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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

**PLAINTIFFS' SUPPLEMENTAL FILING CONCERNING MAGNETIC TAPES**

Plaintiffs respectfully submit this supplemental filing in anticipation of the discovery hearing scheduled on December 15, 2011, to provide the Court with updated information on the issue of the magnetic tapes.[1]

**ACCESSIBILITY**

Defendants must produce relevant, non-privileged information responsive to Plaintiffs' document requests. Two years after the tapes were requested, Defendants' counsel has claimed that they cannot fulfill that production obligation because the data on the magnetic tapes is inaccessible.[2] While Defendants make this claim, they have not moved for a protective order pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).

Defendants bear the burden of proving that the data on the tapes is inaccessible. *Id.; Jadwin v. Cty of Kern*, No. 1:07-cv-0026-OWW-TAG, 2008 U.S. Dist. LEXIS 119832, at *16 (E.D. Cal. May 9, 2008). They cannot meet this burden with conclusory statements that data is inaccessible. *See, e.g., Mikron Indus. v. Hurd Windows & Doors, Inc.*, Case No. C07-532RSL, 2008 U.S. Dist. LEXIS 35166, at *6 (W.D. Wa. Apr. 21, 2008) (finding that Defendants had not met their burden of demonstrating that the Electronically Stored Information ("ESI") is not reasonably accessible when Defendants offered very little evidence beyond a cost estimate and conclusory characterizations of ESI as "inaccessible"). Rather, they must offer details sufficient to allow the requesting party and the Court to evaluate that claim. *Id* at *4.

*Fact Issues.* Defendants have not provided information necessary for Plaintiffs to challenge, or for the Court to assess, Defendants' claims that the data is inaccessible. Defendants have provided only limited information regarding their attempts to retrieve the data on the magnetic tapes in response to Plaintiffs' repeated requests. Defendants have not provided

[1] Plaintiffs contacted Defendants' counsel on December 5, 2011 to discuss the Court's order regarding this issue. This e-mail was not returned. Defendants have not shared any new information with Plaintiffs or provided any information to support their claim; nor has their claim been substantiated in any declarations.

[2] Plaintiffs have previously addressed the two-year history of this discovery issue in their section of the Joint Letter (Docket No. 318 at 19) including Defendants' refusal to provide any information during the Court-ordered meet-and-confer session where Plaintiffs sought basic information about the tapes, the technology used in their creation, and Defendants' claimed attempts to retrieve data from them.

information regarding the technology used to create the magnetic tapes, nor have they answered such basic questions as the hardware or software used. Plaintiffs submit with this filing the Declaration of Expert John Ashley ("Ashley Decl."), who details all of the information Plaintiffs would need to more appropriately assess these claims of inaccessibility, none of which have been provided to Plaintiffs or this Court, these include the answers to the following questions:

1) Was the UNIVAC 1108 computer system and ADEPT system the origin for the data stored on the magnetic tapes?
2) If the hardware and software discussed in question 1 were not the origin, what is the make and model of the computer system and the make and version of the software used to create the magnetic tapes?
3) What are the make, model, and size of the backup tapes?
4) What tape drive was used to create the magnetic tapes?
5) What other systems, if any, were used to create the magnetic tapes?
6) Is the type of hardware and software used to create the magnetic tapes still in the possession or control of Defendants or from any other government agency?
7) What employees, active or retired, still exist that have worked with the equipment used to write the data to the magnetic tapes?
8) What attempts have been made to consult with or involve the employees or unit that first created the magnetic tapes or that provided the electronic files from Edgewood?
9) What sources has the government consulted to identify the equipment used to make the magnetic tapes?
10) What are the specific details concerning the recent attempt to access, read, or convert the tapes?
11) What are the technological capabilities of the sources the government consulted to attempt to access, read, or convert the magnetic tapes?
12) What is the current format of the magnetic tapes?
13) In what location have the tapes been stored?
14) In what condition have the magnetic tapes and duplicates been stored?
15) Have the tapes been rewound on a certain frequency?
16) Is there any external labeling on the tapes? If so, what do those labels contain?

