IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

IN RE: 3M COMBAT ARMS EARPLUG PRODUCTS LIABILITY LITIGATION,

Case No. 3:19-md-2885

Judge M. Casey Rodgers
Magistrate Judge Gary R. Jones

This Document Relates to:

Vernon Rowe
Case No. 7:20-cv-26
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AMEDED ORDER[1]

Pending before the Court is Defendants' Motion to Compel Forensic Analysis of Plaintiff Vernon Rowe's Mobile Device. ECF No. 14. Mr. Rowe has filed a response in opposition, ECF No. 16, Defendants filed, with leave of court, a reply memorandum, ECF No. 20, and Mr. Rowe filed, with leave of court, a sur-reply memorandum, ECF No. 22. Additionally, the Court held a telephonic hearing on October 9, 2020, at which the parties offered argument and limited testimony of their respective forensic analysts. ECF No. 23. At the conclusion of the hearing, the Court took the motion under advisement.

[1] This order is amended only to add language to the last sentence above III. Discussion, on page 12, which inadvertently was deleted when the order was converted to PDF and docketed.

The instant motion is ripe for consideration. For the reasons explained below, Defendants' motion to compel is due to be **DENIED**.

I. BACKGROUND

Mr. Rowe is a Bellwether Plaintiff in Trial Group A of this multidistrict litigation, which initiated in this Court on April 3, 2019. Case No. 3:19-md-2885, ECF No. 1 (N.D. Fla. Apr. 3, 2019). Mr. Rowe began preparing his case against Defendants that same month, when he retained counsel to prosecute his alleged claims. ECF No. 14 at 7; ECF No. 16 at 4.

On July 17, 2019, the Court entered Pretrial Order No. 8. Case No. 3:19-md-2885, ECF No. 440 (N.D. Fla. July 17, 2019). The purpose of the order was "to facilitate the preservation of ESI and hard copy documents in an efficient manner and in accordance with the Federal Rules [of Civil Procedure]." *Id.* at 2. The Court imposed preservation obligations on the parties, including directing "[c]ounsel for individual Plaintiffs [to] advise Plaintiffs of their current and continuing obligations to preserve and not alter or destroy any potentially relevant materials." *Id.* at 5.

Mr. Rowe's counsel informed him of his preservation obligations under Pretrial Order No. 8 in September 2019. ECF No. 16. Mr. Rowe began uploading documents to MDL Centrality on October 24, 2019, ECF No. 14-5, and filed his short-form complaint on January 17, 2020, ECF No.

1. One month later, Mr. Rowe was selected as a Bellwether Plaintiff. Case No. 3:19-md-2885, ECF No. 1015 (N.D. Fla. Feb. 27, 2020).

Mr. Rowe, consequently, became subject to Pretrial Order No. 42 governing the "Bellwether Plaintiffs' identification, collection, and production of relevant and responsive electronically stored information ('ESI')." Case No. 3:19-md-2885, ECF No. 1286 (N.D. Fla. July 28, 2020). Mr. Rowe was directed to conduct a "reasonable investigation" of, among other ESI sources, "any email accounts used by [him]—whether stored locally or in a cloud-based system (*e.g.*, Gmail, Yahoo, and Hotmail)." *Id.* at 2. This investigation including running specific such terms, such as "hear," "hearing," "ear," and "ears." *Id.* at 4. Pretrial Order No. 42 also set forth the processes for linear review, production of ESI, and certification of compliance. *Id.* at 4–6. Mr. Rowe's deadline for production and certification under Pretrial Order No. 42 was July 8, 2020. *Id.* at 6.

Mr. Rowe and his counsel, with the help of counsel's ESI vendor International Litigations Solutions, Inc. ("ILS"), proceeded with their reasonable investigation to locate relevant and responsive ESI. ECF No. 16-1 (Declaration of Michael Ciaramitaro, ILS Director of Digital Forensics). Mr. Ciaramitaro "collected or directed the collection of data from Mr.

