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Western District Case Notes

■ **Kevin M. Hogan and Sean C. McPhee** SPECIAL TO THE DAILY RECORD

FREEDOM OF INFORMATION ACT

In *Pickering v. U.S. Department of Justice*, 14-cv-330-RJA-LGF (May 14, 2024), plaintiff commenced an action pursuant to the Freedom of Information Act, seeking disclosure and release of agency records withheld by the United States Department of Justice, the Federal Bureau of Investigation ("FBI"), and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). The parties cross-moved for summary judgment and supplemented both motions, resulting in 16 recommendations from the Magistrate Judge with regard to numerous exemptions raised by defendant in refusing to produce documents responsive to the FOIA requests.


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The Court noted that, when responding to a FOIA request, a federal agency must (1) conduct an adequate search using reasonable efforts, (2) provide the information requested, unless it falls within a FOIA exemption, and (3) provide any responsive information not subject to an exemption that can be reasonably segregated from the exempt information. In the face of objections raised in response to documents withheld under a FOIA exemption, an agency affidavit should describe the justification for nondisclosure with reasonably specific detail and demonstrate that the withheld information logically falls within the exemption and is not controverted by either contrary evidence in the record nor agency bad faith. Such an affidavit usually is sufficient to sustain an agency's burden and discovery will not be necessary.

In this case, among the numerous exemptions raised and objections lodged was an objection that the ATF failed to segregate disclosable from undisclosable portions of audio tapes. The Court held that the agency must explain whether the audio tapes were not reasonably segregable and, if any tapes no longer exist, why they were lost or destroyed.

Plaintiff also objected to the FBI withholding documents under FOIA Exemption 7(A), which exempts from disclosure records the production of which could reasonably be expected to interfere with enforcement proceedings, such as by hindering an investigation. The agency failed to identify which pages of more than 14,000 that it had withheld and indexed were withheld based upon Exemption 7(A). This, when combined with the exceedingly vague and amorphous characterization of any prospective law enforcement proceeding, caused the Court to rule that it could not assess whether the FBI had properly invoked Exemption 7(A). As a result, the FBI needed to submit a supplemental declaration to demonstrate that Exemption 7(A) was properly invoked. Both agencies withheld other documents under Exemption 7(E), which protects records compiled for law enforcement purposes that would reveal techniques, procedures, or guidelines for law enforcement investigations or prosecutions. Here, the agencies withheld documents pertaining to the funding of specific investigative activities.

Plaintiff argued that monetary amounts requested or paid by the agencies to implement particular investigations are not "techniques," "procedures," or "guidelines" within the scope of Exemption 7(E). The Court held that there was sufficient risk that the amount of money a particular agency had or would pay to implement certain investigative techniques could reveal that agency's level of focus on certain types

of law enforcement or intelligence gathering efforts, and that risk was sufficient to establish that the agencies properly relied on Exemption 7(E) to withhold the document.

SECURITIES FRAUD CLAIMS AND SCIENTER

In *In re Athenex, Inc. Securities Litigation*, 21-cv-00337-LJV-HKS (May 28, 2024)—a putative class action against a biopharmaceutical company and four of its officers individually that was filed two days after the company's market capitalization dropped by $620 million—plaintiff asserted claims under the Securities Exchange Act of 1934 contending that defendants disseminated false statements and failed to disclose certain risks. The individual defendants moved to dismiss and the Magistrate Judge issued a Report and Recommendation finding that the motion should be granted because the individual defendants' statements were nonactionable opinions, and even if they could be characterized as false or misleading, plaintiff had not plausibly alleged scienter.

Plaintiff objected and the District Judge conducted a *de novo* review of the recommendation, noting first that securities fraud claims are subject to heightened pleading requirements under Fed. R. Civ. P. 9(b) and the Private Securities Litigation Reform Act. Among them is the requirement that a complaint must allege scienter (*i.e.* "intent to deceive, manipulate, or defraud"), which can be shown when the defendants had the motive and opportunity to commit fraud, or through strong circumstantial evidence of conscious misbehavior or recklessness. Regarding the former, the motive to attract customers or finance operations is insufficient to establish scienter, and as for the latter, conclusory statements that defendants "were aware" of certain information are similarly insufficient. The District Judge found that plaintiff failed to allege any facts that could plausibly give rise to an inference of scienter on the part of the individual defendants, so the Magistrate Judge's recommendation to grant the motion to dismiss was adopted.

