UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARY BELL, et al. Plaintiffs, v. PENSION COMMITTEE OF ATH HOLDING COMPANY, LLC, et al. Defendants.	)	No. 1:15-cv-02062-TWP-MPB

ORDER ON DEFENDANTS' MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS

This matter is before the Court on Defendants' *Motion to Compel Production of Certain Documents* (Docket No. 143). The motion is ripe with a supporting memorandum and exhibits (Docket No. 144, Docket No. 145), a response in opposition (Docket No. 151), and a reply (Docket No. 152). For the reasons that follow the Court **GRANTS in part and DENIES in part** Defendants' request.

I. INTRODUCTION

Plaintiffs bring this lawsuit alleging that Defendants, as fiduciaries of the Anthem 401(k) Plan (formerly the WellPoint 401(k) Retirement Savings Plan, the "Plan"), breached their duties by causing the Plan to pay excessive investment management and administrative fees and providing an imprudent money market fund—which Plaintiffs assert resulted in tens of millions of dollars of Plan losses. (Docket No. 151 at ECF pp. 1-2). The Plaintiffs are current and former participants of the Plan and they bring the suit on behalf of the Plan under 29 U.S.C. §

1132(a)(2) to obtain remedies due to the Plan under 29 U.S.C. § 1109(a), including damages and equitable relief. *Id.*

Now, Defendants move this Court to compel Plaintiff Janice Grider to produce: (1) a Facebook private message string between her and Plaintiff Cindy Prokish ("Facebook private messages"); and (2) a Facebook post from July 2015 capturing a screenshot related to an attorney seeking members of the Anthem 401(k) Plan ("2015 Facebook post"). (Docket No. 143 at ECF p. 1). Defendants argue Grider testified during her deposition that she had a private Facebook messaging exchange with Prokish regarding depositions and that Grider also testified to publishing a post on her Facebook page related to this litigation. *Id.* Plaintiffs argue both requests should be denied for a host of reasons.

II. LEGAL STANDARD

Federal Rules of Civil Procedure Rule 37 provides a vehicle for an aggrieved party to request an order from the court compelling discovery. *See Chavez v. DaimlerChrysler Corp.*, 206 F.R.D. 615, 619 (S.D. Ind. 2002). District courts have broad discretion in matters relating to discovery. *See Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002) (citing *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 646-47 (7th Cir. 2001)). A party may "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . Information within the scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1). A party may seek an order to compel discovery when an opposing party fails to respond to discovery requests or has provided evasive or incomplete responses. Fed. R. Civ. P. 37(a)(2)-(3). After the moving party establishes relevancy of the sought information, the burden shifts "to the objecting party to show

why a particular discovery request is improper." *Gregg v. Local 305 Ibew*, 2009 WL 1325103, *8 (N.D. Ind. May 13, 2009).

III. ANALYSIS

a. Undue Delay

Preliminarily, Plaintiffs argue the Defendants unduly delayed filing their motion to compel discovery. (Docket No. 151 at ECF pp. 2-6). On June 13, 2017, Defendants served their First Set of Requests for Production of Documents. (Docket No. 144 at ECF p. 4; Docket No. 144-1). On July 18, 2017, Plaintiffs responded (Docket No. 144-2). On July 25, 2017, Defendants took Grider's deposition. (Docket No. 144-3). After Ms. Grider testified to both the 2015 Facebook post and the private messaging between herself and Ms. Prokish, defense counsel stated to plaintiffs' counsel they would be requesting those documents. (Docket No. 144-3 at ECF p. 5; Docket No. 144-3 at ECF p. 10).

On September 27, 2017, defense counsel sent plaintiffs' counsel a letter requesting Ms. Grider to produce her Facebook conversations with Ms. Prokish. (Docket No. 144-4). On October 12, 2017, plaintiffs' counsel responded, maintaining that the Facebook communications are not subject to production pursuant to the instant message communication provisions within the Discovery Order. (Docket No. 145).

On November 21, 2017, counsel attended a telephonic meet and confer conference pursuant to Rule 37. (Docket No. 144 at ECF p. 6). Counsel discussed their respective positions on whether the Facebook private messages fall within the meaning "instant messaging communications" under the Discovery Order. (Docket No. 144 at ECF p. 6). On November 28, 2017, plaintiffs' counsel emailed defense counsel reiterating their position. (Docket No. 144-6). With fact discovery set to close on May 8, 2018, and the deadline to file motions to compel set to

close on April 30, 2018, Defendants filed this instant motion on April 27, 2018. (Docket No. 137; Docket No. 140; Docket No. 143).

