



LEXSEE 2011 U.S. DIST. LEXIS 41006

QUALITY INVESTMENT PROPERTIES SANTA CLARA, LLC, Plaintiff, v. SERRANO ELECTRIC, INC, et al., Defendants.

Case No.: C 09-5376 LHK (PSG)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

2011 U.S. Dist. LEXIS 41006

**April 11, 2011, Decided
April 11, 2011, Filed**

PRIOR HISTORY: *Quality Inv. Props. Santa Clara, LLC v. Serrano Elec., Inc., 2010 U.S. Dist. LEXIS 81796 (N.D. Cal., July 21, 2010)*

Judge.

OPINION BY: PAUL S. GREWAL

COUNSEL: [*1] For Quality Investment Properties Santa Clara, LLC, a Delaware limited liability company, Plaintiff: Joel Mitchell Long, LEAD ATTORNEY, James P. Diwik, Sedgwick, Detert, Moran & Arnold LLP, San Francisco, CA.

OPINION

ORDER GRANTING-IN-PART MOTION TO COMPEL

For Serrano Electric, Inc., a California corporation, Defendant: Charles Henry Horn, LEAD ATTORNEY, LeClairRyan LLP, San Francisco, CA; Donald E. Morris, PRO HAC VICE, LeClairRyan, Richmond, VA; Jill Kristin Rizzo, LeClairRyan LLP, San Francisco, CA.

Before the court is Defendant Serrano Electric, Inc.'s ("Serrano") motion to compel Quality Investment Properties Santa Clara, LLC ("Quality") to organize, index, and label documents. For the reasons below, Serrano's motion is GRANTED-IN-PART and [*2] DENIED-IN-PART.

For Peterson Power Systems, INC., a California corporation, Defendant, Counter-claimant: Christopher James Nevis, Katherine Anne Higgins, LEWIS BRISBOIS BISGAARD & SMITH, LLP, San Francisco, CA.

On December 10, 2010, Serrano served its first request for production of documents to Quality. On January 10, 2011, Quality served its written response objecting to certain requests and indicating that it would produce non-privileged documents.

For Serrano Electric, Inc., a California corporation, Counter-defendant: Charles Henry Horn, LEAD ATTORNEY, LeClairRyan LLP, San Francisco, CA; Donald E. Morris, PRO HAC VICE, LeClairRyan, Richmond, VA.

According to Quality, Quality prepared to produce the documents using the following procedure. Quality established an .ftp site into which Quality personnel deposited their documents.¹ Within this .ftp site, Quality established folders with names either describing the types of documents contained in the folder or corresponding to

JUDGES: PAUL S. GREWAL, United States Magistrate

Serrano's document requests. The documents were then downloaded onto Quality's outside counsel's computer network in the same order and format as organized on the .ftp site. The documents were then processed for production and put on two data disks.

¹ See 3/15/11 Opp'n at 6:6-24 (Docket No. 63).

On February 7, 2011, Quality produced two data disks containing 82 folders containing 11,796 responsive documents and no privilege log. These folders were labeled with sequential numbers. The folders contained 43,368 .tiff images, one for each page in each document, and .opt or "load" files, which Quality claims [*3] can be used in conjunction with "any standard litigation support software" to compile the .tiff images into readable multi-page documents.²

² See 3/15/11 Opp'n at 9:7-9 (Docket No. 63).

On February 25, 2011, Serrano filed its motion to compel, arguing that these documents need either to be produced as they are kept in the usual course of business or organized and labeled to correspond to the categories in the request. Serrano also argued that because no privilege log was produced, privilege was waived and any withheld documents should be produced. Alternatively, Serrano demands that Quality produce a privilege log. Serrano also requests that the trial date and the discovery cut-off date be continued, and seeks sanctions.

After the motion was filed, on February 25, 2011, Quality provided Serrano with a list matching the bates numbers of the produced documents with the category of document or the request to which they corresponded.³ On March 7, 2010, Quality produced a 55-page privilege containing almost 300 entries.