*Legal Issues.* Defendants' claims of inaccessibility should be evaluated in light of the rule that magnetic data is generally presumed to be accessible, particularly for sophisticated technology arms of government such as the CIA and DOD. *See Zubulake v. UBS Warburg*, 217 F.R.D. 309, 319 (S.D.N.Y 2003) (identifying magnetic tape media as a category of electronic data that is typically accessible). Further, the computer forensic expert retained by Plaintiffs opined, based on the little information Plaintiffs have independently discovered through review of related documents as well as a number of assumptions, that the data is accessible. (Ashley Decl. ¶ 12.)

**COSTS**

Plaintiffs anticipate that Defendants may contend that Plaintiffs should bear all or part of

the expense of retrieving the responsive data from the tapes. Defendants must first meet the burden of showing that the data is, in fact, inaccessible before the Court should even consider cost-shifting, given the well-settled presumption that the responding party bears the cost of production. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978); *OpenTV v. Liberate Tech.*, 219 F.R.D. 474, 477 (N.D. Ca 2003) (cost-shifting *only* considered when inaccessible data is sought).

Only if Defendants show that the data is inaccessible does cost-shifting come into play. *Jadwin*, 2008 U.S. Dist. LEXIS 119832 at *16. Then, Defendants would have the burden to show that:

1) The request is not specifically tailored to the discovery of relevant information;
2) The information is available from other sources;
3) The total cost of production is disproportional to the amount in controversy;
4) The total cost of production exceeds the resources of Defendants compared to the resources available to Plaintiffs, a difficult standard to satisfy considering Plaintiffs are handling this case *pro bono*;
5) Plaintiffs are better situated to control costs than Defendants;
6) The cost of production is not justified by the importance of the issues at stake in the litigation;
7) The Plaintiffs receive all of the benefits of obtaining the information.

*See OpenTV*, 219 F.R.D. at 477 (adopting the *Zubulake* factors).[3] These factors are weighed in the order listed above, giving greater weight to the first factors. *Id.*

Cost-shifting analysis would be inappropriate in this case for two reasons. First, because Defendants have wholly contributed to any inaccessibility of the data and, secondly, because Defendants have not met their burden to show cost-shifting is warranted.

First, cost-shifting would be inappropriate because Defendants not only contributed to, but caused, the inaccessibility of the information. Parties cannot make data inaccessible and then use claims of inaccessibility to invoke cost-shifting protections. For example, the court in *Starbucks Corp. v. ADT Sec. Servs., Inc.*, No. 08-cv-900-JCC, 2009 U.S. Dist. LEXIS 120941, at *17 (W.D. Wa. Apr. 30, 2009) determined that data on an archival system, to which an estimate of

[3] Ordering Defendants to provide Plaintiffs with the tapes, rather than the retrieved data on the tapes, amounts to cost-shifting, which would necessitate this analysis. *See OpenTV*, 219 F.R.D. at 477 (making a source code available before converting it to a readable format amounts to cost-shifting). To the extent the Court orders production of the magnetic tapes pursuant to the protective order, Plaintiffs urge the Court to reserve issues regarding the allocation of costs incurred by Plaintiffs in accessing information stored on the tapes.