The Court does not find the delay, in light of the relevant factors, of a nature to support denial of the motion. "On assessing delay of a moving party, courts usually focus on three questions: (i) how long was the delay; (ii) was there an explanation for it; and (iii) what happened during the delay." *West v. Miller*, 2006 WL 2349988, at *5 (N.D. Ill. Aug. 11, 2006).

Here, Defendants learned of the records in question on July 25, 2017, and put Plaintiff's on notice the same day that they would be requesting the records. (Docket No. 144 at ECF p. 4; Docket No. 144-3 at ECF p. 5; Docket No. 144-3 at ECF p. 10). Neither party indicated whether additional communication occurred regarding the requested records between the July 25 deposition and Defendants' September 27, 2017, letter. (Docket No. 144-4). The Court infers that there may have been some discussion considering that the September 27, 2017, letter was styled as a Rule 37-1. Either way, there were at least four communications between the depositions and this motion regarding the records in question. Plaintiffs were well aware that Defendants were seeking this discovery, and the parties made attempts to resolve their disagreements during the delay.

The Court further does not find the delay unreasonable in light of the parties' focus on class certification briefing during the relevant time period. Both sides have requested and received multiple extension requests, and it cannot be said that this case's lackluster pace is due to the actions of Defendants alone. (*See, e.g.*, Docket No. 137, Docket No. 139, Docket No. 140, Docket No. 141, Docket No. 147).

b. Facebook Private Messages

Plaintiffs argue that the Facebook private messages between Plaintiffs are classified as instant message communications and, thus not discoverable per the stipulated ESI order. (Docket No. 151 at ECF p. 6).

On August 23, 2016, the Court entered the Discovery Order. Section IV of the Order, entitled "Preservation," states:

> The Parties agree that the circumstances of this case do not warrant the preservation, collection, review, or production of ESI that is not reasonably accessible because they anticipate that enough relevant information can be yielded from reasonably accessible sources and, as necessary and appropriate, supplemented with deposition discovery. Moreover, the remote possibility of additional relevant information existing in not reasonably accessible sources is substantially outweighed by the burden and cost of preservation, collection, review and production of ESI from sources that are not reasonably accessible. The Parties agree that the following ESI is not reasonably accessible: . . . F. Server or system logs, network activity logs, voicemails, and instant messaging communications.

(Docket No. 55 at ECF pp. 5-6). Plaintiffs argue the Facebook private messages between Grider and Prokish constitute instant message communications. Defendants argue that the Facebook private messages between Grider and Prokish are more like emails and thus, do not fall within this clause of the discovery order.

The Court has reviewed the cases cited by Defendants, which found that private Facebook messages are akin to emails, but notes that in both those cases this conclusion was based on Facebook users' privacy expectations when it came to sending messages as opposed to posting on their wall. Neither case addressed email accessibility over a long period of time as compared to instant messaging communications. *See* *Campbell v. Facebook Inc.*, No. 13-cv-05996, 2015 WL 3533221, at *1 (N.D. Cal. June 3, 2015) (concluded that "[a] Facebook message is analogous to email as it involves an electronic message sent from one user to another

user(s) in a "privacy case" against Facebook); *R.S. ex rel. S.S. v. Minnewaska Area School Dist. No. 2149*, 894 F. Supp. 2d 1128 (D. Minn. 2012) (noting that "Facebook's private messaging service operates in all practical ways as an email service, and individuals have an expectation of privacy when using email"). While insightful, particularly in commenting that the users can access a message inbox on Facebook, 2015 WL 3533221, at *1, it is clear that the analogies are drawn for similarities in privacy concerns and not accessibility. The Discovery Order, drafted by the parties and approved by the Court, does not define instant messaging communications in a way to help the Court better decipher the accessibility concerns the parties anticipated. For instance, the parties could have been concerned that instant messages may not be readily accessible due to the ease with which they are deleted after each conversation or due to the lack of search-ability for particular subject matter or date ranges. Likewise, Plaintiffs' assertion that Grider testified that Prokish sent her an "instant message" is not helpful to the Court in resolving the dispute (Docket No. 151 at ECF p. 8). In this instance, a particular label selected by a Plaintiff is insufficient to determine what category the Facebook private messages falls into as the label selected provides no insight as the record's accessibility.