³ See 3/15/11 Joel M. Long Decl. Ex. A (Docket No. 65). According to Serrano the motion was filed at 4:16 p.m. on February 25, 2011 and the list was faxed at 5:22 p.m. 3/22/11 [*4] Reply Mot To Compel at n.1 (Docket No. 70).

I. LEGAL STANDARDS

Unless otherwise ordered or stipulated, "the party to whom the request is directed must respond in writing within 30 days after being served."⁴ "A party must produce documents as they are kept in the usual course of

business or must organize and label them to correspond to the categories in the request."⁵ Furthermore, "if a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."⁶

⁴ Fed. R. Civ. P. 34(b)(2)(A).

⁵ Fed. R. Civ. P. 34(b)(2)(E)(i).

⁶ Fed. R. Civ. P. 34(b)(2)(E)(ii).

"When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must . . . describe the nature of the documents, communications, or tangible things not produced or disclosed -- and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."⁷ In determining whether privilege is waived because a privilege log was not produced, the [*5] court, using the 30-day period as a default guideline, should make a case-by-case determination, taking into account the following factors:

⁷ Fed. R. Civ. P. 26(b)(5)(A).

1. the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged (where providing particulars typically contained in a privilege log is presumptively sufficient and boilerplate objections are presumptively insufficient);
2. the timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline, is sufficient);
3. the magnitude of the document production;
4. and other particular circumstances of the litigation that make responding to discovery unusually easy (such as, here, the fact that many of the same documents were the subject of discovery in an earlier action) or unusually hard.⁸

⁸ See *Burlington Northern & Santa Fe Ry. Co. V. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005).

"These factors should be applied in the context of a holistic reasonableness analysis, intended to forestall needless waste of time and [*6] resources, as well as tactical manipulation of the rules and the discovery

process. They should not be applied as a mechanistic determination of whether the information is provided in a particular format."⁹

9 *Id.*

II. DISCUSSION

A. DOCUMENT ORGANIZATION AND FORMAT

Fed. R. Civ. P. 26(f) requires that parties meet and confer to prepare a discovery plan to present to the court prior to the case management conference.¹⁰ This discovery plan must state the parties views and proposals on, among other issues, "any issues about the disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."¹¹

10 *Fed. R. Civ. P. 26(f)(1)*.

11 *Fed. R. Civ. P. 26(f)(3)*.

On March 12, 2010, the parties submitted the Report of *Rule 26(f)* Planning Meeting, which states that the parties had met and conferred and would submit their proposed discovery plan in 120 days if the case did not settle before then.¹² A review of the docket indicates that no discovery plan was submitted to the court. At oral argument, counsel for Serrano admitted that the parties never met and conferred regarding the form in which electronically-stored documents should be produced, an admission [*7] counsel for Quality did not dispute.¹³

12 See 3/12/11 Report of *Rule 26(f)* Planning Meeting (Docket No. 20).

13 See FTR, April 5, 2011, 10:03:55 - 10:04:22.

Neither of the parties in this action fulfilled its *Rule 26(f)* obligation to meet and confer about a discovery plan. As a result, Quality has now produced documents in a form that Serrano claims is not compatible with Serrano's system for reviewing documents. Had there been a candid discussion about the form in which documents should be produced, the events precipitating this motion could have been avoided. Instead, rather than the parties each controlling its own fate by negotiating an agreement each could live with, the court must now decide which one of the parties will invest further resources to correct these mistakes.¹⁴

14 As my colleague has recently -- and rightly -- noted: (1) "The argument that an ESI Protocol

cannot address every single issue that may arise is not an argument to have no ESI Protocol at all;" (2) "[T]he clear thrust of the discovery-related rules, case law, and commentary suggests that 'communication among counsel is crucial to a successful electronic discovery process.'" *In re Facebook PPC Advertising Litigation*, No. 09-3043, 2011 U.S. Dist. LEXIS 39830, 2011 WL 1324516, at *1 (N.D. Cal. Apr. 6, 2011) [*8] (citing *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 109 (E.D. Pa. 2010)).