Rowe's Webmail Gmail account, his Facebook account, and his Apple iPhone 8 Plus." *Id.* at 4.

As to Mr. Rowe's Facebook profile, Mr. Ciaramitaro used a "well-known industry standard computer forensic Social Media collection software called Magnet Forensic Axiom." *Id.* at 5. This collected the contents of Mr. Rowe's Facebook "in full, including the Facebook timeline, messages, and friends list," without filtering or other limitations. *Id.* Mr. Ciaramitaro also used Facebook's "Download Your Information" tool as an alternative means of collection. *Id.* In total, Mr. Ciaramitaro "collected [more than] 9,600 Messenger Messages and thousands of Timeline posts," totaling 1,500 megabytes of data. *Id.* The messages included 9,603 separate message threads between Mr. Rowe and his Facebook friends, dated between September 7, 2007, through June 30, 2020. *Id.* at 6.

As to Mr. Rowe's iPhone, Mr. Ciaramitaro used an industry-standard micro-computer forensic collection kit, Cellebrite UFED 4PC, to perform a remote collection of data. *Id.* Specifically, Mr. Rowe connected his device to a mini-computer delivered to his home, and Mr. Ciaramitaro used a screen sharing application to instruct Mr. Rowe and to supervise the collection. ECF No. 22-1 at 2–3. Mr. Ciaramitaro states that "[t]hroughout the mobile phone collection, the forensic examiner was able to monitor and

properly administer the collection and prior to completion of the collection, the forensic examiner verified collection to micro-computer." *Id.* This collection yielded thousands of photos and videos, more than 600 "chat communications," and "105 MMS and 220 SMS messages." ECF No. 16-1 at 7. The latter included 29 deleted chat threads. *Id.*

Mr. Rowe produced a collection of ESI to Defendants on July 8, 2020, and he certified compliance with Pretrial Order No. 42. ECF No. 14-7. Following the necessary processing of search terms, Mr. Rowe produced 3,126 documents of responsive ESI and 97 native social media files. ECF No. 16 at 3–4.

When Defendants deposed Mr. Rowe two weeks later, he testified that he communicated with three individuals identified in his initial disclosures (Rodolfa Ravada, Johnny Hall, and Joshua Oddsen) to tell them he may "use their name[s]" in this litigation. ECF No. 14-1 at 8. Mr. Rowe confirmed that he contacted them "through Facebook," as well as by texts to Mr. Ravada because they communicated "regularly." *Id.* at 9. Although Mr. Rowe testified that those communications were produced, *id.*, they in fact were not, ECF No. 14 at 9. Indeed, Mr. Rowe's counsel, after returning to Mr. Rowe and Mr. Ciaramitaro, informed Defendants' counsel on August 11, 2020, that Mr. Rowe did not have any text or Facebook

messages between himself and Messrs. Ravada, Hall, and Oddsen. ECF No. 14-8 at 2. Mr. Rowe's counsel stated that Mr. Rowe did not "know whether [the messages] were deleted or not" and that he "indicated he has always tended toward deletion of text and message chains once the discussion is complete." *Id.*

Defendants served third-party subpoenas under Federal Rule of Civil Procedure 45 on Messrs. Ravada, Hall, and Oddsen to obtain their communications with Mr. Rowe. ECF No. 14 at 12; ECF No. 16 at 6. Defendants received one responsive Facebook message thread from Mr. Oddsen regarding the status of Mr. Rowe's case against Defendants. ECF Nos. 14-2, 14-3. In this thread, Mr. Rowe told Mr. Oddsen: "I might get no money at all but if for some craze reason I get a lot, I got you bro 😜." ECF No. 14-2. Additionally, Mr. Ravada produced to Defendants seven messages with Mr. Rowe. ECF No. 16-2. Defendants deposed Mr. Ravada, who stated he deleted his Facebook profile in 2018 and that he could have communicated with Mr. Rowe by phone or text. ECF No. 16-3 at 31, 160.