However, the Court need not determine whether Facebook messages are more akin to email or instant messaging communications to resolve today's dispute. As cited above, the Discovery Order also provides: "nothing . . . shall prevent a Party from subsequently requesting that ESI identified above be preserved and produced if specific facts demonstrate a particular need for such evidence that justifies the burden of preservation and retrieval." (Docket No. 55 at ECF p. 6). Defendants argue that even if the communications are deemed instant messaging communications, Grider herself testified during her deposition as to their relevancy and accessibility providing the necessary "specific facts [that] demonstrate a particular need for such

evidence." (Docket No. 144 at ECF pp. 8-9) (*quoting* Docket No. 55 at ECF p. 6). Plaintiffs assert that Defendants fail to provide citation to any testimony where Grider established that the Facebook private messages were legally relevant, instead only describing communications with co-plaintiff Prokish regarding their deposition preparations. (Docket No. 151 at ECF p. 7).

Of course, a Plaintiff or other witness in a deposition need not testify as to a specific communication's "legal relevance." *U.S. v. Espino*, 32 F.3d 253, 257 (7th Cir. 1994) (*citing* Fed. R. Evid. 701) (providing that it is beyond the scope of a fact witness to provide a conclusion regarding legal implications). Statements involving a Plaintiff's personal views and opinions concerning the lawsuit can be relevant. Here, Grider testified that both she and Prokish communicated that they were nervous for their depositions, Grider testified she told Prokish she had never done a deposition and that she was "just trying to help and be the representative." (Docket No. 144-3 at ECF pp. 11-12). Based on this testimony and without any specific argument by Plaintiffs arguing otherwise, these communications have relevancy to the parties' claims and defenses—indeed, Grider testified that she talked about, at least to some extent, agreeing to be the representative for the case. (Docket No. 144-3 at ECF p. 12). *See* Fed. R. Civ. P. 26(b)(1) (eventual admissibility is not required for information to be discoverable).

Plaintiffs also argue that Defendants have not established the difficulty or ease that the instant message communications could be downloaded. This misconstrues the testimony. After discussing both the instant messaging communications and the Facebook post, defense counsel asked Grider: "Have you done anything to delete anything off of your Facebook page?" (Docket No. 144-3 at ECF p. 9, 27:21-22). Grider answered: "No." (Docket No. 144-3, at ECF p. 9, 27:23). A follow-up question was then asked focusing on the 2015 Facebook post specifically. (Docket No. 144-3 at ECF pp. 9-10, 27:24-28:2, "Q: Okay. So imagine that the record still exists,

that we could look at your data from your Facebook page and see precisely the date that you posted that; right?). The Court also notes that other than faulting Defendants as to a perceived lack of investigation regarding the burden of preservation and retrieval of the Facebook messages, Plaintiffs have provided no evidence or specific argument as to the burden of retrieval. The Court finds that Defendants provided the requisite showing contemplated by the Discovery Order that the particular need for these Facebook communications justifies the burden of preservation and retrieval. Although the ultimate relevance of Grider and Prokish's "jibber jabber" prior to the depositions may be minimal, this is enough when the Court compares it to the minimal burden of preservation and retrieval that has been established by the current record before the Court.

Plaintiffs next argue that the Facebook private messages are not responsive to the discovery propounded. (Docket No. 151 at ECF pp. 9-10). Specifically, they argue that the communications are not responsive to Request No. 24 as it only pertains to documents reviewed prior to deciding to become a party to the suit nor can it be responsive to Request Nos. 12 and 34 as these seek documents "related to any of the allegations in the Second Complaint," whereas Grider testified their discussion was about deposition preparation—which did not fall into any of these requests.

The Court disagrees with Plaintiffs' representation of Grider's testimony. In addition to discussing the depositions and meetings with the attorneys, Grider also testified that they discussed "jibber jabber." (Docket No. 144-3 at ECF p. 11). When asked to expound on what "jibber jabber" meant, Grider testified that she was "trying to help and be the representative." (Docket No 144-3 at ECF p. 12). This description implies that the messages contained, at least in part, a discussion "related to any of the allegations in the Second Amended Complaint" and

related to allegations "referenced and cited within the Second Amended Complaint."). (Docket No. 144-1, Request Nos. 12, 34). It is not atypical for a document responsive to a discovery request to contain relevant and responsive information alongside non-responsive and irrelevant information. This fact does not impact the documents discoverability. *Cox v. Sherman Capital LLC*, 1:12-cv-01654-TWP-MJD, 2016 WL 397607 at *1 (S.D. Ind. Feb. 2, 2016).

