

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
PENNSYLVANIA

MARGARET R. SCAIFE,

FAMILY DIVISION

Sealed

Plaintiff,

No. FD-06-002384-001

vs.

RICHARD MELLON SCAIFE,

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO COMPEL ENTRY AND
INSPECTION**

Defendant.

Filed on behalf of Plaintiff,
Margaret R. Scaife

Counsel of Record for this Party:

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ALLEGHENY COUNTY

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARGARET R. SCAIFE,

FAMILY DIVISION

Plaintiff,

No. FD-06-002384-001

vs.

RICHARD MELLON SCAIFE,

Defendant.

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO
COMPEL ENTRY AND INSPECTION**

Now before the Court for consideration is defendant's vastly overreaching and legally ungrounded Motion to Compel Entry and Inspection of Plaintiff's residence and the computers kept at her residence, because "defendant believes that an examination of these computers will lead to the discovery of admissible evidence." Motion, ¶3. This Motion should be denied, for the reasons set out below.

As defendant indicates, this is a support action, Motion, ¶1, in which the parties' "net income" is at issue. 23 Pa. C.S. §4302, Pa. R. Civ. P. 1910.16-1, 1910.16-2. Potentially also at issue are the factors listed in Rule 1910.16-5(b).

For this purpose, defendant has submitted document requests and interrogatories to plaintiff, to which she has responded, and has also taken her deposition. Following her deposition, defendant served on plaintiff, on August 4, 2006 a second request for production of documents. A copy of this Second Request is attached, marked Exhibit 1.

One of the “documents” requested in the Second Request is “the hard drives of the Mac Powerbook and iMac computers owned by you and identified during your deposition.”¹ Exhibit 1, No. 3.

In his Notice of Entry and Inspection, purportedly pursuant to Rules 4009.31 and 4009.32 of the Pennsylvania Rules of Civil Procedure, and also served on August 4, 2006, defendant requested entry into plaintiffs’ residence on August 28, 2006 “for the purpose of inspecting, examining, securing and downloading data contained in plaintiff’s Mac Powerbook and iMac computers.” Motion to Compel, Exhibit A. Plaintiff formally objected to this request on August 17 on the grounds that it was improper, burdensome, overly broad, oppressive, not reasonably calculated to lead to the discovery of admissible evidence, and as seeking private and privileged information. Objections to Notice of Entry and Inspection, Exhibit B to Motion to Compel.

It should be noted that Request No. 3 of defendant’s “Document” request seeks hardware, and his Request for Entry seeks “data.” Nothing in Rule 4009.31 suggests that this Rule is properly invoked when a requesting party is seeking “data” contained in documents, even if those documents are stored or recorded in electronic form, particularly where the party possessing the documents can produce the data in the form of a print-out or readable disc or similar format. Moreover, Rule 4009.12 specifies how a responding party is to respond to a properly framed document request. The responding party is to produce to the requesting party responsive documents to which there is no objection. Under Rule 4009.12(a)(2)(i), the responding party has the option of allowing the requesting party to review its documents to identify responsive documents; the Rule does not give the requesting party the right to do so.

¹ A computer “hard drive” is not a “document.” It is a piece of hardware incorporated in a computer which typically contains the computer’s operating system, programs and user files. “Hard drives” are normally not removed from a computer except for repair or replacement and can be damaged in the process.

Asking plaintiff for her computer “hard drives” or uncontrolled and unlimited “access to” her computers is like asking a person to give out, for purposes of discovery, the key to his office and/or all storage files and/or any other place he keeps “documents” and allowing the other party to rummage through the office, files, cabinets, etc. at will, without any regard for whether any of the material to which he has been given access is “relevant to the subject matter involved in the pending action,” as minimally required by Rule 4003.1(a) of the Rules of Civil Procedure, or is subject to a privilege recognized by the rules of discovery, see Pa. R. Civ. P. 4003.1(a), or is invasive of that person’s rights to privacy or confidentiality or similar interest.

In short, the Request for Entry and Inspection is beyond the scope of discovery, as set forth in Rules 4003.1 through 4003.6, is overbroad and overreaching, invasive of attorney-client and other privileges, and totally without regard for plaintiff’s rights to privacy and other protected interests. Surely, the Court would not permit a party the right to go into the office of an adverse party and open and inspect any and all drawers, file cabinets, credenzas, desks or storage closets. This request is no different. For those reasons, the Motion to Compel should be denied.

The Motion to Compel should also be denied because the request for entry and inspection of plaintiff’s computers, or for the hard drives themselves, is premature and is made without even a suggestion by the defendant of what protocols should govern this production or inspection.

