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Quality Medical Imaging of California,
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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

<p>Policarpio Plaintiff/Petitioner(s)</p> <p style="text-align: center;">VS.</p> <p>Quality Medical Imaging of California, Inc. Defendant/Respondent(s) (Abbreviated Title)</p>	<p style="text-align: center;">No. <u>RG16835690</u></p> <p style="text-align: center;">Order</p> <p style="text-align: center;">Motion to Compel (Motion) Granted</p>
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The Motion to Compel (Motion) was set for hearing on 10/02/2018 at 03:00 PM in Department 23 before the Honorable Brad Seligman. The Tentative Ruling required that the parties appear, and the matter came on regularly for hearing.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

Plaintiffs' Motion to Compel and for Sanctions under C.C.P. §§ 2031.310(h) & 2031.320(b) is **GRANTED**. **IT IS ORDERED THAT** Defendant Quality Medical Imaging of California, Inc. ("Defendant") produce any remaining responsive documents and ESI no later than October 16, 2018. **IT IS FURTHER ORDERED THAT** sanctions in the amount of \$39,060 shall be payable by Defendant and its counsel to Plaintiff.

The Court also approves a hearing date for a further motion for sanctions on November 6, 2018 at 3:00 P.M. Whether or not there is a substitution of counsel or agreed withdrawal of counsel, Defendant Quality Medical Imaging of California, Inc. is **ORDERED** to personally appear by way of an executive level employee at the November 6, 2018 hearing.

Plaintiffs brought this action on behalf of themselves and those similarly situated who were employed by Defendant as x-ray and ultrasound technicians providing remote examinations. Plaintiffs allege that Defendant failed to pay Plaintiffs and those similarly situated for off-the-clock work and on-call waiting time in violation of various sections of the Labor Code and Wage Order 4. Plaintiffs have therefore sought from Defendant payroll records, timesheets, work schedules, compensation summaries, and contracts. Plaintiff contends that Defendant has only produced heavily excerpted and redacted records for less than 15% of the putative class in non-native format with purportedly corrupted metadata. (Mot. at pp. 1-2.)

Plaintiffs seek an order from the Court compelling Defendant to produce complete, un-redacted, and un-excerpted responses to Requests for Production of Documents, Set One (Nos. 4, 18-22, 24-28, 30-32, 36-40, 46, 47, and 50-53), Set Two (Nos. 7, 19 and 56), and Set Three (Nos. 4-13). Those documents include: (1) payroll records, timesheets, report schedules, and pay logs (including Paychex data) for

Plaintiffs and putative class members; (2) outstanding production of native-format, electronically-stored information ("ESI") in compliance with Plaintiffs' search term proposal dated November 27, 2017; and (3) contracts and service agreements between Defendant and hospitals, medical facilities, and other clients for which Plaintiffs provide on-call services. Plaintiffs also seek sanctions for its attorney's fees and costs in bringing this Motion.

FACTUAL BACKGROUND

On November 16, 2016, Plaintiffs propounded Requests for Production of Documents, Set One ("RFP 1") on Defendant, which Defendant responded to on December 16, 2016, and then provided an amended response on May 16, 2017. (Declaration of Dustin Collier ["Collier Dec."], ¶¶ 3, 6-7, Exs. A, D-E.) Plaintiffs assert that Defendant's initial response to its RFP 1 on December 16, 2017 consisted of "blanket, non-specific, form objections," and that Defendant failed to produce complete payroll records for the putative class necessary to calculate class damages, timekeeping records, work schedules, documents related to policies and practices for timekeeping and compensation, or responsive ESI. Notably, Defendant did not provide information from its Paychex system, which Plaintiff Policarpio provided a partial report showing that the system was used to record clock-in, clock-out, and "callback" data for putative class members. (Id. Ex. I.) Plaintiffs also assert that the spreadsheets provided concerning data for 15% of the total class—an agreement Plaintiffs made without prejudice to its ability to seek more complete data later—were created by Defendant's management and attorneys in anticipation of litigation based on the metadata on the documents, and therefore cannot confirm that the data is complete and accurate. (Mot. at p. 3.)

After an informal discovery conference on November 21, 2017, Plaintiffs state that Defendant had agreed to provide the native format of the compensation reports, employee time cards and schedules "so that meaningful damages calculations can be performed." (Collier Dec., Ex. L at p. 15.) Further, Plaintiff states that Defendant agreed to produce all compensation reports, timecards, and paystubs for the putative class. (Id.) Despite Defendant's assurances to Plaintiffs that it would comply with the discovery requests and supplement the incomplete production, Plaintiffs contend that Defendant has never done so.