The Court is also unpersuaded by the argument that Plaintiff was confined to requesting the post-filing Facebook private messages under Document Request No. 24, which focuses only on pre-suit documents, because this was the only document request listed in Defendants' September 27, 2017 letter. (Docket No. 151 at ECF p. 10). This argument is disingenuous. As established above, the communications are responsive to Document Request Nos. 12 and 34.

Request 12 states:

> Request No. 12: All documents that reflect, refer to, or otherwise relate to any communications between you and any Defendant or you and any current or former employee, agent, or official of Anthem or WellPoint that are related to any of the allegations in the Second Amended Complaint.

(Docket No. 144-1 at ECF p. 8).

Request 34 states:

> Request No. 34: All documents not produced in response to the previous requests that support, contradict or otherwise relate to each allegation in the Seconded Amended Complaint, including those referenced and cited within the Second Amended Complaint.

(Docket No. 144-1 at ECF p. 11).

Plaintiffs responded to both requests, in relevant part, that "subject to and without waiving the above objections, Plaintiffs will produce non-privileged responsive documents, to the extent not already produced, if any." (Docket No. 144-2 at ECF pp. 11, 24). Thus, while it would have been ideal for Defendants to have cited the specific requests in their September 27,

2017, written letter that they believed the Facebook private messages were responsive to, their failure to do so does not result in waiver of the documents where there were relevant document requests and those requests were appropriately named in the instant motion.

Plaintiffs next argue that the Rule 26(b)(3) work product doctrine and common interest privilege protect the Facebook private messages given that the communications were made as part of the litigation process and were confidentially exchanged between parties with identical legal interests. (Docket No. 151 at ECF pp. 10-11). Defendants argue these assertions are baseless because nothing in the conversations relate to materials prepared in the anticipation of litigation, but are instead general conversations regarding a litigant's feelings about litigation, which does not fall under the work product doctrine. (Docket No. 144 at ECF p. 10).

The work product doctrine was designed "to protect the work of an attorney from encroachment by opposing counsel." *BASF Aktiengesellschaft v. Reilly Indust., Inc.*, 224 F.R.D. 438, 441 (S.D. Ind. 2004) (internal quotations omitted). Under the work product doctrine, a party may protect "documents and tangible things that are prepared in anticipation of litigation or for trial by or for [that] party or its representative (including [that] party's attorney, consultant, surety, indemnitor, insurer, or agent)" from discovery by another party. Fed. R. Civ. P. 26(b)(3)(A). The work product doctrine consists of a multi-level protection whereby that information most closely related to an attorney's litigation strategy is absolutely immune from discovery, while that information with a more tenuous relationship to litigation strategy might be available in circumstances evincing a substantial need or undue hardship on the part of the discovery proponent. Fed. R. Civ. P. 26(b)(3). Accordingly, information that is merely factual may not be withheld under the umbrella of work product but must be available, if not through the production of otherwise protectable documents, then through interrogatories or depositions. *Allen*

v. Chicago Transit Authority, 198 F.R.D. 495, 500 (N.D. Ill. 2001) (*citing* 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2023, at 194).

The threshold determination in a case involving a claim of work product privilege is whether the material sought to be protected from discovery was prepared in anticipation of litigation. *Binks Mfg. Co. v. Nat'l Presto Industries, Inc.*, 709 F.2d 1109, 1118 (7th Cir. 1983). This determination, however, "eludes precision." *Allen*, 198 F.R.D. at 500. Yet, it can be summarized that:

> [I]n order to establish work production protection for a document, a discovery opponent must show that "the primary motivating purpose behind the creation of a document . . . must be to aid in possible future litigation," under circumstance where the discovery opponent can show "objective facts establishing an identifiable resolve to litigate." Only by strictly construing the elements of work product, can the doctrine's original intent be best served. That intent is to protect the adversarial process by providing an environment of privacy in which a litigator may creatively develop strategies, legal theories, and mental impressions outside the ordinary liberal realm of federal discovery provisions, thereby insuring that the litigator's opponent is unable to ride on the litigator's wits.

Id. at 500.

"The common interest doctrine is not an independent source of confidentiality. Rather, it simply extends the protection afforded by other doctrines, such as the attorney/client privilege and the work product rule." *McNally Tunneling Corp. v. City of Evanston*, 2001 WL 1246630, at *2 (N.D. Ill. 2001) (citations omitted). Accordingly, the Court first decides whether the work product doctrine applies.

