IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

MEMBER WILLIAMS, et al.	)	CASE NO. CV 2016 09 3928
	)	
Plaintiffs	)	JUDGE JAMES A. BROGAN
	)	(Sitting by Assignment #18JA1214
-vs-	)	
	)	
KISLING, NESTICO & REDICK, LLC, et al.	)	**DECISION**
	)	
Defendants	)	

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The four Plaintiffs in this matter have moved to compel the Defendants to search their files for certain information regarding former clients ("putative plaintiffs") who might join their lawsuit against the Defendants.

The Defendants argue that the Plaintiffs' expansive discovery requests are focused on fishing for evidence on the merits of their putative class claims and are not remotely related to the certification requirements of Civ.R. 23.

The Defendants argue in part as follows: that the discovery sought by Plaintiffs will astronomically increase that burden, which cannot possibly be justified if class certification is denied and the case proceeds, if at all, only as an individual action with negligible damages. Moreover, Defendants argue that Plaintiffs have set forth no proposal to bear the exorbitant costs associated with their wild goose chase, and have refused to enter into reasonable stipulations proposed by Defendants in an effort to put the certification issue in front of the Court in a timely manner.

Defendants are respectfully requesting that this Court impose **structure and order** on these proceedings. To that end, Defendants have requested that the Court deny Plaintiffs' motion to compel, and take up the pending dispositive motions related to the class allegations, and requests that the Court enter an Order limiting and/or bifurcating the discovery process to permit discovery *only* as it relates to certification at this time – consistent with case precedent and fundamental fairness. Taking into consideration the stipulations Defendants have offered in an effort to resolve the factual issues related to certification, Defendants argue that Plaintiffs should be required to identify, precisely, any additional information **necessary to resolve the issue of certification**.

The Plaintiffs argue that the Defendants' opposition amounts to little more than a claim that their files are too large and disorganized to be subject to discovery in this case. Also, Plaintiffs argue they are entitled to discovery to show that questions common to the class in fact predominate over individual ones, proof of which necessarily overlaps with proof of the merits (citing *Cullen v. State Farm Mut. Auto. Ins. Co.*, (2013) 137 Ohio St.3d 373). Lastly, Plaintiffs argue that Defendants' calculation of what it would cost them to search their files for responsive material is absurd on its face. Plaintiff notes that it has proposed a solution to the burden issue Defendants raise. They suggest as follows:

First, before uploading *any* data (let alone 17 terabytes' worth) to a cloud-based review platform for deduplication, Defendants should first use the electronic search capabilities that their own email system already has, using the search terms agreed upon by Plaintiffs, to limit the amount of responsive data to be uploaded. *See* Pls' Mot. To Compel at 12-13. This would narrow the amount of data to be uploaded to a fraction (likely a small fraction) of the 17 terabytes of which Defendants complain.

Then, this narrowed set of data could, within a matter of days be deduplicated to remove redundant information, which is the main point of uploading the data onto a cloud-based review platform in the first place. As explained in Plaintiffs' motion to compel (at 15) and the supporting Affidavit of Brett Burney (Ex. 21, ¶¶7-10), this deduplication process will substantially reduce the amount of data that would need to remain on the platform for attorney review, again, likely to a fraction of that uploaded in the first place. This is particularly so given the fact that Defendants routinely made use of email lists to send the same email to many different users.

Thus, Defendants are not only dramatically overstating the amount of data to be uploaded in the first place, they are also dramatically overstating the length of time that all but a fraction of this data would have to be hosted on the third-party review platform, with these overestimates forming the basis of their inflated claims of burden. Additionally, Defendants' IT manager has admitted that it would only cost one to two thousand dollars and a couple hours of time to set up the storage space necessary to complete the preliminary narrowing task, yet Defendants ignore this testimony, and continue to claim, without qualification or justification, that they have "insufficient [storage] space to complete the [requested] searches." Defs' Opp. at 7. Finally, Defendants cite their IT manager's offhanded and ultimately irrelevant estimate that it "would take at least two years to review 3.2 million items," without any explanation of why 3.2 million items would have to be reviewed, or how an IT manager would know how long it should take for attorneys to complete a document review in any event. Defs' Opp. at 8, 30.