Defendants now request that the Court appoint a neutral expert to conduct a limited forensic examination of Mr. Rowe's iPhone to attempt to recover deleted communications with Messrs. Ravada, Hall, and Oddsen

and metadata relating to the deletions. ECF No. 14 at 5. Defendants also claim that a neutral forensic examination would "test Plaintiff Rowe's assertion that he has always tended toward deletion of text and message chains once the discussion is complete." *Id.* Defendants have submitted, with their reply memorandum, a declaration from forensic analyst Brad C. Bogar, who states that "message fragments or partial data available on the phone could be used to recover messages." ECF No. 20-1 at 7.

Mr. Rowe opposes Defendants' motion, arguing that he has complied with Pretrial Order No. 42 and that Defendants fail to meet the intent standard adopted by this Court to compel a forensic examination, as well as the relevancy and proportionality prongs of Federal Rule of Civil Procedure 26(b)(1). ECF No. 16. Mr. Rowe has submitted, with his sur-reply memorandum, a supplemental declaration from Mr. Ciaramitaro. ECF No. 22-1. Mr. Ciaramitaro avers that an additional forensic analysis will not be fruitful because "all collections performed on Mr. Rowe's mobile phone were completed in an exhaustive and industry standard way … by qualified forensic specialists[.]" *Id.* at 4. Mr. Ciaramitaro further states that, based on his experience, "deleted messages are no longer recoverable from Facebook … nor from the iPhone mobile device where Mr. Rowe may have accessed Facebook or Facebook Messenger." *Id.* at 6 n.4.

At the hearing on Defendants' motion to compel, the Court questioned the respective forensic analysts, Mr. Ciaramitaro (for Mr. Rowe) and Preston Miller (for Defendants), about the likelihood of recovering deleted text or Facebook messages from Mr. Rowe's iPhone. Consistent with Mr. Bogart's declaration, Mr. Miller testified to a possibility that a "full forensic examination" of Mr. Rowe's iPhone could recover deleted text or Facebook "message fragments" based on how the phone regularly functions. Although Mr. Ciaramitaro conceded there was a possibility fragments could be recovered, he emphasized that there was a "low probability" it would result in an "understandable" or "coherent" data collection. Unlike data collection using Cellebrite, a full forensic examination involves "jailbreaking" or "hacking" the iPhone, which means the examination involves a full acquisition of all of the data systems. Such an examination collects all of the data on the device and possibly because of the extensive nature of the examination can void the warranty on the device or possibly render the device unusable. Notably, neither party contended that Pretrial Order No. 42 contemplated a full forensic examination of Mr. Rowe's iPhone or that such an examination is a routine method for the collection of relevant and responsive ESI in civil litigation.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide some guidance on this issue. Rule 34(a)(1) permits the inspection, testing, or sampling of a party's ESI. Fed. R. Civ. P. 34(a)(1)(A). When Rule 34(a)(1) was amended to include ESI as a discovery source, however, the Advisory Committee warned that inspection or testing of this material "may raise issues of confidentiality or privacy" and its addition was "not meant to create a routine right of direct access to party's electronic information system[.]" Fed. R. Civ. P. 34 advisory committee's note. The Advisory Committee suggested that "[c]ourts should guard against undue intrusiveness resulting from inspecting or testing such systems." *Id.* Thus, the Court has limited authority to compel a forensic examination of a party's ESI in the absence of consent.[2]

[2] *See In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003) (district court's order allowing requesting party direct access to responding party's electronic databases without "a factual finding of some non-compliance with discovery rules" was an abuse of discretion); *Belcastro v. United Airlines, Inc.*, No. 17-C-1682, 2019 WL 7049914, at *2 (N.D. Ill. Dec. 23, 2019) ("A forensic ESI exam constitutes an extraordinary remedy[.]"); *FCA US LLC v. Bullock*, 329 F.R.D. 563, 567 (E.D. Mich. 2019) ("Courts have cautioned that they are loathe to sanction intrusive examination of an opponent's computer[.]"); *Vasudevan Software, Inc. v. Microstrategy Inc.*, No. 11-cv-6637-RS-PSG, 2013 WL 1366041, at *2 (N.D. Cal. Apr. 3, 2013) ("[F]orensic inspection … is an extraordinary remedy that requires substantial support.").

