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**Electronic Discovery Law**

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**Court Finds Claims of Burden and Expense "Exaggerated," Declines to Find Emails "Not Reasonably Accessible"**

**Starbucks Corp. v. ADT Security Servs., Inc., 2009 WL 4730798 (W.D. Wash. Apr. 30, 2009)**

In this recently released opinion written early last year, the defendant, ADT Security Services, Inc. (“ADT”), sought to avoid its obligation to produce archived emails by arguing the emails were not “reasonably accessible because of undue burden or cost,” as that term is used in Fed. R. Civ. P. 26(b)(2)(B).  In support of this position, ADT’s Manager of Information Technology, John Mitchell, provided various estimates regarding the potential cost of time and money to restore the requested email.  In response, the plaintiff, Starbucks Corporation (“Starbucks”), provided its own estimates of the potential cost which were significantly lower than those proffered by ADT.  Finding Mitchell had “at every turn, provided exaggerated reasons and exaggerated expenses as to why ADT allegedly cannot and should not be ordered to comply with its discovery obligations,” the court declined to find the information at issue “not reasonably accessible.”  Moreover, the court indicated that even had the information been deemed not reasonably accessible, the court would have found that good cause existed to order the production.  Accordingly, Starbuck’s motion to compel was granted.

Starbucks sought to compel the production of archived emails from the years 2003 through 2006 regarding “five specifically identified current and former employees.”  ADT objected, arguing that the emails were not reasonably accessible because of the “cumbersome” nature of the system on which they were stored and the resulting burden of retrieval.  Specifically, ADT represented that the emails were stored in a format that could only be read by proprietary equipment, that restoring the emails could take up to four years (if all 5 custodians had 25,000 relevant emails to restore), and that such retrieval would result in significant disruptions to ADT’s business.  Regarding the cost of the production, including processing, etc., Mitchell initially estimated a cost of $88,000.  Just six months later, Mitchell amended the estimate to a potential cost of $834,285.  Notably, despite the allegedly significant problems with the Plasmon System (the system on which the archived emails were stored), ADT continued to utilize it in the operation of its business and had not migrated the archived emails to its newer, more easily accessed system.

As discovery continued, two alternatives for production arose. First, the court became aware that ADT could produce “email stubs,” containing limited information such as the “To,” “From,” and “Subject Matter” data and about 80 characters of email.  These stubs could be retrieved “relatively quickly” (subject to a clawback provision) and Starbucks could then specify which emails it wanted to see.  Second, the court learned that “more than half” of the DVDs in the Plasmon system were not, in fact, in the Plasmon-format, and thus could be read by a vendor.  However, ADT argued that the disks still “could not be read by all equipment,” that the processing would still take an extended period of time, that additional equipment would need to be purchased, and that approximately 2 terabytes of storage would need to be stored.  Anticipating the need for outside assistance, ADT provided an estimate of “several hundred thousand dollars” for a vendor "just to make copies and thousands more to purchase a hardware system to house the data", but failed to include the vendor’s proposal with its submission to the court.

In response, Starbucks provided its own estimates (procured from two outside vendors) which indicated the likely cost to be between $17,000 and $26,000.  These estimates were attached to the declarations provided to the court.

Accordingly, the court determined that “Mr. Mitchell has, at every turn, provided exaggerated reasons and exaggerated expenses as to why ADT allegedly cannot and should not be ordered to comply with its discovery obligations.  He simply is not credible.”  Moreover, the court stated that “it is difficult to conclude that the ESI sought in this case is ‘not reasonably accessible’ in light of the fact that the Plasmon System continues to be used by ADT personnel…The fact that a company as sophisticated as ADT…chooses to continue to utilize the Plasmon System instead of migrating its data to its now-functional archival system should not work to plaintiff’s disadvantage.”

The court went on to state that, even had it found the email “not reasonably accessible,” it would have found that “good cause” existed to compel production, considering the factors set forth in Fed. R. Civ. P. 26(b)(2)(C).  In so finding, the court rejected ADT’s “alternatives to production” including interrogatories and depositions.  The court also dismissed ADT’s assertion that certain of the emails may already have been in Starbuck’s possession.