production could exceed hundreds of thousands of dollars, was accessible. Refusing to apply a cost-shifting analysis, the court stated that "[t]he Court cannot relieve Defendant of its duty to produce those documents merely because Defendant has chosen a means to preserve the evidence which makes the ultimate production of relevant documents expensive." *Id.* at *18. Similarly, the court in *Disability Rights Council of Greater Washington v. Washington Metro. Transit,* 242 F.R.D. 139, 147 (D.D.C. 2007), refused to cost-shift when a party failed to institute a policy to stop email from being deleted after sixty days. Forcing the parties to restore backup tapes to produce relevant information, the Court stated that "[w]hile the newly amended Federal Rules of Civil Procedure initially relieve a party from producing electronically stored information that is not reasonably accessible because of undue burden and cost, I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains." *Id.* In this case, Defendants opted to store critical information regarding sensitive human testing on magnetic tapes, and to send it to a storage facility where only three top officials could obtain access. (See Docket No. 291-1 at 9.) It also appears that Defendants subsequently failed to follow their own regulations with respect to data maintenance that required them to maintain the accessibility of the data on the tapes. (*See* AR 25-400-2 § 3-12 (1993) (Media care and maintenance: specifies quality control measures for "magnetic tapes that store records retained for 8 years or longer . . .")[4]

Secondly, Defendants have not provided any information with which Plaintiffs or the Court can perform a cost-shifting analysis, making any such analysis on the merits premature.

[4] The regulation requires, *inter alia*, that tapes be rewound every 3.5 years, that "a 3 to 7 percent statistical sample of all reels of magnetic computer tape containing the official copy of these records [be read] to identify any loss of data and to discover and correct the causes of data loss," and that "[i]nformation must be recopied onto tested and verified tapes before the end of the 10 year cycle." AR-25 400-2 § 3-12 (1993). The regulation has since been replaced by more general regulations on electronically stored media, requiring the DOD to manage the data in a way that provides for "economic, efficient, and reliable maintenance, retrieval, preservation, storage, and scheduled disposition of the information." *See* AR-25 400-2 § 3-4 (2007). Plaintiffs are currently working with the Government Archives Library to ascertain whether there are any regulations preceding this one governing magnetic tape data as those historical regulations are not readily available publically.

Defendants have not provided any supporting case authority or any analysis or support regarding the factors considered in determining whether cost-shifting is appropriate. The only thing Defendants have done, in fact, is conclusively contend that the data is inaccessible. Courts have time and time again rejected these conclusory statements when even more information was provided, such as a cost estimate. *See Jadwin*, 2008 U.S. Dist LEXIS 119832 at *16-18 (refusing to cost-shift when Defendants submitted to the Court only a cost estimate, stating that "Defendants have not provided any case authority to support its position or an analysis of the factors to be considered in determining whether cost-shifting is appropriate, other than contending that many of the documents requested by Plaintiff have little or no relevance to this case and the cost of their production outweighs any likely benefit."). In this case Defendants have not even so much as provided an *estimate* with respect to costs to support any claim that costs should be shifted. Defendants state that they issued a Request for Information ("RFI"), a non-binding form of inquiry that is informational only. Defendants have not said whether the government received any bidders or cost estimates pursuant to this "RFI." The parties and the Court are certainly ill equipped to perform a cost-shifting analysis in a financial vacuum (especially in light of the fact that two of the cost-shifting factors specifically call for cost comparison). At minimum, Defendants should be prepared to provide this information to the Court prior to any cost-shifting determination.

**CONCLUSION**

Plaintiffs respectfully submit this information to assist the Court in ruling on the magnetic tapes issue that the Court will hear on December 15, 2011, and respectfully submit that Defendants have not provided sufficient information to meet their burden of showing that the data on the tapes is inaccessible or that Plaintiffs should bear any cost with respect to its retrieval. As a result, Plaintiffs respectfully request that the Court order one of the following, in order of Plaintiffs' preference:

1. Order Defendants to exhaust all means to retrieve the files on the magnetic tapes at their expense; or

2. Appoint a third-party with security clearance to exhaust all means to produce the contents of the magnetic tapes at Defendants' expense; or

3. Order Defendants to provide Plaintiffs with a copy of the magnetic tapes, but defer any cost-shifting analysis until after the Court has more information or a cost estimate with respect to the retrieval process.

At the hearing, Plaintiffs will be prepared to report to the Court on the current status of other discovery disputes.

Dated: December 14, 2011

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