This Court recently addressed the legal burden a party must satisfy for the Court to compel a neutral forensic examination. *See Baker v. 3M Company*, Case No. 7:20-cv-39-MCR-GRJ, ECF No. 18. "[T]he Court will compel a forensic examination of a party's ESI only where there is a strong showing that the party intentionally destroyed evidence or intentionally thwarted discovery." *Id.* at 8. This standard protects against "discovery uncertainties or abuses," is "most in line with the Eleventh Circuit's holding in *In re Ford Motor Co.*," and ensures "the requesting party's mere desire to 'double check' the completeness of a responding party's production will not suffice." *Id.* at 8–9.[3]

In any event, the Court need not in this case reach the issue in *Baker* because, as a threshold matter, the crux of the parties' dispute (not presented in *Baker*) is whether the discovery requested by Defendants—a neutral forensic examination to attempt to obtain deleted messages between Mr. Rowe and three individuals or data related to those deletions—is relevant or proportional to the needs of this case. Discovery is limited to nonprivileged matter that is "relevant to any party's claim or

[3] *See also Estate of Rand v. Lavoie*, No. 14-cv-570-PB, 2017 WL 11541229, at *2 (D.N.H. July 25, 2017); *Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV, 2014 WL 11498061, at *3 (S.D. Fla. Dec. 30, 2014); *NOLA Spice Designs, LLC v. Haydel Enters., Inc.*, No. 12-2515, 2013 WL 3974535, at *3 (E.D. La. Aug. 2, 2013).

defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Accordingly, a court should only compel a forensic examination of a cell phone or other personal electronic device when such an examination "will reveal information that is *relevant* to the claims and defenses in the pending matter" and when "such an examination is *proportional* to the needs of the case given the cell phone owner's compelling privacy interest in the contents of his or her cell phone." *Hardy v. UPS Ground Freight, Inc.*, No. 3:17-cv-30162-MGM, 2019 WL 3290346, at *2 (D. Mass. July 22, 2019) (emphasis added).[4]

Relevancy is construed "broadly to encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).[5] If the relevance of the requested discovery is not apparent, the party seeking the production must demonstrate relevancy. *S.E.C. v. BankAtlantic Bancorp, Inc.*, 285 F.R.D. 661, 666 (S.D. Fla. 2012).

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[4] *See also Henson v. Turn, Inc.*, No. 15-cv-1497-JSW (LB), 2018 WL 5281629, at *5 (N.D. Cal. Oct. 22, 2018); *Ramos v. Hopele of Fort Lauderdale, LLC*, No. 17-62100-CIV, 2018 WL 1383188, at *2 (S.D. Fla. Mar. 19, 2018).

[5] *See also Henson*, 2018 WL 5281629, at *5 (denying motion to compel inspection of a party's mobile device where the request "threatens to sweep in documents and information that are not relevant to the issues in this case, such as the plaintiffs' private text messages, emails, contact lists, and photographs").

Determining whether discovery is proportional requires consideration of "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). As to proportionality:

> A court will deny a motion to compel forensic imaging of personal electronic devices if the party seeking the image fails to show that it will likely produce the material it seeks, if an alternative, less invasive means of obtaining the evidence exists, or if the motion is not accompanied by a proposal for a protocol appropriately tailored to protect the privacy concerns of the opposing party.

Hardy, 2019 WL 3290346, at *3.[6] In short, even if a party could demonstrate a need for a forensic examination, such an examination is not justified if the moving party fails to establish that such an examination likely will produce the information sought. In this case, Defendants seek allegedly deleted text messages. But, as explained below, even if there is some possibility that a forensic examination could identify fragments of messages in the Court's view it is not likely or probable that the forensic examination would capture the deleted text messages.

[6] *See also Henson*, 2018 WL 5281629, at *5 (collecting cases).

