United States District Court, N.D. California.
Doris SHENWICK, et al., Plaintiffs,
v.
TWITTER, INC., et al., Defendants.

Case No. 16-cv-05314-JST (SK)

Signed 02/07/2018

Attorneys and Law Firms

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Opinion

ORDER RE JOINT OMNIBUS DISCOVERY LETTER

Regarding Docket No. 134

SALLIE KIM, United States Magistrate Judge

*1 The parties filed a letter brief regarding disputes about responses to Plaintiffs' First Request for Production of Documents (“RFPs”) and the production of documents responsive to the RFPs. (Dkt. 134.)

A. Factual Background

Plaintiffs filed a securities class action under federal law on behalf of all persons who purchased or otherwise acquired common stock of Defendant Twitter, Inc. (“Twitter”), between February 6, 2015 and July 28, 2015 (the “Class Period”). (Consolidated Complaint, Dkt. 81, 2.) Plaintiffs name Twitter and two individuals as defendants (“Defendants”). (*Id.*, 13-15.) Twitter is “a social media company that provides a platform where any user can create a ‘tweet’ and any user can follow other users.” (*Id.*, 19) Twitter uses different metrics to show its “financial health and growth prospects”: (1) the number of monthly active users (“MAU”)—the number of users in a month, (2) daily active users (“DAU”)—the users' daily activity (user engagement), and (2) “advertising engagements (the ability of the Company to turn user activity into advertising revenue).” (*Id.*, 20.)

Defendants filed a motion to dismiss, and the Court granted in part and denied in part the motion. (Dkt. 113.) The remaining allegations of the Consolidated Complaint fall into two general categories: (1) Defendants “misled investors by failing to disclose DAU metrics during the class period,” and (2) Defendants made positive statements about “user engagement trends” that were false and misleading. (*Id.*)

B. Issues in Dispute

There are six issues in dispute, discussed in detail below.

1. Issue #1—Custodians

The parties have met and conferred and agreed upon searching files of 25 “custodians”—employees of Twitter. (Dkt. 134.) They have one dispute: whether Defendants should search the files of an additional

custodian, Jack Dorsey. Dorsey was a co-founder of Twitter and Chief Executive Officer ("CEO") of Twitter from 2007 to 2008. Dorsey remained as a member of the Board of Directors even after he stepped down from his position as CEO and was the Chair of the Board of Directors during the Class Period. Dorsey then became CEO again on June 11, 2015—during the Class Period—and he "came clean" about the true state of Twitter's metrics on July 28, 2015. (Dkt. 81, 60-62, 138.)

Defendants argue that the 25 custodians have all the relevant documents, since they constitute all the major decision makers for Twitter. Defendants posit that it is unlikely that Dorsey will have any additional documents. Defendants argue that allowing a search of the "apex" custodian at this time is premature and that any search should be limited in time and scope.

The Court does not agree that Dorsey's involvement is limited, does not agree that he should be excluded as a custodian, and does not agree that any search of his files should be limited in time and scope. Dorsey was the Chair of the Board of Directors during the Class Period and then became CEO during the Class Period. Dorsey is also the person who notified the public of the true state of affairs of Twitter's metrics. The idea that responsive documents will necessarily be found in other custodians' records is not sufficient to defeat a search of his files. It is always possible that one custodian will have a document or documents that other custodians have not retained, or even that one custodian may have created a document, such as handwritten notes, that no other custodian possesses. For these reasons, the Court ORDERS Defendants to include Dorsey's files in the group of records that will be searched from individual custodians.

2. Issue #2—Sources—Direct Messages and Falquora

a. Direct Messages

*2 Plaintiffs request that Defendants search Twitter direct messages that each custodian sent and received. A direct message is a private message through the Twitter platform. Defendants have agreed to provide direct messages for individual defendants Anthony Noto and Richard Costolo only. Defendants argue that the Stored Communications Act, 18 U.S.C. § 2701 *et seq.* prevents the disclosure of direct messages from anyone other than a named individual defendant. The Court agrees.

"The Stored Communications Act prevents 'providers' of communication services from divulging private communications to certain entities and individuals." *Crispin v. Christina Audigier, Inc.*, 717 F.Supp.2d 965, 971-72 (C.D. Cal. 2010). Specifically, the government is limited in its right to compel providers to disclose information belonging to or about its subscribers. *Id.* at 972. The Stored Communications Act contains two categories of providers of: (1) remote computing services ("RCS"), and (2) electronic communication services ("ECS"). Id. (internal citations omitted). The uncontested allegation is that direct messages are private messages. Thus Twitter is an ECS under the Stored Communications Act. *See*, *e.g.*, *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 900 (9th Cir. 2008); *Crispin*, 717 F.Supp.2d at 980-82 (finding that Facebook, to extent that it provided private messaging, was an ECS). To the extent that Twitter retains direct messages, it is an RCS. *See, e.g., Crispin*, 727 F.Supp.2d at 987 ("message that have been opened and retained" cause the entity retaining the message to be a RCS).

