that it withheld the production of certain documents based upon the assertion of attorney client privilege. H & C claims that by previously producing otherwise privileged material, the attorney client privilege has been waived. Smart claims that the material provided was not privileged (and the privilege was not otherwise waived) because, although it included communications with attorneys, third parties were also copied on the communications.

The attorney client privilege is one of the oldest of common law privileges that is now embodied as a statute in CPLR §4503. Spectrum Sys. Intl. Corp. v. Chemical Bank, 78 NY2d 371 (1991). It requires that there be an attorney-client relationship. Not all communications between an attorney and a client, however, are privileged. The information must be of a confidential nature, made for the purpose of obtaining legal advice or services. People v. Mitchell, 58 NY2d 368 (1983); Matter of Priest v. Hennessy, 51 NY2d 62 (1980). Communications relating solely to non-legal matters are not privileged. People v. Belge, 59 AD3d 307 (4th dept. 1977). Nor are materials disclosed to third parties. Netherby Ltd. v. G.V. Trademark Investments, Ltd., 261 AD2d 151 (1st dept. 1999).

In order to claim that an otherwise responsive document may be withheld from discovery based on privilege, the party asserting the privilege is required to create a privilege log with sufficient identifying information for the court to attempt to ascertain the bona fides of the claim. In the absence of such a log, the court is unable to rule on privilege issues . CPLR §3122; Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc2d 99 (NY Co. Sup Ct. 2003). Once a log is prepared, the court may still require

an *in camera* review of the withheld documents. Spectrum Sys. Intl. Corp. v. Chemical Bank, *supra*.

As to the issue of waiver, the documents attached as exhibit J to the motion which H & C claims demonstrate waiver, do not on their face, clearly delineate what they are and to who they were sent. Some of the copies are garbled and illegible. Nor is Smart's attorney's conclusory statement that the documents were sent to third parties probative on the issue of waiver. Neither party identifies for the court what these documents are, to whom they were sent, when they were sent and other essential information that would allow the court to make any ruling on the issue of waiver.

On the issue of waiver, therefore, the court grants the motion only to the extent that Smart is directed to provide H & C with a privilege log within 30 days after this decision and order is posted to SCROLL. After such production, H & C may renew its motion regarding the production of such documents. The renewed motion and any opposition thereto, however, must contain sufficient factual information for the court to make the appropriate ruling.

3. Disputes over Wells letter and communications with SEC

Smart claims that such documents are "confidential" because they are part of a non-public investigation. H & C claims that because Smart has already agreed to produce them, it should be compelled to do so at this time.

Smart cites no authority for its claim that such documents, absent some other applicable privilege, are immune from disclosure in this action. See: SEC v. Collins & Aikman Corp., 256 FRD 403 (SDNY 2009). A party's designation of a document as confidential will not prevent a court from ordering its discovery if otherwise appropriate.

Osowski v. AMEC Constr. Mgr., 69 AD3d 99 (1st dept. 2009).

Smart does not deny that it had previously agreed to produce this material. The can be ordered produced on this basis alone. Even if it had not agreed to such production, however, the court would direct that this material be provided, because they are not protected.

The motion is, therefore, granted to the extent that Smart is directed to produce the Wells letter and other communications with the SEC regarding such letter within 30 days after this decision appears on SCROLL.

4. Other Documents

Both parties accuse the other of not producing documents that were requested of it. A party is required to produce only those document that are in their custody, control or possession. CPLR 3120(1); Rosado v. Mercedes-Benz of North America, Inc., 103 AD2d 395 (2nd dept. 1984). There is no exemption from producing documents that the other side may also have. If the documents cannot be located, the party who has been called upon to produce them should provide a sworn statement, made by someone with personal knowledge, detailing the search that had been made, which is sufficient to support a conclusion that a good faith effort was made to supply the requested records. Jackson v. City of New York, 185 AD2d 768 (1st dept. 1992); WMC Motrg. Corp. v. Vandermulen, 32 Misc3d 1206 (A)(NY Sup Ct. Suffolk Co. 2011).

To the extent Smart withheld any documents because it believed that H & C had the documents already, it is required to produce them within 30 days of the date this decision and order appears on SCROLL.

Mary Grace's "affidavit", submitted on this motion, which purports to claim that

Smart has produced everything that it has, is rejected. An affidavit cannot be notarized over the phone. Nor does Edward K. Lencini's affirmation, submitted in response to the cross-motion, satisfy the requirement of a good faith sworn statement fo the efforts made to locate responsive documents. In any event, his argument, that based on the number of pieces of papers H & C has already produced, the court should conclude it has complied with discovery, is rejected.

Both parties are directed to again search for all categories of requested documents and update their production with any additional documents they find that are responsive. Along with any newly found documents, they should provide a good faith affidavit as otherwise identified herein, which articulate not only the efforts made before these motions were brought but also those made to comply with this order, in connection with locating responsive documents. The parties should provide the documents and affidavits within 30 days of this order appearing on SCROLL.

5. Priority of Depositions

H & C wants to change the priority of depositions so that it can depose Mary Grace before any of its witnesses are deposed. The reason asserted is that it believes that Ms. Grace will assert her 5th Amendment privilege, which it believes will provide a basis for its motion for summary judgment. The court does not believe that H & C's litigation strategy provides a special circumstance sufficient to change the deposition priority set out in the CPLR. Bucci v. Lydon, 116 AD2d 520 (1st dept. 1986); Serio v. Rhulen, 29 AD3d 1195 (3rd dept. 2006).

Accordingly, the motion to change the deposition priority is denied. The parties are directed to proceed to depositions which are to be completed no later than June 22,

2012.

Conclusion

In accordance with the foregoing the motion and cross-motion are granted in part and denied in part as follows:

[1] Both parties are directed to produce the documents they already have produced in their native format, no later than 60 days after this decision appears on SCROLL;

[2] Smart is directed to provide H & C with a privilege log within 30 days after this decision and order appears on SCROLL. After such production, H & C may renew its motion regarding the production of such documents;

[3] Smart is directed to produce the Wells letter and other communications with the SEC regarding such letter within 30 days after this decision appears on SCROLL.

[4] To the extent Smart withheld any documents because it believed that H & C had the documents already, it is required to produce them within 30 days of the date this decision and order appears on SCROLL.

[5] Both parties are directed to again search for all categories of requested documents and update their production with any additional documents they find that are responsive. Along with any newly found documents they should each provide a good faith affidavit, as otherwise identified herein, which articulates not only the efforts made before these motions were brought but also those made to comply with this order, in connection with locating responsive documents. The parties should provide the documents and affidavits within 30 days of this order appearing on SCROLL.

[6] There will be no change in the priority of depositions. The parties are directed

to proceed to depositions, which are to be completed no later than June 22, 2012.

[7] A status conference is scheduled for **June 28, 2012 at 9:30 a.m.** No further notices will be sent. The Note of Issue shall be filed on June 29, 2012.

Any requested relief not expressly granted herein is denied. This constitutes the decision and order of the court.

Dated; New York, New York

March 26, 2012

SO ORDERED:

J.G. J.S.C

FILED

MAR 27 2012

NEW YORK
COUNTY CLERK'S OFFICE