In an affidavit filed on April 5, 2018, Ethan Whitaker, the Defendants' information technology manager stated the following concerning transferring Plaintiffs' data to cloud-based technology like Logikcull or CloudNine:

The only way to transfer data to Logikcull would be to upload the data over the internet, via their secure website. Based upon the amount of data in question, I estimate it would take at least 17 days or more to upload the entirety of KNR's electronically stored data to a cloud-based platform, presuming a 100 megabyte upload speed running at 24 hours a day and no errors are encountered during the upload process. Logikcull further estimates it would take another 60 to 90 days or more for the program to process the electronic data before it can be searched. CloudNine offers software to assist in the upload process but transfer time and processing time remain similar to Logikcull.

With no commitment, Logikcull charges a base monthly rate of $40.00 per gigabyte to host data on its cloud-based platform. Logikcull provides a discounted monthly rate of $11.91 per gigabyte for customers that pay an annual subscription up front.

Assuming the upload and processing go favorably, it would cost at a minimum $2,088,960.00 to upload and process the data (17,408 gigabytes x $40.00 per gigabyte x 3 months), or $2,487,951.36 utilizing the discounted monthly rate with an annual subscription (17,408 gigabytes x $11.91 x 12). Logikcull believes their system will be able to handle this volume, but mentioned they have yet to be contracted on a case this size.

CloudNine charges a base monthly rate of $35.00 per gigabyte to host data on its cloud-based platform with no commitment. CloudNine provides a discounted monthly rate of $11.00 per gigabyte for customers that pay a 6-month subscription up front.

At the very minimum, and again assuming the upload and processing go favorably, it would cost approximately $1,827,840 to use the CloudNine platform under the base monthly rate (17,408 gigabytes x $35.00 per gigabyte x 3 months) or $1,148,928.00 to obtain CloudNine's discounted monthly rate with a 6-month subscription (17,408 gigabytes x $11.00 x 6). CloudNine advises these charges do not include additional services like collection of the data, upfront imaging, etcetera. The above pricing does not include the costs associated with uploading the total universe of documents to the cloud-based platform and troubleshooting failed uploads and other problems.

Staff Comments to Ohio Civ.R. 26. Rule 26(B)(4) provides, in part, that,

A party need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the party from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause.

This Court will at this time OVERRULE the Plaintiffs' request to compel the Defendants to search its computer records for the information requested. The Court is willing to revisit that issue at a later date should more evidence be needed for Plaintiffs to prove the predominance issue.

Back in August 2017, Defendants' counsel denied Plaintiffs' request for all Settlement Memorandum for KNR's clients reflecting payments to investigators. Counsel noted that this request sought documents protected by the attorney client privilege and confidential proprietary information. Counsel noted that each individual putative class member must waive the applicable privilege before Defendants can produce the Settlement Memorandum. In addition, there are potential issues of confidentiality provisions in settlement agreements that could preclude the release of the names of KNR's clients. In addition, the Defendants' counsel noted that Interrogatory 17 was overbroad in that it sought information back to 2004 and include over tens of thousands of cases. Counsel did note that the Defendants have agreed to provide Plaintiffs with a list of the investigators subject to an appropriate protective order.

One of the best sources of discovery is information from the putative Plaintiffs themselves. The conventional way of obtaining that information and meeting the numerous requirements of Civ.R. 23(A)(1) and overcoming privilege objections is advertising in the media the fact of the lawsuit. In the lawsuit, the Plaintiffs contend the Defendants engaged in self-dealing, unprofessional and fraudulent conduct. They contend that they and numerous other KNR clients were improperly charged an investigative fee, were improperly referred to Akron Square Chiropractic, were improperly charged a narrative fee, and improperly referred clients to take out high interest loans from Liberty Capital Funding, LLC because KNR stood to benefit from such referral.

It may be that some former clients have little interest in pursuing a potential claim against KNR but it will depend how much money they stand to gain by joining the current lawsuit. In any event, the Defendants want the Court to set a final date for resolution of the certification question. Accordingly, the Plaintiffs shall complete its discovery on the certification issue by **November 1, 2018.**

IT IS SO ORDERED.

JUDGE JAMES A. BROGAN
Sitting by Assignment #18JA1214
Pursuant to Art. IV, Sec. 6
Ohio Constitution

The Clerk of Courts shall serve all parties of record.

JAB:lcb
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