Courts have held that the Stored Communications Act prevents a court from enforcing a subpoena issued to a third party ECS or RCS for the protected information. *Crispin*, 727 F.Supp.2d at 991; *In re Facebook, Inc.,* 923 F.Supp.2d 1204, 1206 (N.D. Cal. 2012). Plaintiffs argue that, although courts cannot compel a third party to divulge this information, the Court can compel the production of this information if issued to a party under Federal Rule of Civil Procedure 34. *See*, *e.g.*, *Mintz v. Mark Bartelstein & Assocs., Inc.*, 885 F.Supp.2d 987, 994, (C.D. Cal. 2012); *Flagg v. City of Detroit*, 252 F.R.D. 346, 366 (E.D. Mich. 2008).

Plaintiffs are correct that a court can compel a party to produce information within the party's custody and control, but they confuse the identity of the party with the identity of the individual custodians. Here, for purposes of analysis, the Court will treat Twitter as if it is separate from the individual custodians who have direct messages stored with Twitter. The individual custodians other than Costolo and Noto are not parties. In other words, because Defendants claim, without opposition, that Twitter did not require its employees to use direct messages for communications, the Court must evaluate Twitter separately from the individual custodians who have privacy rights protected by the Stored Communications Act. The two named individual defendants, Costolo and Noto, are allowing discovery of their direct messages, as Plaintiffs can issue to them requests for information pursuant to Rule 34 and obtain their direct messages. Plaintiffs are correct that, as the Court in *Mintz* explained, that a party can obtain text messages from the party—not from the ECS or RCS provider. 885 F.Supp.2d at 994. Here, however, Plaintiffs merge Twitter and its individual custodians' rights. They are not the same. If Plaintiffs issued a third party subpoena to a company—not Twitter—for direct

messages that the individual custodians sent and received, there is no question that the Court could not enforce such a subpoena. Under the same reasoning, the Court cannot compel Twitter, a party in this litigation, to produce protected direct messages of individual custodians who are not parties simply because Twitter is also the provider of the direct messaging service.

b. Falquora

*3 Plaintiffs request that Defendants produce documents from Falquora, Twitter's internal message board. Defendants argue that Plaintiffs abandoned this issue in the process of meeting and conferring, but Plaintiffs disagree. Given that Defendants have offered to meet and confer on this issue further and given that the parties have not provided sufficient information on this subject for the Court to rule, the Court DENIES Plaintiffs' request WITHOUT PREJUDICE. Plaintiffs may raise this issue again in a joint letter brief with Defendants after meeting and conferring on this issue, and the Court urges them to provide an explanation of this platform and the challenges and solutions for searching this platform.

3. Issue #3—Redaction for Relevance

Plaintiffs move to compel full copies of documents, which Defendants have redacted on grounds of relevance. Defendants argue that the documents they have produced are highly sensitive and that the Protective Order in this place does not provide sufficient protection for those documents. For those reasons, Defendants propose that redacting based on relevance is appropriate. The Court disagrees.

In general, courts frown upon the practice of redacting irrelevant information from documents based on one party's unilateral assessment of relevance. *See, e.g., Eshelman v. Puma Biotechnology, Inc.,* 2018 WL327559, at *2-3 (E.D.N.C. Jan. 8, 2018) (citing cases with similar holdings); *Virco Mfg. Corp. v. Hertz Furniture Sys.*, 2014 WL 12591482, at *5 (C.D. Cal. Jan. 21, 2014)(noting that protective order can address concerns about confidentiality of non-relevant information); *In re High-Tech Emp. Antitrust Litig.*, 2013 WL 12230960 a, at *1 (N.D. Cal. March 15, 2013); *In re Medeva Sec. Litig.*, 1995 WL943468, at *3 (C.D. Cal. May 30, 1995) (noting that unilateral redactions based on relevance creates more work for parties and court).