Serrano complains that the form of the production does not comply with the Rule 34 requirement that documents be (1) produced as they are kept in the usual course of business or (2) organized and labeled to correspond to the categories in the request.

Quality argues that because it stores its documents electronically, and the documents were produced electronically, it complied with the first requirement. Quality's description of its procedures for processing the documents into .tiff and load files, however, makes clear that the documents were not kept in those formats in the usual course of business. As just one example, Quality's declarants have presented no information establishing that the metadata that Quality provided would identify from whose files a given document was collected.

Quality further argues that because the documents on the .ftp site were organized into informatively-labeled folders, it also complied with the second requirement. When produced, however, the documents also were not organized and labeled to correspond to the categories in the discovery request. Quality has subsequently provided Serrano [*9] with a list identifying documents by category or by the corresponding discovery request. The supplemental list, however, fails to correct that deficiency because the list is not sufficiently specific. For example, it is unclear which document request corresponds to the categories of documents with the file title "SLA Credits, Paul C" or "Outage Triage, Paul C" and no documents are listed as corresponding to Request for Production 1, 2, or 3.¹⁵ Thus, Quality has not organized and labeled every document according to the categories in the discovery requests.

15 See Long Decl. Ex. A; 2/25/21 Jill K. Rizzo Decl. Ex. B. (Document No. 56-2).

In light of the foregoing, the court concludes that

Quality has not complied with its obligations under *Rule* 34. Accordingly, no later than April 25, 2011, Quality shall re-produce its documents consistent with a specification agreed upon by the parties.¹⁶ If the parties are unable to reach agreement, no later than May 2, 2011, Quality shall, for each document it produces, identify the categories in each document request(s) to which the document is responsive.

¹⁶ For starters, the court suggests that Mr. Voccia visit Mr. Arnold - without the lawyers present [*10] -- and explain how the data already produced can be loaded into Serrano's litigation database and then searched.

B. PRIVILEGE LOG

Quality produced its privilege log almost three months after the request for production was served. In determining whether the untimely production of the privilege log waived privilege for those documents, the court must consider the factors listed above. First, the objections served on January 10, 2011 are boilerplate objections that do not provide the type of information found in a privilege log.¹⁷ Second, the objections were served 31 days after the request was served, only a very small deviation from the required 30-day production deadline. Third, the document production was sizable, 11,796 documents produced and almost 300 documents withheld. Finally, the court considers other factors making production easier or harder. Quality provides some information indicating that production was harder: the intervening holidays, its general counsel was out of the country during the last two weeks of December, the breadth of the requests, and the resulting size of the production.¹⁸ In light of these factors and the unsatisfying record of the meet and confer, the [*11] court finds that the delay in producing the privilege log

was reasonable and therefore privilege was not waived.¹⁹

¹⁷ See 2/25/21 Rizzo Decl. Ex. C. (Document No. 56-3).

¹⁸ See 3/15/11 Opp'n at 8:5-16. (Docket No. 63).

¹⁹ In its reply, Serrano argues the court should compel production of withheld documents for several reasons related to deficiencies in the privilege log. These new arguments, some of which may be mooted by this order, were not raised in the motion, and thus Quality has not had an opportunity to respond. If Serrano seeks to pursue these arguments, they should be properly brought before the court in a new motion.

C. SANCTIONS

Under Civ. *L.R.* 7-8, any motion for sanctions must be separately filed. Both Serrano and Quality make requests for sanctions, but neither party has properly brought a motion for sanctions compliant with Civ. *L.R.* 7-8.

D. CONTINUANCE

Serrano's request for a continuance of the trial date and the discovery cut-off is not properly before this court because it is outside the scope of the referral to the magistrate judge. If Serrano seeks a continuance, it must request a continuance from the presiding judge, Judge Koh.