III. DISCUSSION

Defendants advance three arguments in support of their motion to compel a neutral forensic examination of Mr. Rowe's iPhone: (1) ensure the initial collection of data from the mobile device was complete; (2) collect any additional available data establishing (or refuting) Mr. Rowe's pattern or practice of deleting text and Facebook messages; and (3) attempt to locate fragments of deleted text and Facebook messages between Mr. Rowe and Messrs. Ravada, Hall, and Oddsen. The Court concludes these arguments fail to demonstrate a compelling need for the forensic examination, and, therefore, Defendants' motion to compel is due to be denied.

First, the Court will not compel a neutral forensic examination of Mr. Rowe's iPhone to ensure the collection was complete because there is no dispute that Mr. Rowe's initial ESI collection complied with Pretrial Order No. 42. This is not a case where a neutral examination would be prudent because Mr. Rowe or his counsel attempted to retrieve ESI for production without assistance.[7]

[7] *See In re Abilify (Aripiprazole) Prods. Liab. Litig.*, No. 3:16-md-2734, 2017 WL 9249652, at *3 (N.D. Fla. Dec. 7, 2017) ("[A]s the Court expressed at the hearing, self collection by a layperson of information on an electronic device is highly problematic and raises a real risk that data could be destroyed or corrupted."); *Mirbeau of Geneva Lake LLC v. City of Lake Geneva*, No. 08-cv-693, 2009 WL 3347101, at *1 (E.D. Wis. Oct. 15, 2009) ("Only

Indeed, Mr. Rowe turned this task over to an ESI expert, Mr. Ciaramitaro, who undertook a thorough collection and review process described in his declarations. ECF Nos. 16-1, 22-1. There are no discrepancies or inconsistencies between Mr. Rowe's discovery responses and his ESI production to justify Defendants' motion,[8] and, as explained above, the Court cannot order a forensic examination when the sole purpose of that examination is based on mere skepticism, suspicion, or speculation concerning the completeness of a party's discovery production.

Second, Defendants fail to demonstrate that a forensic examination would likely produce data on Mr. Rowe's iPhone, relevant to establish or negate a purported pattern or practice of deleting messages. The crux of Defendants' argument is that a forensic examination will produce evidence to refute Mr. Rowe's assertion that he "tended toward deletion" of messages once a conversation was complete. Defendants say that a forensic examination would show deletions, deletion-frequency, and retention of older inactive message threads. At first blush while there may

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if the moving party can actually prove that the responding party has concealed information or lacks the expertise necessary to search and retrieve all relevant data, including metadata or residual data, is it proper for the moving party to initiate the searches of the other party's ESI.").

[8] *Memry Corp. v. Ky. Oil Tech., N.V.*, No. C04-3843-RMW-HRL, 2007 WL 832937, at *4 (N.D. Cal. Mar. 19, 2007); *Ameriwood Indus., Inc. v. Liberman*, No. 4:06-cv-524-DJS, 2006 WL 3825291, at *4 (E.D. Mo. Dec. 27, 2006)

be some traction to this argument, upon closer inspection it remains unclear how a party could prove or disprove the veracity of such a statement.

According to Defendants' expert, a forensic examination could possibly show that there were messages missing (and thus presumably deleted) but the forensic examination would not be able to show *when* a message was deleted but only when the message was sent. The text messages are assigned corresponding numbers so that if there is a gap (or an intervening missing number assigned to a text message) this would evidence a deleted or missing text. It says nothing about the content of the text but only that a text message was missing. The problem is that this type of evidence at best would show only that a text message had been deleted and would not show anything to document when test messages were deleted, why they were deleted, the contents of the deleted text message or the pattern, if any, of the user in deleting messages. Take for example, that most cell phone users delete (at some point in time) unsolicited messages, and depending upon the length of the thread of text messages, delete text messages daily, weekly, monthly or randomly. Thus, a forensic examination (even assuming the examination successfully identified that there were text messages in sequential order, which were missing) would

not identify when the text messages were deleted, thus leaving for speculation whether the text messages were deleted when the conversation in the text thread was completed or whether the text messages were deleted at some other point in time. More importantly, the forensic examination would not show the contents of the deleted text message but only that a text message had been deleted. Therefore, rather than definitively answering the question of whether Mr. Rowe deleted any text messages to his friends, and if so when he did so, the forensic examination would at best show that some, but not all, text messages were deleted.