The Advisory Committee on the Federal Rules of Civil Procedure has proposed a series of “electronic discovery” amendments to the Federal Rules of Civil Procedure, which will take effect December 1, 2006 absent contrary Congressional action. The proposed amendment to Rule 34 would be titled “Production of Documents, Electronically Stored Information and Things and Entry Upon Land for Inspection and Other Purposes.” Fed. R. Civ. P. 34, Proposed Amendment of Subdivisions (a) and (b) (2006), 28 U.S.C. Although Rule 34 of the Federal Rules of Civil Procedure, in both its present form and amended form, covers requests both for production of

documents and for “entry” for purposes of inspection, unlike the Pennsylvania Rules, which contain separate rules for these procedures, the Advisory Committee Note on the proposed 2006 amendment to Rule 34 comments that while the amended rule contemplates inspection of electronically stored information in its electronic format:

Inspection or testing of certain types of electronically stored information or of a responding party’s electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Fed. R. Civ. P. 34, Advisory Committee Notes, 2006 Amendment, Subdivision (a) (emphasis added).

The Advisory Committee Note comports with developing case law on this issue. In cases where federal courts have allowed a requesting party access to the other party’s computers or hard drives, it has been where the responding party has not responded to specific requests for production, and/or the requesting party has reason to believe that the responding party has deleted, on a first level, certain information from its electronic storage system and therefore not produced it, and/or the requesting party has a valid request for data only to be found in the computer’s hardware. See Playboy Enterprises, Inc. v. Welles, 60 F. Supp. 2d 1050, 1053-54 (S.D. Cal. 1999) (recovery of deleted e-mails from defendant’s hard drive, because such e-mails could not be produced as a “document”); Simon Property Group, LP. v. My Simon, Inc., 194 F.R.D. 639 (S.D. Ind. 2000) (same); The Antioch Co. v. Scrapbook Borders, 210 F.R.D. 645 (D. Minn. 2002) (same); Experian Information Solutions v. I-Centrix, L.L.C., 2005 U.S. Dist. LEXIS 42868 (N.D. Ill. 2005) (recovery of metadata).

Moreover, where courts have allowed a requesting party access to another party's computer or hard drives, they have done so only where protocols have been put in place to control access and protect the responding party's privacy and confidentiality interests and prevent the production of privileged information or documents. See Playboy Enterprises v. Welles, 60 F. Supp. 2d at 1054-1055 (directing protocol to be followed); Fennell v. First Step Designs, 83 F.3d 526, 532-33 (1st Cir. 1996) (refusing access because, *inter alia*, proposed protocol insufficient to protect defendant's protectible interests and privileges); Simon Prop. Group, L.P. v. My Simon, Inc., 194 F.R.D. at 641 (establishing protocol to be followed by computer expert for purposes of allowed discovery); The Antioch Co. v. Scrapbook Borders, 210 F.R.D. at 653 (same).

On the other hand, courts have refused to allow a party access to the other party's hard drives or computers when the requesting party had no particularized request for information, obtainable only through such access, and appeared, as here, to be embarking on the proverbial "fishing expedition." See Fennell v. First Step Designs, Ltd., 83 F.3d at 532-534; In re Ford Motor Co., 345 F.3d 1313 (11th Cir. 2003) (district court erred in granting plaintiff unlimited, direct access to electronic data bases without restrictions or protocols and without regard to relevance, privilege or confidentiality and where there had been no prior finding of non-compliance with discovery rules).

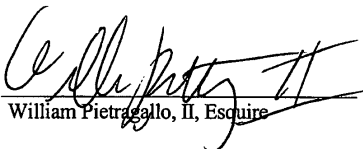
In Diepenhorst v. City of Battle Creek, 2006 U.S. Dist. LEXIS 48551 (W.D. Mich. 2006), the district court, citing to, *inter alia*, Ford Motor Co., refused to allow defendant access to plaintiff's computer hard drive, which would in effect have given defendant access to "all the programs, files and other information contained therein, whether or not germane to this case", where defendant had not demonstrated that plaintiff's document production had been inadequate or that access to the computer was necessary to recover deleted, relevant materials or made any other particularized showing of need for such access.

The same defects as noted in the cases cited in the paragraphs above infect defendant's Request for Entry and Inspection here. He has made no absolutely showing of particularized need for access to plaintiff's computers and/or their hard drives. All he says is an examination of them "may lead to the discovery of admissible evidence." Even if defendant had made a particularized showing of need, he has proposed no protocol for conducting his proposed examination or safeguarding plaintiff's interests including her assertable, and asserted, privileges and rights to privacy and confidentiality.

Accordingly, Defendant's Motion to Compel should in all respects be denied.

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MARGARET R. SCAIFE,

Plaintiff,

v.

RICHARD M. SCAIFE,

Defendant.