Dated: April 11, 2011

/s/ Paul S. Grewal

PAUL S. GREWAL [*12]

United States Magistrate Judge

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

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11 QUALITY INVESTMENT PROPERTIES
SANTA CLARA, LLC,

12 Plaintiff,

13 v.

14 SERRANO ELECTRIC, INC., et al.,

15 Defendants.
16

CASE NO. 5:09-cv-05376-JF

**DECLARATION OF KEVIN VOCCIA IN
SUPPORT OF PLAINTIFF'S OPPOSITION
TO SERRANO ELECTRIC, INC.'S
MOTION TO COMPEL**

Date: April 5, 2011
Time: 10:00 a.m.
Location: Courtroom 5, San Jose
Judge: Hon. Paul Singh Grewal

17 And Related Cross-Actions.
18

19 I, Kevin Voccia, declare as follows:

20 1. I am a Practice Support Specialist at Sedgwick, Detert, Moran & Arnold LLP, and
21 I have been employed at Sedgwick in that capacity from June 2006 to the present.

22 2. The matters stated in this declaration are of my own personal knowledge except as
23 to those matters which are based on information and belief, and as to those matters, I am
24 informed and believe them to be true. If called upon I could and would competently testify to all
25 matters stated in this declaration under oath.

26 3. I work in Sedgwick's Litigation Support Group. My job duties as a Practice
27 Support Specialist include, among other things, the following: creating and maintaining firm-
28 wide databases to ensure that electronically stored information ("ESI") is accessible; intake and

1 processing of ESI through LAW Pre-Discovery software; exporting extracted metadata from
2 LAW for importing into industry-recognized litigation support software; exporting .tiff images,
3 .dat files, and .opt load files for production exchange; and understanding the electronic discovery
4 process to advise and collaborate with legal staff in preparing and executing ESI protocols.

5 4. Prior to my employment at Sedgwick, I worked for five years at Brobeck, Phelger
6 and Harrison in San Francisco, first as a Project Manager and later as firm-wide Practice Support
7 Department Manager. Prior to that, I worked for a total of twelve years at a paralegal at Cooper,
8 White & Cooper, Broad, Shulz, Larson and Wineberg, Morgenstein & Jubelirer, and Heller,
9 Ehrman, White & McAuliffe. Prior to that, I attended Providence College and San Jose State
10 University.

11 5. As a result of my work experience described above, I am very familiar document
12 production discovery, specifically including document production discovery in federal litigation
13 and the production of electronically stored information.

14 6. I was asked by Sedgwick special counsel Joel Long to assist him with the
15 production of documents by firm client, plaintiff Quality Investment Properties Santa Clara, LLC
16 (“Quality”), in response to defendant Serrano Electric, Inc.’s first request for production of
17 documents to Quality.

18 7. Mr. Long informed me that Quality established an .ftp (file transfer protocol) site
19 to create a single repository into which the relevant Quality personnel could deposit their
20 documents. Mr. Long further informed me that, within the .ftp site, Quality created folders with
21 names either identifying the discrete group of documents contained in the folder (for example,
22 “SLA Credits, Paul C”) or corresponding to Serrano’s document requests (for example, “Request
23 No. 1,” “Request No. 2,” etc.).

24 8. In consultation with me, Mr. Long downloaded the documents from the .ftp site
25 onto Sedgwick’s computer network.

