

VIRGINIA:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

DULLES JET CENTER LITIGATION	)	CONSOLIDATED
	)	Case No. CL 00061040
Consolidated Under:)	
	)	<u>CASES AFFECTED</u>
Global Aerospace, Inc., at al.	)	All
Plaintiffs,	)	Case No. CL 61040
v.	)	Case No. CL 61991
	)	Case No. CL 64475
LANDOW AVIATION L.P., et al.	)	Case No. CL 63795
	)	Case No. CL 63190
Defendants.	)	Case No. CL 63575
	)	Case No. CL 61909
	)	Case No. CL 61712
	)	Case No. CL 71633

OPPOSITION OF PLAINTIFFS:

**M.I.C. INDUSTRIES, INC., FACTORY MUTUAL INSURANCE CO., GLOBAL
AEROSPACE, INC., and BAE SYSTEMS SURVIVABILITY SYSTEMS, LLC**

TO

THE LANDOW DEFENDANTS'

**MOTION FOR PROTECTIVE ORDER REGARDING ELECTRONIC DOCUMENTS
AND "PREDICTIVE CODING"**

At its core, the production of documents is not a complicated concept. Talk to the client.
Locate the files that might reasonably contain responsive documents. Look at the documents.
Select the ones that are responsive and not privileged. Produce them.

The Landow Defendants¹ wish to produce their emails and other electronic documents
without undertaking any of these steps. Instead of having human beings look at and select
documents, the Landow Defendants want a computer program to make the selections for them.

¹ Landow Aviation Limited Partnership, Landow Aviation I, Inc., and Landow & Company Builders, Inc.

By design, this “predictive coding” computer program would, at best, and assuming each step is executed flawlessly, only produce about 75% of the responsive documents. *See* Landow Mem. at 2, 12 (“Landow proposes an acceptable recall criterion of 75%”).

There are no grounds justifying this departure from the Landow Defendants’ obligation to produce *all* responsive documents located upon reasonable inquiry. This is particularly so given that the Landow Defendants would apply “predictive coding” to all electronic documents, including those relating to the most important issues in the case. *See* Rule 4:1(b)(1)(iii) (in determining whether discovery is unduly burdensome, the Court should consider, among other factors, “the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation”).

The Landow Defendants have cited no cases in which a court has compelled a party to accept a document production selected by a “predictive coding” computer program. The New York case that they rely upon indicates that no such decision exists. *Da Silva Moore v. Publicis Groupe*, -- F. Supp. 2d --, 2012 U.S. Dist. LEXIS 23350 at *2 & fn 1 (S.D.N.Y. 2012) (attached to Defendants’ Mem. as Ex. E) (“no reported case (federal or state) has ruled on the use of computer-assisted coding” “the Court did not order the parties to use predictive coding”). There is certainly no reason to believe that Virginia law permits such a radical departure from the standard practice of human review of documents as a necessary step in responding to a request for production.

In arriving at their conclusion that they need to employ “predictive coding,” the Landow Defendants first copied every file from every computer. As a result, they accumulated all data “covering every aspect of the Landow operations for a period of several years.” Landow Mem. at 4. Apparently, there was no attempt to separate the files pertaining to the Dulles Jet Center

from the files pertaining to the Landow family's many other business and personal ventures. Rather, after looking at a few files, and finding mostly nonresponsive documents, the Landow Defendants then threw up their hands. There is too much data, they claim. Only a machine, they claim, could sort through such a mass of information without expending tens of thousands of man hours and millions of dollars. *Id.* at 2.

These claims by the Landow Defendants are illogical and without any merit.

According to the Landow Defendants' interrogatory answers, only seven employees were ever involved in the construction of the Dulles Jet Center. *See* Ex. 1 (Landow & Co. Resp. to Global Interrogs.) at 4. The first three are members of the Landow family: Nathan, Michael, and David Landow. While they owned the Landow Defendants and served as the corporate officers, it is unclear how much work they actually did on the construction of the Dulles Jet Center. In their interrogatory answers they are working hard to distance themselves from any substantive participation.

"... when it came to design and construction of the [Dulles Jet Center] facility, Landow Aviation hired what it believed to be competent professionals to perform those functions."

"Neither Landow Aviation nor Landow Builders had any involvement in the technical aspects of the design or construction of the facility."

"Throughout this entire process, neither Landow Aviation nor Landow Builders, had any involvement in development of the designs for the structural system, approval of such designs, fabrication of the structural steel, inspection of the fabricated steel, erection of the structural steel, or field inspections."

Ex. 2 (Landow Aviation Resp. to MIC Interrogs.) at pp.11-12.

The fourth Landow employee involved in the construction of the Dulles Jet Center is David Landow's administrative assistant. Ex. 1 at 4. Her files may be important to the extent she received and sent messages for others, but her role is described as "performed administrative

duties.” Ex. 2 at 6. She is therefore unlikely to have created many documents independently. The fifth employee was an owner representative who worked at the construction site. Ex. 2 at 6-7; Ex. 3 (Ladow Aviation Resp. to Global Interrogs.) at 6-7. He replaced the sixth employee, who had held the same position. *Id.* The only other Ladow employee involved in the construction of the Dulles Jet Center, we are told, was the receptionist at the construction trailer. Ex. 1 at 4.

The Ladow Defendants refused to provide any further information regarding who they may have employed. Ex. 2 at 6.

While there may be others who generated responsive documents, the core production involves review of the files generated by seven people. That simply is not an unmanageable task.

This is not to say that the Ladow Defendants cannot use computer technologies to make their review process more efficient. To ensure that relevant evidence is not left behind, Defendants may (and indeed should) use keyword searching to spot-check the files deemed nonresponsive. Likewise, by running searches keyed to specific email addresses, it is very easy to identify all documents that went to or from a person of interest (such as a key witness, an important subcontractor, or the airport authority). These tools can and should be used as well to ensure a complete response. But computerized tools are supplements to the ordinary review process. No computer program is an adequate substitute for having human beings review and sort the documents.

The Ladow Defendants’ alternative request, if the Court does not endorse “predictive coding,” is that the Court order the parties opposing the Ladow Defendants’ motion to “pay the additional costs” incurred in reviewing documents. Ladow Mot. at 1. The Ladow Defendants, however, cite no authority that would permit them to shift to other parties the ordinary cost of

responding to discovery requests. In fact, as this Court previously noted in rejecting a party's argument that discovery sought was overly broad and costly, "[a]ll parties and counsel going into such litigation should be well aware of the potential for voluminous, costly and lengthy discovery." *Natale v. Miller*, No. 11634, 1988 WL 619406, at *1-*2 (Va.Cir.Ct., Dec. 9, 1988) (Chamblin, J.) (Ex. 4).

The Landow Defendants should produce all responsive emails and other electronic documents, not just the 75%, or less, that the "predictive coding" computer program might select. Their motion for protective order should therefore be denied.

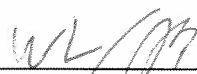
April 16, 2012

Respectfully submitted,

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