The District Judge also adopted the Magistrate Judge's recommendation to deny plaintiff's alternative request for leave to amend contained in his opposition to the individual defendants' motion to dismiss, noting that the Court's Local Rules require a movant seeking to amend a pleading to attach an unsigned copy of the proposed amended pleading as an exhibit to a motion, which plaintiff failed to do. As a result, there was "no reason to believe that another amended complaint might do the trick."

CONTRACTS AND BINDING PRELIMINARY AGREEMENTS

In *Hayvin Gaming, LLC v. Workinman Interactive, LLC*, 23-cv-06172-FPG-MWP (May 24, 2024), the parties entered into an agreement wherein defendant would provide plaintiff with certain professional services. Within months, their relationship deteriorated and, during a video conference call, defendant informed plaintiff that it intended to terminate the agreement, but the parties also discussed the possibility of modifying the terms of the agreement. Following the call, plaintiff sent defendant an email demanding that the parties come up with a plan to move forward, and defendant replied to that email and included an attachment with a proposal. Plaintiff responded to that email the next day, stating: "we are ok with this" along with certain other pleasantries, and defendant responded similarly. Thereafter, plaintiff proceeded in accordance with the terms set forth in the attachment to defendant's email, including paying defendant in the amount set forth in that document, but defendant later rejected plaintiff's payments as insufficient under the parties original agreement and issued a notice of default under the original agreement.

Plaintiff then commenced suit against defendant seeking a declaratory judgment that the parties modified the original agreement as a result of their email exchanges, and sought partial summary judgment on that claim. Defendant opposed, arguing that the parties continued to negotiate the terms of the modification in the days following the email exchange. In response, for the first time in its reply papers, plaintiff argued that the email exchange was, at the very least, a "binding preliminary agreement." In deciding the motion, the Court first observed that where the parties contemplate further negotiations and the execution of a formal instrument, a preliminary agreement does not create a binding contract. The Court also noted, however, that a preliminary agreement may be fully binding when the parties agree on all points that require negotiation (including

whether to be bound) and merely desire a more elaborate formalization of the agreement.

The Court then analyzed the four factors identified by the Second Circuit for determining whether a preliminary agreement is fully binding: (1) the language of the agreement; (2) the existence of open material terms; (3) whether there has been partial performance; and (4) the necessity of putting the agreement in final form as indicated by the customary form of such transactions. The Court found that while the fourth factor weighed "slightly in favor" of plaintiff, factors two and three weighed against plaintiff, and factor one—which is the most important—was neutral. As a result, the Court held that, because a reasonable factfinder could conclude that the parties did not intend to be legally bound by their email exchanges, plaintiff was not entitled to summary judgment.

SPOLIATION SANCTIONS

In *Hummel v. Target Corp.*, 19-cv-6852-EAW-MJP (June 7, 2024), plaintiff sued to recover damages for personal injuries allegedly resulting when a shopping cart malfunctioned in defendant's store. Plaintiff moved for spoliation sanctions under Rule 37(b) or 37(e) when defendant was unable to produce any security camera video evidence of the accident. The Court noted that, to establish spoliation of evidence in the Second Circuit, a party must establish that the opposing party had control over the evidence, an obligation to preserve that evidence at the time it was destroyed, and a culpable mind, and that the destroyed evidence was relevant to and would have supported the party's claim or defense.

The Court denied the motion for spoliation, finding that plaintiff failed to meet the threshold issue of establishing that the video footage ever existed in the first instance. The Court found that plaintiff had offered only speculation to support its assertion that the evidence once existed and instead had been spoliated. Citing Rule 37(a)(5)(B), the Court also directed defendant to submit an application for reasonable expenses, including attorneys' fees, in opposing the motion for sanctions, holding that the rule mandated that the moving party, its attorney, or both, should reimburse the party who successfully opposed the motion its reasonable expenses.

DEPOSITION RULES

In *Gugino v. City of Buffalo et al.*, 21-cv-283-LJV-LGF (May 30, 2024) ¾ a civil rights action in which plaintiff alleged defendants violated his constitutional rights by using unnecessary force in assaulting him during a protest that continued after a city curfew ¾ plaintiff, defendants, and a non-party witness filed various motions concerning disputes that arose out of depositions during discovery. One such motion, by defendants, sought a protective order precluding any further deposition of the City's police commissioner, who had appeared to testify on two occasions amounting to still less than the maximum seven hours allowed by Rule 30(d)(1). In this case, defendants acknowledged that the police commissioner had unique, firsthand knowledge that could not be obtained through other less burdensome or intrusive means.