26 9. From there, I and my group processed the documents into the two-disk document
27 production that was ultimately provided to Serrano. This included, without limitation, the
28 following specific tasks: (a) importing the ESI downloaded from Quality’s .ftp site into LAW

1 5.705 PreDiscovery software (“LAW”) via that program’s ED Loader Function (“ED” stands for
2 electronic discovery); (b) extracting ESI metadata and text, with original folder structure tracked
3 via extraction; (c) converting ESI to .tiff images, excluding MS Excel, or .xls, files (“tiff” stands
4 for tagged imaged file format and is a file format that was created in the early 1990’s by Aldus
5 software as a standard for scanner vendors to store images rather than using proprietary formats);
6 (d) assigning control numbers to .tiff images and native .xls files; (e) OCR’ing the .tiff images
7 (“OCR” stands for stands for optical character recognition, and OCR’ing a document is a process
8 by which the text of paper or digital files is extracted and translated into machine encoded text,
9 which process is often used to load text into full-text search and retrieval systems); and (f)
10 exporting the .tiff images, extracted metadata, and native .xls files to an export folder. By virtue
11 of the foregoing, the export folder consisted of a .dat file (containing metadata), an .opt or “load”
12 file, and folders containing the .tiff images and native .xls files.

13 10. I and my group then created a database using the litigation management software
14 called Concordance. We populated the database with the information from the export folder in
15 the same order and with the same folder information as created by Quality. This enabled the
16 documents to be reviewed by counsel for the purpose of identifying confidential, privileged, and
17 non-responsive documents.

18 11. After Mr. Long reviewed the documents and tagged those identified as
19 confidential, privileged, or non-responsive, I and my team exported the .tiff images back into
20 LAW using the .opt file, which unitizes the .tiff images in preparation for creating the document
21 production. Unitization groups the single-page .tiff images into their original discrete document
22 paginations. This is done to retain original document integrity.

23 12. Using the tools within LAW, we then removed the documents tagged as non-
24 responsive, bates labeled the documents, and marked the documents “CONFIDENTIAL” where
25 applicable. The documents tagged as privileged were then removed to create the production set.
26 The production set was then exported from LAW to an export folder, the contents of which were
27 “burned” onto two disks for production.

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1 13. The disks contain 82 sequentially numbered folders, and each folder contains
2 sequentially numbered .tiff images. The disks contain a total of 11,796 documents comprised of
3 43,368 .tiff images. Each .tiff image is a single page, but not necessarily a document in the case
4 of multi-page documents. The disks also contain a .dat file (02-04-11_PRODUCTION.dat),
5 which contains metadata, and an .opt file (02-04-11_PRODUCTION.opt), otherwise known as a
6 “load” file. A load file is a text delimited file containing all information needed to link the
7 imaging module with a database. Each line references the database image key, the associate
8 image path, and defines the .tiff document breaks and page counts.

9 14. In my experience, the process described above represents the accepted and
10 standard practice for document production discovery, particularly the production of ESI in
11 federal litigation in jurisdictions such as the United States District Court for the Northern District
12 of California.

13 15. Based on my experience, as well as standard practice with respect to electronic
14 discovery, I would reasonably expect any law firm receiving a production such as Quality’s to
15 provide the disks to the firm’s litigation support personnel, IT staff, or paralegal to be loaded into
16 whatever litigation support program the firm uses to view document productions, with most
17 firms today using Summation, Concordance or other popular litigation support software. This is
18 necessary to make the production viewable and searchable on a document by document basis, as
19 opposed to a .tiff image by .tiff image basis. The purpose of the process described in Paragraphs
20 9-12 above is to enable this viewability and searchability by the end user, and this is the reason
21 why Quality’s production included not only the .tiff images, but also the .opt or “load” file. The
22 load file must be used to properly view the documents.

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16. I would not expect a law firm to attempt to review the disks on a .tiff image by .tiff image basis, as the .tiff images are not unitized and not searchable. As such, the document production would appear to be an undefined, continuous series of single-page images, as opposed to the sequence of defined documents that it actually is.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of March, 2011.

/s/ Kevin Voccia
Kevin Voccia

SIGNATURE ATTESTATION: I, Joel M. Long, counsel for plaintiff, attest that concurrence in the filing of this document has been obtained from the signatory, Kevin Voccia.

SEDGWICK, DETERT, MORAN & ARNOLD LLP

By: /s/ Joel M. Long
Joel M. Long
Attorneys for Plaintiff
Quality Investment Properties Santa Clara, LLC