Balancing the cost of production versus the likely benefit, the court found it significant that “the ESI critical to this case was created during the time period which means that it is housed on the Plasmon System.”  The court went on to note the significant stakes for both parties (e.g. Starbucks was seeking at least one million dollars) and that “both parties in this case have the substantial resources necessary to conduct this litigation.”  Finally, the court noted that Starbucks had attempted to mitigate the burden to ADT by limiting the number of custodians and providing terms to filter for those persons.

Thereafter, the court ordered ADT to “implement an immediate plan to make copies of the archived UDF-formatted disks and to save them to an appropriate searchable storage medium.”  Regarding the disks in the proprietary format, the court found the complete restoration of those disks “inappropriate at this time,” and instead ordered the production of all relevant emails’ stubs and for Starbucks to designate emails for restoration and production.  Finally, the court ordered the parties to confer to agree upon fees and costs due to Starbucks or, in the event agreement could not be reached, for Starbucks to file an appropriate motion requesting such fees.

## Sample Abstract

Title: Court Finds Claims of Burden and Expense “Exaggerated,” Declines to Find E-mails “Not Reasonably Accessible”

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URL: <http://www.ediscoverylaw.com/2010/01/articles/case-summaries/court-finds-claims-of-burden-and-expense-exaggerated-declines-to-find-emails-not-reasonably-accessible/print.html> {Please do not include the actual article in the abstract submission, only the URL}.

Facts:

The defendant, ADT Security Services, Inc. “ADT”, argued that the archived emails requested by the Starbucks Corporation (“Starbucks”) were not “reasonably accessible because of undue burden or cost”.

Plaintiff’s Claim

Per Rule 34, Starbucks requested discovery of archived emails from 2003 through 2006 of five current and former employees. Zubulake v. UBS Warburg LLC., 217 F.R.D. 309 (S.D.N.Y. 2003), allows such a request even for electronic evidence that has been deleted and resides on backup disks.

Defendant’s Claim

Due to the system that the emails were stored on, ADT sought to avoid their obligation to produce the archived emails. According to ADT’s Manager of Information Technology, John Mitchell, restoring the emails could take four years at an initial cost of $88,000.00 and six months later Mitchell amended the cost to ten times that amount.

Applicable Law:

Fed.R.Civ.P. 26(b)(2)(B): A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.

Issues of Law:

ADT must show that the information is not reasonably accessible because of the burden and cost it would require to retrieve the documents from its Plasmon System. Starbucks conducted their own research with vendors that estimated the total cost of retrieval, much lower than the cost that ADT estimated and the Court determined that ADT had other options to retrieve the digital evidence in a more timely and costly manner. Did ADT prove that the discovery sought by Starbucks is not reasonably accessible?

Remedy Sought:

With its motion to compel, Starbucks is awarded costs and fees.

Holding:

In Starbucks Corporation v. ADT Security Services, Inc., No. 08-cv-900-JCC, in the United States District Court for the Western District of Washington, (D. Wash. Apr. 30, 2009) Starbuck’s motion to compel was granted.

The court relied on AAB Joint Venture v. U.S., 75 Fed. CI. 432, 2007, where the court noted the defendant cannot be relieved of duties to produce documents just because the defendant has chosen a means to preserve the evidence on a system that allows expensive means of retrieval.

Impact on E-Discovery:

This ruling stressed that good cause would require production even if the information were deemed not reasonably accessible. Further research determined that the emails that Starbucks were seeking were important in determining what witnesses knew about the ADT install contract requirements for Starbucks nationwide. The court ruled that without ADT’s ESI, Starbucks would not be allowed to discover what the witnesses knew and have the evidence to challenge the testimony of the five individuals. Finally, the court scheduled subsequent discovery conferences and determined that ADT could produce email “stubs” that contained relevant data that included “To”, “From”, “Subject Matter” data and approximately 80 characters of email that Starbucks could use to filter through the information and determine what may be important. It was also determined that more than half of the Plasmon-format disks were actually utilized on Universal Data Format (UDF) that would allow a less burdensome retrieval process.

Impact on e-discovery precedents, case law, and the case(s) at issue:

Companies need to look at alternative ways to meet a discovery request and certainly not over-estimate costs if other avenues are available to comply with the discovery request.