FAMILY DIVISION

No. FD 06-002384-001

**DEFENDANT'S SECOND REQUEST
FOR PRODUCTION OF DOCUMENTS
DATED AUGUST 4, 2006**

Code

Filed on behalf of Richard M. Scaife,
Defendant

Counsel of Record for this Party:

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Pa. I.D. No. 01226

Reid B. Roberts, Esquire
Pa. I.D. No. 41007

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These requests are not only for documents and tangible things which are owned by you, but also for documents and tangible things which are in your possession, custody, or control. This means that you must produce all documents and tangible things which are responsive to a particular request and which are in your possession (regardless of whether they are your property), or over which you have control even if they are documents and tangible things which are in the possession, custody, or control of your agents, employees and/or attorneys.

Before responding to these requests, you are required to make a diligent search of your files and records to ascertain whether you have documents which would be responsive to a given request. Your agents, employees and attorneys must do the same.

To avoid any possibility of confusion with respect to these requests, please note that the following terms have the following meanings in these requests, unless a particular request clearly indicates otherwise:

"You" or "your" refers to the person to whom these requests have been addressed.

"Person" means any natural person, corporation, unincorporated association, trust, partnership, and/or any other legally cognizable entity. It is contemplated that any corporation or other business entity acts only through its agents, officers, employees and attorneys, and requests which apply to any such legal entity should be construed accordingly.

"Plaintiff" means the particular Plaintiff named in this action.

"Defendant" means the particular Defendant named in this action.

"Document," "record," "file" and "report" all refer to and contemplate all written, recorded, or graphic information, whether preserved in writing, on magnetic tape, by

electronic means, in photographic form, on microfilm, or microfiche, or by any other means of information retrieval or storage.

DOCUMENTS REQUESTED

1. All documents, reports, memoranda, letters and other forms of written or electronic communication prepared by the private investigator who was retained by you in or about December 2005, from the date of your first contact with him/her through the date of your response to this request.

2. All photos, videos, movies and other forms of electronic media created by the private investigator who was retained by you in or about December 2005, from the date of your first contact with him/her through the date of your response to this request.

3. The hard drives of the Mac Powerbook and IMac computers owned by you and identified during your deposition.

4. A downloaded-to-disk and printed hard copy of all Quick Books PRO 2006 financial information maintained by your personal secretary, Susan McWilliams, from the date of the first entry through the date of your response to this request, as referenced in your deposition testimony and in response to Defendant's interrogatory no.22.

5. All hard copies of all emails printed and retained by you, as stated in your deposition testimony, from January 1, 2003 through the date of your response to this request.

6. All TRPC board meeting binders in your possession.

7. All records of the Tribune-Review and Allegheny Foundation referenced in your response to Defendant's interrogatory No. 18.

8. All cancelled checks for National City Account #xxxxx[REDACTED] from January 1, 2003 through the date of your response to this request.

9. All monthly and other periodic summary reports issued by PNC for your PNC investment account from January 1, 2003 through the date of your response to this request.

10. All documents that support your contention that your date of separation was on or about December 23, 2005 as stated in your response to Defendant's interrogatory no. 2.

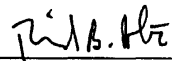
11. All documents evidencing all money given to Karen King, Martha Guel and Westray Battle in the last two years as stated in your response to Defendant's interrogatory no. 3.

12. All documents evidencing your disposal of any marital or non marital property, real or personal, in the past two years, having a value in excess of \$500.00.

13. All documents evidencing your National City Bank line of credit, including all applications, financial statements and other documents submitted by you to obtain said line of credit, as referenced in your response to Defendant's interrogatory no. 28.

14. All documentation evidencing all of your expenditures for transportation, lodging, food, shopping and incidentals for each of the trips you have taken since January of 2006 as listed in your response to Defendant's interrogatory no. 44.

STRASSBURGER MCKENNA
GUTNICK & POTTER

By 

H. Yale Gutnick
Reid B. Roberts

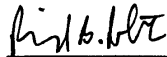
CERTIFICATE OF SERVICE

The foregoing DEFENDANT'S SECOND REQUEST FOR PRODUCTION OF
DOCUMENTS DATED AUGUST 4, 2006, was served on the 4 day of

August, 2006, by U.S. First Class Mail, postage prepaid, on the following:

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H. Yale Gutnick
Reid B. Roberts

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARGARET R. SCAIFE,

FAMILY DIVISION

Plaintiff,

No. FD-06-002384-001

vs.

RICHARD MELLON SCAIFE,


Defendant.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Memorandum in Opposition to Defendant's Motion to Compel Entry and Inspection was served upon counsel for Defendant at the address stated below on the 8th day of September, 2006, via U.S. First Class Mail, postage prepaid:

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By


William Pietragallo, II, Esquire