Here, there is a stipulated Protective Order that all parties submitted to the Court for approval. (Dkt. 128.) Defendants mention concerns about violation of the Protective Order and their concerns that individuals with access to confidential material will disclose that information. Those concerns are inherent in any case involving sensitive documents. The Court is well aware of the need for confidentiality, as this District handles numerous cases involving trade secrets and other financial secrets. The solution to Defendants' concerns about the Protective Order is to move to amend the Protective Order, not to allow parties to make unilateral assessments about redaction based on irrelevance. Therefore, the Court ORDERS Defendants to produce documents in unredacted form.[1]

4. Issue # 4—Documents Containing Terms "DAU" and "MAU"

Plaintiffs seek an order compelling Defendants to produce all documents that are responsive to Plaintiffs' RFPs. It appears that Plaintiffs request all documents responsive to RFPs 1, 2, 3, and 5. These requests seek "[a]ll documents and communications concerning" several categories: User Engagement, Monthly Active Users, Ad Engagements, and any meetings during which there was a discussion of User Engagement and/or Monthly Active Users. Defendants argue that these requests are so broad that they will be required to produce almost every document at Twitter, since these documents address the core of Twitter's business in increasing users and advertisement. The Court agrees that the RFPS 1, 2, 3, and 5 are overbroad under Rule 26(b)(1) of the Federal Rules of Civil Procedure. However, it is not clear from the Responses and the letter brief what compromises or proposals Defendants have offered to produce targeted documents, other than the general proposition that Defendants will produce relevant information. (Dkt. 134-2.) For that reason, the Court DENIES the motion to compel WITHOUT PREJUDICE. If Plaintiffs are concerned that the other RFPs are not yielding relevant documentation, they may re-file this motion with a more specific, targeted approach.

5. Issue #5—Search Terms

4 Plaintiffs seek guidance on the search terms for searching electronic data. Although the parties have met and conferred in good faith to agree upon many search terms, they have not agreed on the use of the word "engag." In this system, the use of the asterisk calls up documents that have the root "engag" but with additional letters after it.

Defendants argue that the use of that term alone yields too many non-responsive documents, such as communications about engagement parties, civic engagement and political engagement. Defendants have suggested that the search for "engag*" but only where that word is within five words of certain terms. For

example, in response to RFP 1, Defendant propose that the search for documents containing the word "engag*" only do so for documents where over 20 suggested terms are within five words of "engag*." Plaintiffs are concerned that the use of those limiting terms will cause relevant information to slip through the search, since an experimental search of Twitter's publicly-filed documents shows that the search with those limiting terms will not reveal all relevant documents. Plaintiffs and Defendants raise good points, and there is no perfect solution. However, as a practical compromise, the Court ORDERS that the search with the term "engag*" be conducted for documents with that term within 10 words of certain terms. Defendants have proposed 20 plus terms (Dkt. 134-7), and Plaintiffs may add an additional 10 terms.

6. Issue #6—Litigation Hold Memoranda

Plaintiffs move to compel documents responsive to RFP 27, documents concerning Defendants' efforts to "maintain, search for and preserve all documents" and things related to this action. Defendants claims that all responsive documents are privileged and that they will not produce them. Defendants are correct that preservation notices, if prepared by counsel and directed to the client, are protected by the attorney-client privilege. *See, e.g., In re eBay Seller Antitrust Litig.*, 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007). Defendants argue, without citation to supporting evidence, that documents responsive to RFP 27 are all privileged. Plaintiffs argue that the threat of spoliation destroys that attorney-client privilege and cite to Twitter's statement that Twitter does not have data to reconcile some figures regarding MAU "[d]ue to our data retention policies." (Dkt. 134-8.) Any concerns that Plaintiffs have about spoliation can be addressed through means other than forcing Defendants to reveal attorney-client privileged documents or documents protected by the work product doctrine. For example, the Court in *eBay Seller Antitrust Litig.* held that, although the "document retention notices" were protected by attorney-client privilege and/or attorney work product doctrine, plaintiffs in that case were "entitled to inquire into the facts as to what the employees receiving the [document retention notices] have done in response; i.e., what efforts they have undertaken to collect and preserve applicable information." 2007 WL 2852364 at *1. In that case, the Court ordered that a deposition of the person most knowledgeable about retention of electronic information and collection efforts take place. *Id.* at * 2.

Defendants are required to provide a privilege log if they withhold documents on the basis of attorney-client privilege or attorney work product doctrine and have the burden of showing that the attorney-client privilege and/or attorney work product apply. It does not appear that Defendants have either provided a privilege log or met their burden, although generally speaking the Court accepts that a memorandum or notice regarding document retention in response to or in anticipation of litigation is protected. Thus, the Court DENIES Plaintiff's motion to compel documents responsive to RFP 27 WITHOUT PREJUDICE.

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Even though the parties have brought six issues to the Court's attention, it is clear that the parties have worked hard in meeting and conferring to narrow the issues of dispute. The Court commends the parties for doing so and for presenting the remaining issues for dispute in a clear and cogent matter. The Court is confident that the parties will continue to meet and confer in good faith, narrow the areas of their dispute, and only present to the Court matters which they cannot resolve and which are significant.

IT IS SO ORDERED.

Footnotes

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Of course, Defendants may continue to redact documents to remove privileged information or information protected by the attorney work product doctrine, subject to a privilege log.

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