On November 1, 2017, Plaintiffs propounded Requests for Production of Documents, Set Two ("RFP 2") on Defendant, which Defendant responded to on December 13, 2017. (Id. ¶¶ 4, 8, Exs. B, F.) RFP 2 sought discovery regarding timekeeping trainings, payroll policies and practices, and job duties. (Id., Ex. B.) On November 27, 2017, Plaintiffs provided Defendant with a formal search proposal for ESI. (Id. ¶ 9, Ex. G.) Plaintiffs claim that the response to RFP 2 is similarly incomplete as the response to RFP 1.

Then, on December 19, 2017, Plaintiffs propounded Requests for Production of Documents, Set Three ("RFP 3") on Defendant, seeking additional timesheets, clock-in/clock-out data, payroll records including Paychex data entries and the Payroll Adjustment Spreadsheet referenced during the deposition of Defendant's payroll administrator, paystub documents, intake processes and procedures, and contracts between Defendant and its vendors. (Id. ¶ 5, Ex. C.) The information sought included job duties, deadlines, and any policies to which the putative class was expected to comply. (Mot. at p. 5.) Plaintiffs state that Defendant has still not served objections or any statements to compliance in response to RFP 3. (Mot. at p. 8.)

Discovery was set to expire by January 24, 2018, so Plaintiffs sought an informal discovery conference with the Court and a request to extend the discovery deadline due to the incomplete discovery responses. On January 31, 2018, the Court held a discovery conference, but Defendant's then counsel informed the Court that it would be withdrawing as counsel.

When new counsel appeared before the Court on May 8, 2018, Defendant's counsel represented that the parties were in active mediation discussions and requested the CMC be continued until September 11,

2018 to give the parties time to exchange discovery. Yet, Plaintiffs claim that Defendant has since ignored Plaintiffs' requests to schedule mediation, ignored Plaintiffs' discovery requests, ignored re-scheduled deposition notices and ignored Plaintiffs' requests to meet and confer.

On August 1, 2018, the Court held an informal discovery conference in which the Court ordered Defendant to provide Plaintiffs with supplemental responses to Plaintiffs' pending discovery requests. (Collier Dec. ¶ 10.) The supplemental responses were provided on August 10, 2018, which set forth a production date of September 10, 2018, stated that Defendant would provide a 15% sampling of putative class records, and that certain electronic records would only be provided in hard copy. (Id., Ex. H; see also id., Ex. L at p. 15.) Plaintiffs state that this supplemental response contradicts the previous agreement to produce documents in their native format, and that they did not agree to limit discovery to only a 15% sample.

DISCOVERY PRODUCED

Defendant has produced scheduling information from its online portal, payroll information for "Guaranteed Employees," disciplinary action records concerning putative class members. (Collier Dec. ¶¶ 18-20, Exs. Q-S.) Defendant has also produced PDF versions of Excel spreadsheets that Defendant maintained for putative class members that show exam dates, assignment times, times of assignment acknowledgments, and times of assignment completion. (Id. ¶ 21, Ex. T.) Defendant has also provided "Compensation Detail Report" documents relating to 13 of the 87 putative class members. (Id. ¶ 16, Ex. N.) Defendant also produced five, redacted contracts it held with medical facilities to provide on-call medical imaging services. (Id., Ex. P.)

MOTION TO COMPEL

Defendant provided a limited opposition to this Motion stating that it was unable to produce documents by the September 10, 2018 date. The limited opposition briefly states sanctions are not warranted but does not otherwise address or contest the amount of sanctions requested. Defendant states, without any evidence or supporting declarations, that the delay is because its former IT employee is no longer employer by Defendant, but that Defendant was working to locate and identify documents. (Opp. at p. 2.) Further, Defendant states that it has received three boxes of additional records on September 12, 2018, which it is currently reviewing for privilege and privacy. (Id.) Defendant also states that it has retained an IT consultant for the ESI production and estimates that it

would be able to produce the data within the next ten days, but that Defendant's counsel would have to review that data before it is produced. (Id.)

Defendant represents that it will produce the complete unredacted hospital contracts. (Opp. at p. 3.) Nevertheless, in light of Defendant's previous failed assurances, the Court finds that an order to compel is necessary to ensure compliance.

