

Id. Defendants object to the Magistrate Judge's Order granting, in part, the Motion to Compel, for the same reasons.

II. Defendants Object to the Order to the Extent It Compels Production of All Responsive Documents, Without Regard to Objections

In the Order granting in part plaintiff's Motion to Compel, the Magistrate Judge ordered defendants to produce, within 14 days of the date of the Order, "materials that Defendants previously agreed to produce in response to Second Request for Production No. 5." Order at 2 (ECF 77). In finding that defendants had "agreed" to produce documents, the Magistrate Judge relied on a July 9, 2014, email from defendants' counsel to plaintiff's then-counsel, summarizing a conversation held on July 7 as follows:

As to Request No. 5, defendants agreed to search for responsive documents. Defendants will attempt to advise by Friday, July 11 as to the existence, amount and location of any responsive documents, and agree to a production schedule.

ECF 77 at 2, citing Defendants' Opposition to Motion to Compel (ECF 74 at 4 and 74-2 at 1). On July 8, 2014, defendants filed their Suggestion of Mootness and Motion to Stay Discovery. ECF 64. The same day, plaintiff filed his Motion to Vacate the appointment of his counsel along with his Motion for Leave to File his Motion to Compel. ECF 67. On July 9, the Magistrate Judge stayed discovery. ECF 66. Accordingly, counsel had no further discussions regarding documents responsive to Request No. 5.

Defendants dispute that the above email constitutes an agreement to produce all responsive documents without objection. The agreement made with plaintiff's counsel was to search for documents, a necessary first step to further discussion regarding relevance, burdensomeness, privileges and other objections, as well as timing of production. Until defendants had the opportunity to determine the universe of responsive documents, defendants' counsel could not assess privileges and objections.

Following the Magistrate Judge's Order granting the Motion to Compel, defendants searched for responsive documents. Defendants have produced almost 1500 pages responsive to Request No. 5 in accordance with the Court's Order. However, some potentially responsive documents have been identified as possibly containing information that is "trade secret or other confidential research, development, or commercial information." Fed. R. Civ. P. 26(c)(1)(G). These documents must be reviewed by agency personnel to determine, among other things, whether the documents contain proprietary or other confidential third-party information, and/or whether the information is protected under the Federal Technology Transfer Act, 15 U.S.C. § 3710a(b)(7)(A) and (B) or other applicable law. Nothing in defendants' discussions with plaintiff's counsel could be construed to have waived these objections or to suggest that defendants "agreed" to produce these documents.

On August 7, 2014, defendants filed a motion seeking clarification of the Magistrate Judge's Order, to the effect that the Order should be clarified to require defendants to *respond* to plaintiff's Request No. 5, not to *produce* documents, and that defendants have not waived the opportunity to object to the production of particular documents. ECF 81. The Magistrate Judge has not yet ruled on the Motion, however, and so, in an abundance of caution, defendants object to the Order granting, in part, plaintiff's Motion to Compel to the extent it could be construed to require such production.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

John Eakin
Plaintiff *pro se*

/s/ Susan Strawn
SUSAN STRAWN
Assistant United States Attorney