While Plaintiffs cite the applicable work product doctrine standard, they provide no analysis as to how the Facebook private messages fall within the doctrine. Based on the testimony provided in the record the Court is unconvinced that the messages dealt with the litigation strategies as opposed to merely factual information. Grider testified that they discussed

when there depositions were to occur, that Prokish was to meet with the attorneys, and "jibber jabber" about being a little nervous, wanting the deposition over with, and wanting to be a good representative. (Docket No. 144-3 at ECF pp. 11-12). Without more, the Court cannot conclude that the Facebook private message communications are protected by the work product doctrine given that there is no evidence that the communication related to the legal strategies, theories, and mental impressions related to the furtherance of Plaintiffs' case. Instead, based on the testimony provided it appears that the Facebook private message was a general, factual communication between the two Plaintiffs. Since the work product doctrine does not apply, the Court need not analyze whether the common interest doctrine applies.

c. 2015 Facebook Post

With regards to the 2015 Facebook Post, Plaintiffs argue that Defendants did not comply with Local Rule 37-1 with respect to the 2015 Facebook post. (Docket No. 151 at ECF pp. 11-13). Plaintiffs assert neither Defendants' September 27, 2017 correspondence nor Plaintiffs' October 12, 2017 response mention the 2015 Facebook post. (Docket No. 144-4; Docket No. 145). Moreover, they argue, that Defendants' description of the November 21, 2017 telephonic meet and confer between the parties does not mention the 2015 Facebook post. *Id.* Defendants assert that they asked for the 2015 Facebook post during the deposition and that the subsequent communications referred to Facebook communications, generally, which include both private messages and posts. (Docket No. 162 at ECF p. 3).

Local Rule 37-1(a) provides, "[p]rior to involving the court in any discovery dispute, including disputes involving depositions, counsel must confer in a good faith attempt to resolve the dispute." *See also* Fed. R. Civ. Pro. 37. There is no doubt that the parties engaged in what this Court considers several meaningful meet and confers, including communication via letters,

emails, and finally a telephonic conference regarding a wide-range of discovery disputes. It is also evident that the parties resolved the majority of those disputes without assistance from this Court, which is the goal of Local Rule 37-1. Defendants' September 27, 2017, letter only specifically itemizes that "Ms. Grider referenced a conversation on Facebook with Ms. Prokish (messaging back and forth) about this lawsuit." (Docket No. 144-4 at ECF p. 3). However, Defendants also cite the deposition testimony that involves the 2015 Facebook post, i.e., "Grider Dep. pp. 22:3-25:6, 27:24-28:5, 40:2-41:2." *Id.* In this instance—where Defendants requested the 2015 Facebook post during the deposition and the parties meaningfully conferred, including regarding Grider's Facebook testimony, on several occasions prior to filing this motion to compel—to strictly construe Local Rule 37-1 to require in depth discussion as to every individual record dispute would defeat the Rule's purpose to resolve discovery disputes as efficiently as possible.

Plaintiffs also argue that the 2015 Facebook post is not relevant because Grider testified she merely posted a snapshot of an attorney inquiry she had read a few times in the local paper regarding the 401(k). (Docket No. 144-3 at ECF p. 6). She also testified that there may have been some responses to the post, but that is it. (Docket No. 144-3 at ECF pp. 6-7). Defendants provide no response to this argument. The party requesting discovery bears the initial burden of establishing its relevancy. *Gregg v. Local 305 Ibew*, 2009 WL 1325103, *8 (N.D. Ind. May 13, 2009). On its face, the Court does not see the relevancy of Grider's 2015 Facebook post of a snapshot of an attorney inquiry she had read a few times regarding the 401(k) nor, without a more detailed explanation, the relevancy of a few comments back and forth about the snapshot. Thus, the Court finds Defendants have not met their initial burden of establishing relevancy of the 2015 Facebook post and concludes that there request for the same should be denied.

IV. CONCLUSION

For the foregoing reasons, Defendants' *Motion to Compel Production of Certain Documents* (Docket No. 143) is **GRANTED in part and DENIED IN PART**. The Court **ORDERS** Plaintiffs to provide the Facebook private message communications between Grider and Prokish within fourteen (14) days of this Order. Defendants request for the 2015 Facebook post is denied.

SO ORDERED.

Dated: June 14, 2018

Matthew P. Brookman
United States Magistrate Judge
Southern District of Indiana

Service made electronically to all ECF registered counsel of record.