Defendant also states that the ESI previously produced were in native format and that the metadata was only altered because the files had to be marked "Confidential" by prior counsel, but that the file itself was not modified. (Opp. at p. 3.) Since no declaration was provided by anyone with knowledge as to the handling of the documents by prior counsel, the Court cannot accept the representations in the opposition brief at face value. **IT IS FURTHER ORDERED THAT** Defendant's new counsel ensure that the documents at issue are provided again, unaltered and in their native format.

ESI SEARCH PROTOCOL

With respect to pending ESI search results, Defendant argues that the search proposed by Plaintiff in

November 27, 2017 is overbroad and burdensome. Defendant contends that the search for the term "pay" resulted in 20,000 hits, for example, but fails to demonstrate whether that was limited to e-mails belonging to or referencing the putative class members. Further, this claim of hardship was unsubstantiated by any evidence or supporting declaration.

Defendant also claims that Plaintiffs had previously agreed to only a 15% sampling of the e-mail records of the putative class, but Plaintiffs refute this. The follow up to the November 2017 informal discovery conference demonstrates that Plaintiffs agreed at the time to allow Defendant to limit its production of documents concerning personnel files, communications, adverse employment actions, pay stubs and pay records to 15% of the class. (Collier Dec., Ex. L at pp. 10, 13-15.) However, Plaintiffs did not agree to such a restriction with respect to compensation reports, employee time cards, schedules, and payroll documents. (Id. at p. 15.) Notably, Plaintiffs highlighted that if full records were not produced for the 15% sampling, then Plaintiffs would not be able to properly perform a damages calculation. (Id.) Finally, Plaintiffs stated that they "can only accept this incomplete 15% production if [Defendant] agree[s] that it will not prejudice [Plaintiffs'] ability to seek relief from the Court if the data still proves inadequate to assess class damages." (Id.)

Plaintiffs state that this agreement to the 15% sampling at the outset of the case is no longer viable, because at this stage of litigation, failure to produce the complete records will leave Plaintiffs unable to complete meaningful depositions, prepare an informed brief for mediation or prepare for trial. (Mot. at p. 10.) Plaintiffs contend that in light of the incomplete production even as to the 15% sampling, "little can be gleaned as to the whole class by considering just these five individuals" of the 13 total sample for which data should have been provided. (Id.)

Defendant proposes searching only e-mails sent to or received by the 15% sampling, or referencing the sample members full names, with the proposed search terms. Plaintiffs seek a search of e-mails sent to or received by any of the putative class members, or referencing their full names, with the proposed search terms. The Court finds no binding agreement by the parties or necessity to limit the search to only the 15% sampling, and Defendant has not met its burden to demonstrate any undue burden.

Defendant fails to raise any other objections to the requested discovery in its limited opposition.

SPOLIATION

Plaintiffs raise the concern of spoliation of evidence and contends that Defendant may have failed to meet its obligation to preserve evidence in anticipation of this litigation. Defendant has represented that "some schedule[s] have been deleted in the normal course of business and not within the preservation of evidence required as part of this litigation." (Collier Dec., Ex. E.) Then in its opposition brief, Defendant stated that in November 2016-after this case was filed, and months after a demand letter was issued (Reply at p. 3)-Defendant migrated from using Exchange 2010 to Microsoft365, and the only emails that migrated were for office staff and management, and before preservation was put in place, Defendant had a normal business practice of deleting e-mail accounts 30 days after an employee's termination. (Opp. at p. 4.) Thus, Plaintiffs argue that appropriate evidentiary, issue and/or terminating sanctions may be appropriate if Defendant has destroyed relevant evidence even after being given notice of the claims in this action. The Court GRANTS Plaintiff's request for leave to seek additional sanctions arising out of this potential misconduct and sets a hearing date of November 6, 2018 at 3:00 p.m..

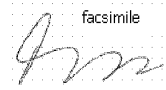
SANCTIONS

With respect to motions to compel, the Court "shall" impose a monetary sanction against the losing party or attorney in the absence of substantial justification or other circumstances that make the imposition of sanctions unjust. (CCP §§ 2031.310(h), 2031.320(b).) The Court finds that in light of

the unjustifiable delay in Defendant's response to the requests for documents and its unmerited objections to the requested discovery, that Defendant has not acted with substantial justification. Defendant's conduct has required numerous discovery conferences and case management conferences in which the Court ordered prompt compliance with discovery requests. While Plaintiff has provided a broad summary of the work required and the hourly rates involved, Defendant does not contest the amount of fees incurred. Thus, Plaintiffs' request for sanctions is GRANTED.

The motion is granted. Compliance date is within () days of Notice of Entry of Order.

Dated: 10/02/2018

facsimile


Judge Brad Seligman