As a result, the Court focused on whether the deposition would significantly interfere with performance of his official duties. The police commissioner, however, had already appeared for two deposition sessions, and defendants could not point to any fact supporting their position that a third deposition session would interfere with the performance of his duties.

For those reasons, the motion for protective order was denied. The Court then turned to a motion, this time by plaintiff, concerning the sufficiency of the police commissioner's answers and whether plaintiff was entitled to insist that he answer questions with a yes or no response. The Court noted that Rule 30(c)(1) provides that depositions shall proceed as they would at trial under the Federal Rules of Evidence, and that Fed. R. Evid. Rule 611(c)(2) permits leading questions to be asked of an adverse party such as the police commissioner. Although those rules in combination permit a party to ask leading questions that, in turn, require a yes or no response, the Court found that in many instances plaintiff had not asked a straightforward leading question, but rather had asked questions that could not be answered with a simple yes or no answer, or invited a narrative, or were compound, and even could be fairly characterized as argumentative.

On the other hand, the Court observed that defendants' attorneys entered more than 300 form objections to almost every ques-

tion plaintiff's counsel posed. The Court thus permitted a third deposition session to proceed consistent with its direction regarding permissible and impermissible questions. One of the other motions involved whether an attorney for a non-party witness had impermissibly interfered with the deposition when he handed the witness an index card with a typewritten response that was prepared in advance of the deposition. The Court noted it was well settled that an attorney may not influence or coach a witness during a deposition, and that the depositions in this case were taken pursuant to the Court's deposition guidelines, which included that "counsel shall not make objections or statements which might suggest an answer to a witness," and "counsel and their witness/clients shall not initiate or engage in private off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege." The Court held that the use of the index card constituted impermissible interference with a deposition that was grounds for sanctions under Rule 37.

RECEIVER'S FEES

In *Consumer Financial Protection Bureau v. StratFS, LLC*, 24-cv-00040-EAW-MJR (May 22, 2024)—a lawsuit brought against twenty-nine corporate defendants, two individual defendants, and eleven "relief defendants" for taking advance fees from consumers in the course of providing debt-relief services to consumers—the Court appointed a Receiver who was tasked with, among many other things: (1) assuming full control of all receivership defendants; (2) taking exclusive custody, control, and possession of all assets, documents, and electronically stored information; (3) conserving, holding, and managing all receivership assets; (4) identifying additional receivership defendants not already named in the lawsuit; (5) managing the business, including the potential hiring and dismissing of employees, as well as making disbursements from the receivership estate as necessary; and (6) maintaining a chain of custody of all defendants' records. Approximately two months after he was appointed, the Receiver filed an application for fees and expenses totaling $1,107,109.25 associated with the first seven weeks of the receivership. Those fees and expenses were for the Receiver's own services, as well as those of three law firms he hired to assist with the receivership, a forensic accounting firm, and a data forensic consultant.

Noting first that a "receiver appointed by the court who reasonably and diligently discharges his duties is entitled to be fairly compensated for services rendered and expenses incurred" in an amount that is determined by the Court in the exercise of its reasonable discretion, the Court next noted that the presumption of reasonable compensation extends to a receiver's counsel and professionals. The Court then evaluated the factors to be considered in determining a reasonable fee, including: "(1) the complexity of problems faced; (2) the benefits to the receivership estate; (3) the quality of the work performed; and (4) the time records presented." The Court may also consider "the reasonableness of the hourly rate charged and the reasonableness of the number of hours billed." Applying the factors, the Court found that the Receiver has faced extremely complex factual, legal, and administrative issues in performing his duties.

The Court also found that the Receiver, his counsel, and the other professionals retained by the Receiver performed high quality work which benefited the receivership estate by, among other things, collecting $4,176,000 as a result of the Receiver's operation of the lawful arms of defendants' business. Finally, the Court considered the time records of the Receiver, his counsel, and the other professionals that rendered services on the Receiver's behalf and determined that those records were extremely detailed, and that the hourly rates and hours billed were reasonable. As a result, the Court granted the Receiver's fee application in its entirety.

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