IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NORTHERN CROSSARM CO. INC.,

Plaintiff,

ORDER

v.

03-C-415-C

CHEMICAL SPECIALTIES, INC.,

Defendant.

Plaintiff has filed a motion to compel defendant to provide its electronic e-mail files (dkt. 39). Defendant has provided the *information* contained in the e-mails in hard copy form, but plaintiff wants it provided in an electronic format. We're talking about 65,000 pages of e-mail here. Defendant objects to re-production electronically, claiming that its attorneys reviewed the documents in hard copy form and turned over the materials in the manner in which it was reviewed just like any other discovery. Defendant claims it would be unfairly time consuming and expensive for it to comply with plaintiff's demand.

This dispute arises out of a misunderstanding between the lawyers that perhaps was unavoidable in this case (although I'm guessing these particular attorneys will be extremely gun shy in the future). It's unfortunate that the issue got tangled up like this, but here we are, and the motion has to be decided. Plaintiff is not entitled to the relief it seeks, either under a general appeal to the discovery rules or under circumstances presented here.

Contrary to plaintiff's argument, Rule 34 does not require a party to present evidence in a particular format. Rule 34(a) specifies that electronic data falls within the definition of "documents," and requires that the respondent must, if necessary, translate that information into reasonably usable form, but this does not require the respondent to present its evidence in the format in which the respondent stores it. To the contrary, this provision of the rule ordinarily is used to justify a party's motion to compel its opponent to disclose its electronic information in a *different* format, such as providing hard copies of its e-mail, with the opponent arguing that a CD is enough. But regardless of the direction in which the dispute runs, neither the letter nor the spirit of Rule 34 mandates that a party is *entitled* to production in its preferred format.

Rule 34 (b) provides that a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize them to correspond with the categories in the request. This does not contradict Rule 34(a) because it is an anti-sabotage provision: a party may not dump its files into a mail cart, stir well, then wheel it to opposing counsel. Thus, if a party produces its electronic information in a hard copy format that mimics the manner in which that information is stored electronically, then that party has not disobeyed Rule 34.

If a party specifically requests the production of electronic information in a specific electronic format, then the respondent cannot simply ignore the request: it must comply, compromise, or seek court protection. But in the absence of such a specific demand–or perhaps

a less formal but actual understanding between the attorneys–it is not improper for a party to provide its electronic data in hard copy form.

Nothing in *Sattar v. Motorola, Inc.*, 138 F.3d 1164 (7th Cir. 1998) contradicts this. There, plaintiff's motion ran in the more usual direction: he was displeased that defendant had produced its e-mail in electronic form, and he claimed entitlement to 210,000 pages of e-mail in hard copy. The district court disagreed and fashioned a compromise. The Court of Appeals affirmed, noting that "district courts have broad discretion in matters related to discovery." *Id*. at 1171.

In the instant case, perhaps this court might have fashioned a compromise involving electronic production of the e-mail if the parties had brought the matter to its attention before the 65,000 hard copies were produced. Although counsel exchanged letters disagreeing on the nature of the required production as it proceeded, the matter was not fronted with this court until it was a *fair accompli*. It would be extraordinarily inefficient to declare a mulligan, and despite its protestations to the contrary, plaintiff has not been genuinely prejudiced.

First, plaintiff did not specifically request production of the e-mail in electronic format, it simply asked for production of "documents," adopting the definition in Rule 34(a). This certainly entitled plaintiff to disclosure of information stored electronically, but it did not require production in electronic format.[1]

[1] Apparently, this also was the procedure used by plaintiff's president when responding to a request for his e-mail, but I surmise that this involved disclosure on a significantly lower order of magnitude. *See* Deft's Memorandum in Opposition, Dkt. 42 at 10).

Second, defendant's attorneys did not provide hard copies of the e-mail as a sharp tactic in contravention of any rules or agreements. Apparently this is a routine practice in their firm. It cost a lot of money to provide 65,000 copies, but defendant has absorbed the expense. I discern no malice or gamesmanship here, just an unfortunate failure to communicate adequately. That's not a basis to grant relief.

Although defendant has created CDs of its e-mail, I will not order them disclosed. Defendant's attorneys had them made solely for work product purposes and they are over-inclusive. Counsel have provided affidavits reporting that the process of re-reviewing and then producing these internal CDs would consume extraordinary amounts of time and money. Under the circumstances presented here, I will not put defendant to this expense.

The upshot of all this is that plaintiff's motion to compel is denied. Each side shall bear its own costs on this motion.

Entered this 3rd day of March, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge