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FEDERAL E-DISCOVERY

Courts Reject Speculative Requests For 'Discovery on Discovery'


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The very phrase, "discovery on discovery," suggests something improper. And so it is no surprise that parties resisting discovery, whether by way of requests for production, interrogatories, or depositions, often complain that the discovery is inappropriate "discovery on discovery." Given the adversarial nature of civil litigation, the expectation for broad discovery, and the complexities inherent to e-discovery, it is almost inevitable that parties will disagree on how much detail about their processes should be shared with each other during discovery (including meet and confers). Judges are thus often called upon to resolve the issue: Is the "discovery on discovery" complaint valid or is the request, including one seeking information about preservation, collection, or search-and-review efforts, legitimate given the facts of the case?

A recent set of cases demonstrates that judges are well aware of this dance between adversaries and have established a set of standards to determine when requests labeled "discovery on discovery" are appropriate. Thus, although courts prefer that parties cooperatively work out such issues on their own—and in general will appropriately defer to a producing party's ability to determine its own reasonable and proportional discovery efforts—courts will authorize so-called "discovery on discovery" when a moving party provides an adequate factual basis and does not rely on mere suspicion or speculation. A few recent decisions illustrate this approach.

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Some Recent Decisions

In *Scherer v. FCA US*, 2021 WL 5494463 (S.D. Cal. Nov. 23, 2021), the plaintiffs asked the court to compel the defendant to produce "the search and review parameters/discovery protocol that resulted in the reduction of documents from the 4,829 identified by the search terms to the 698 that were produced." Id. at *3. The plaintiffs additionally requested that the court order production of all 4,829 documents that contained

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search hits. The court denied both requests, ruling not only that "Defendant is allowed to review all documents identified by search terms for relevance and privilege and to only produce the nonprivileged documents that are relevant and responsive to the discovery request," id., but also that "Plaintiffs do not have a right to conduct discovery into Defendant's discovery methods." Id. The court explained that mere speculation was not enough to justify "discovery on discovery" and that, here, "Plaintiffs have not demonstrated that Defendant's discovery practices are inadequate. Plaintiffs' speculation does not warrant the extensive discovery/disclosure of information that Plaintiffs are seeking." Id. With the defendant repeatedly confirming its ongoing compliance with its discovery obligations, the court denied the plaintiffs' request for "discovery on discovery."

The court in *Dalton v. Town of Silver City*, 2021 WL 4307149 (D. N.M. Sept. 22, 2021), addressed a motion by the plaintiff to compel discovery by the defendant, which included, inter alia, responding to an interrogatory requesting—for each search conducted by the defendant—"the person conducting the search, the database or system searched, [and] the search parameters used, including date ranges, fields, and exact search terms." Id. at *5. The plaintiff raised concerns relating to the sufficiency of the defendant's discovery responses while the matter was in state court and was extending those concerns to potential responses in federal court.

Ruling on the motion to compel, the court cautioned, "'[M]eta-discovery' or discovery about discovery 'should be closely scrutinized in light of the danger of extending the already costly and time-consuming discovery process *ad infinitum*.'" Id. (citations omitted). It added, "Courts like this one agree, though, that discovery on the process that a party used to respond to discovery request is appropriate where there is reasonable doubt about the sufficiency of a party's response … . A few courts have also authorized this discovery where progress in discovery has become 'glacial' due to a breakdown in the collaborative process." Id. The court found that the plaintiff prematurely raised concerns regarding "the sufficiency of Defendant's responses to *these* requests … before Defendant has even answered most of them," id., and instructed the parties to meet and confer to "cooperatively" plan the "search methodologies that Defendant will use to identify and produce documents responsive to the unanswered federal requests for production." Id. at *6.

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Scherer and *Dalton* reinforce the widely-held stance that "discovery on discovery" is justifiable in limited circumstances upon an adequate factual basis. This position is endorsed, notably, by The Sedona Conference in Principle 6 of its "The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, which states, "Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."

When courts do grant "discovery on discovery," they tend to do so only when the moving party has made an adequate, fact-based showing of a deficiency in the responding party's discovery process. This happened in *Am. West Bank Members, L.C. v. State of Utah*, 2021 WL 5234372 (D. Utah Nov. 10, 2021), where the plaintiff requested information "to discern the identities of individuals whose emails would have been responsive to its discovery requests were those emails still available; the identification of documents or categories of documents which

are no longer available; and an explanation from the State Defendants as to why other responsive documents were not produced." Id. at *1. The parties disagreed on the appropriate standard in the Tenth Circuit to justify "discovery on discovery;" the plaintiff argued that the reckless failure to preserve evidence was sufficient while the defendant argued that "a threshold showing of spoliation" coupled "with a 'culpable state of mind'" was required. Id. The court, though, found that "[n]either of these standards applies here." Id. at *2. Rather, unlike discoverable information within Federal Rule 26(b)(1), "'discovery on discovery' is different because it seeks discovery on a collateral issue—a party's discovery and retention processes—as opposed to a party's claim or defense." Id. In citing to cases following the widely held standard discussed above, the court explained: "It makes sense to allow limited 'discovery on discovery' 'where there is reasonable doubt about the sufficiency of a party's response.' … This requires an adequate factual basis, not mere speculation.' … However, even when permitted, this type of discovery must be cautiously approached, and the bounds must be strictly limited." Id. (citations omitted). Thus, based on the facts here, the court granted "discovery on discovery" that was "strictly limited to the purged former employee email accounts." Id. at *3.

Another recent case demonstrates a party's more extreme attempt at gathering details about its adversary's discovery processes. In *Edwards v. McDermott Int'l*, 2021 WL 5121853 (S.D. Tex. Nov. 4, 2021), the plaintiffs asked the court to "order Defendants to conduct custodial interviews aimed at determining the existence, status, and contents of various document repositories, and produce a report to Plaintiffs identifying 'their size and scope, and when they can be collected and ready to search.'" Id. at *3 (citation omitted). Citing Sedona Principle 6, the court determined, "I simply do not think that district court judges should micro-manage the parties' internal review procedures." Id. Quoting the commentary to the Principle, the court continued, "[A]s a general matter, neither a requesting party nor the court should prescribe or detail the steps that a responding party must take to meet its discovery obligations, and there should be no discovery on discovery, absent an agreement between the parties, or specific, tangible, evidence-based indicia (versus general allegations of deficiencies or mere 'speculation') of a material failure by the responding party to meet its obligations." Id. Declining the plaintiffs' request, the court emphasized its desire that the parties cooperate through the discovery process, and only reach out for the court's assistance "to help the parties navigate the choppy discovery waters if need be, although I certainly do not relish the opportunity to do so." Id.

Conclusion

As demonstrated by these decisions, courts generally will authorize "discovery on discovery" only when a party makes a sufficient showing of a deficiency or failure in discovery processes. This approach is designed to keep discovery focused on the merits of a case while not foreclosing discovery when there is a legitimate showing of a deficiency in the discovery process—one that may be preventing access to discovery necessary to resolve the merits of the case.