

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CENVEO CORPORATION :  
Plaintiff : CIVIL ACTION  
 :  
vs. :  
 : NO. 06-CV-2632  
GEORGE SLATER, ET AL. :  
 :  
Defendants :

**MEMORANDUM OPINION & ORDER**

GOLDEN, J.

JANUARY 31, 2007

Plaintiff alleges in its second amended complaint that its former employees improperly used plaintiff's computers, confidential information and trade secrets to divert business from plaintiff to defendants. Before the Court are two motions to compel. For the reasons that follow, the November 21, 2006 motion to compel will be granted in part and denied in part and the November 28, 2006 motion to compel will be denied as moot, as the parties advise the Court that the issues have been resolved.

**BACKGROUND**

The November 21 motion concerned how and under what circumstances materials on hard drives in defendants' possession would be produced to plaintiff. Plaintiff seeks to use a mirror or digital imaging method to access the information on the hard drives whereby a digital image of the hard drives would be created and turned over to a third party computer forensics expert of plaintiff's choosing who would search the image for relevant information. Plaintiff further proposes that, to avoid any disclosure of privileged information, defendants provide a privilege log to plaintiff's third party forensic expert, and that the forensics expert would be bound not to disclose any privileged information provided to him. Defendants, on the other

hand, propose that they create a digital image of the hard drives in question and search that image using terms that plaintiff provides and defendants agree upon. Defendants would then produce the results of the search to plaintiff, save any confidential or privileged information.

Defendants' oppose the imaging method primarily on the grounds that it might result in the disclosure of privileged information on its hard drives. In the event that defendants' method is employed, plaintiff wishes to have its forensics expert present during defendants' imaging of the hard drives, and defendants wish to conduct the imaging without such oversight.

### ANALYSIS

Federal Rule of Civil Procedure 26(b)(1) allows the parties to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." Rule 26 was amended December 1, 2006 to include changes concerning the production of electronic information. Amended Rule 26(b)(2)(B) provides that:

[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. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

A Court may limit discovery of electronic materials under Rule 26(b)(2)(C) if:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

The dispute before the Court requires a weighing of defendants' burden in producing the information sought against plaintiff's interest in access to that information. Because of the close relationship between plaintiff's claims and defendants' computer equipment, the Court will allow plaintiff to select an expert to oversee the imaging of all of defendants' computer equipment.<sup>1</sup>

Several prior cases have allowed the digital imaging of a hard drive in the presence of an opponent's digital forensics expert. See, e.g., Balboa Threadworks, Inc. v. Stucky, 2006 WL 763668, at \*4 (D. Kan. Mar. 24, 2006); Fox Indus., Inc. v. Gurovich, 2004 WL 2348365, at \*3 (E.D.N.Y. Aug. 25, 2004); Physicians Interactive v. Lathian Sys., Inc., 2003 WL 23018270, at \*10 (E.D. Va. Dec. 5, 2003); Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652 (D. Minn. 2002); Simon Prop. Group v. mySimon, Inc., 194 F.R.D. 639, 641 (S.D. Ind. 2000). Recently, the U.S. District Court for the Eastern District of Missouri addressed this issue in Ameriwood Indus., Inc. v. Liberman, 2006 WL 3825291, at \*5-7 (E.D. Mo. Dec. 27, 2006) (slip copy). The Court finds Ameriwood instructive here and borrows from that opinion at length. Accordingly, the parties shall conduct discovery as follows.

1. Imaging

Plaintiff shall select a computer forensics expert trained in the area of data recovery to produce a digital or mirror image of all computers and portable hard drives that have been in defendants' custody, possession, or control since January 2006. Once the expert is chosen,

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<sup>1</sup> There is an additional piece of computer equipment at issue without a clear owner. Plaintiff alleges that defendant George Slater absconded with its laptop computer, and avers that the laptop contains materials in furtherance of defendants' improper interference with plaintiff's business. It is undisputed in the record before the Court that defendants subsequently returned the laptop but retained the laptop's original hard drive. Defendants explain their actions by asserting that Mr. Slater acquired the laptop by earning commissions during his employment with plaintiff. Defendants provide no explanation however, as to why they returned the laptop that they allegedly own without its original hard drive. Defendants are directed to provide a complete digital image of the original laptop hard drive pursuant to the procedures outlined in this memorandum and order.

plaintiff shall notify the defendants, and the expert shall execute a confidentiality agreement agreed to by the parties and sign a copy of the protective order in place in this matter (Document No. 20). The expert shall further agree to submit to the jurisdiction of this Court and be bound by the terms of this memorandum and order.

Defendants shall then make all of the computer equipment described above available to plaintiff's expert at their place of business or residences at mutually agreeable times. Plaintiff's expert shall use his or her best efforts to avoid unnecessarily disrupting the normal activities and business operations of defendants while inspecting and imaging defendants' computer equipment. Plaintiff's expert may not remove defendants' computer equipment from defendants' premises, and only plaintiff's expert and his or her employees assigned to this project are authorized to inspect the equipment produced. Defendants may also have an electronic data recovery expert present during the inspection and imaging of their computer equipment. After the inspection and imaging, plaintiff's expert may perform the remainder of his or her responsibilities outside defendants' premises. Plaintiff's expert shall maintain all information in the strictest confidence. Plaintiff's expert will maintain a copy of the mirror images and all recovered materials until sixty days after the unappealable conclusion of this litigation.

Within ten days of inspection and imaging, plaintiff's expert shall provide the parties with a report describing the computer equipment defendants produced and the actions plaintiff's expert took with respect to each piece of equipment. This report shall include a detailed description of each piece of equipment inspected, including the name of the manufacturer and model and serial number of the equipment, wherever possible.

2. Recovery

Plaintiff's expert shall recover all documents from the mirror images, including but not limited to all word-processing documents, email messages, PowerPoint or similar presentations, spreadsheets and other files, including "deleted" files. Plaintiff's expert shall provide the recovered files to defendants in a reasonably convenient and searchable form, along with, to the extent possible, information showing when any files were created, accessed, copied, or deleted. Plaintiff's expert shall also provide plaintiff notice of when the recovered materials were provided to defendants.

3. Disclosure

Within forty-five days of receipt, defendants shall review the recovered materials for privilege and responsiveness, supplement defendants' responses to plaintiff's discovery requests, and send to plaintiff's counsel all non-privileged responsive documents, as well as a privilege log complying with Federal Rule of Civil Procedure 26(b)(5)(A). Plaintiff shall have the opportunity thereafter to propound any additional discovery requests, and defendants shall produce any non-privileged responsive materials to plaintiff as described above. Nothing in this order shall prevent plaintiff from filing a motion to compel if it is unable to resolve a claim of privilege or relevance with defendants, but the parties are strongly encouraged to resolve these issues without Court intervention.

This procedure shall govern the recovery of discoverable materials located on defendants' computer equipment. The Court directs the parties to meet and confer to determine how they will carry out the terms of this order, keeping in mind the Court's directive to minimize the burden and inconvenience to defendants.

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**ORDER**

AND NOW, this 31st day of January, 2007, it is hereby ORDERED that:

1. Plaintiff's November 21, 2006 motion to compel (Document No. 28) is GRANTED to the extent it is consistent with the procedures described in the above memorandum and otherwise DENIED.
2. Plaintiff's November 28, 2006 motion to compel (Document No. 29) is DENIED as moot.

BY THE COURT:

/s/ Thomas M. Golden  
THOMAS M. GOLDEN, J.