In sum, the Court is not persuaded based upon the information offered by the respective ESI experts that the data obtained from a forensic examination ultimately would uncover relevant and useful data that more likely than not would be relevant to challenge Mr. Rowe's purported practice that he "tended toward deletion of text messages once the discussion was complete." And information obtained from a forensic examination to show pattern and practice inevitably would raise more questions than answers if it ever reached the Court or a jury.

Third, the forensic examination requested by Defendants is not proportional to the needs of this case. Even assuming the content of any

deleted messages were relevant to Mr. Rowe's claims or Defendants' defenses, "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." *Carr v. State Farm Mut. Auto. Ins. Co.*, 312 F.R.D. 459, 467 (N.D. Tex. 2015). Here, proportionality turns on the likelihood of the forensic examination producing the material Defendants seek. At best, however, Defendants proved only that there was some possibility that a full forensic examination might collect and identify "fragments" of deleted messages. And even if a full forensic examination of Mr. Rowe's IPhone produced "fragments" of deleted messages, it is not highly likely that the message content could be recovered from the message fragments. While all of this may be possible, in the Court's view, recovery of the full text of deleted messages is not highly probable. Therefore, Defendants have failed to demonstrate a compelling reason sufficient to justify compelled intrusion on Mr. Rowe's privacy. The forensic examination thus is disproportionate to the slight importance of this potential discovery to the case.[9]

[9] *See Hardy*, 2019 WL 3290346, at *4 (denying motion to compel imaging of a plaintiff's cell phone where defendant "failed to demonstrate [deleted text messages] can be recovered" based on "broad assertions that electronic information is discoverable")

Finally, the cases cited by Defendants at the hearing on their motion—*Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645 (D. Minn. 2002), and *Zimmer, Inc. v. Stryker Corp.*, No. 3:17-cv-152-JD-CAN, 2015 WL 13770949, at *1 (N.D. Ind. May 11, 2015)—are factually inapposite and do not alter the result in this case. Put simply, neither case presents a meaningful dispute of the relevance of the discovery sought in those requested forensic examinations or the proportionality of ordering forensic examinations (such as the likelihood of recovering deleted data) to the needs of those cases. Indeed, as to proportionality and the likelihood of recovery, the requesting party in *Antioch* explained that the data it sought was available on a hard drive but was "constantly being overwritten … by the [d]efendants' continued use of that equipment." 210 F.R.D. at 650–51. There is no similar representation in this case. The Court concludes, therefore, that these cases (like the Court's recent order in *Baker* discussed above) present different issues than the relevance and proportionality considerations in issue here.

In sum, the Court will not compel a full system acquisition forensic examination of Mr. Rowe's iPhone by a neutral analyst. Mr. Rowe's initial ESI collection by Mr. Ciaramitaro was reasonable, consistent with industry standards and appropriate under Pretrial Order No. 42. Most of the

discovery Defendants are seeking through a forensic examination will not produce information relevant to Mr. Rowe's claims or Defendants' defenses. And Defendants have failed to satisfy Rule 26(b)(1)'s proportionality prong by demonstrating a reasonable likelihood (as opposed to a mere possibility) that a forensic examination would locate and capture the content of deleted text messages or even when text messages were deleted.

IV. CONCLUSION

Accordingly, for these reasons, it is **ORDERED** that Defendants' Motion to Compel Forensic Analysis of Plaintiff Vernon Rowe's Mobile Device, ECF No. 14, is **DENIED**.

DONE AND ORDERED this 15th day of October 2020.

s/Gary R. Jones
GARY R. JONES
United States Magistrate Judge