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**STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE**

SC Court of Appeals

**IN THE COURT OF COMMON PLEAS
CASE NO. 2021-CP-23-03414**

Richard A. Gorman,

Plaintiff,

vs.

John C. Monarch,

Defendant.

**ORDER GRANTING MOTION TO
COMPEL PRODUCTION OF
ELECTRONIC DEVICES**

This matter came before me at a hearing in the above-captioned action on September 15, 2021, set for the Plaintiff's motion to compel production of electronic devices for examination and the Plaintiff's motion for sanctions. As noted in previously filed Form 4 orders, the court grants the motion to compel production and continues the motion for sanctions to be heard at a later time.

This case (now restored after having been stricken pursuant to Rule 40(j), SCRCP) began over seven years ago under Case No. 2014-CP-23-04432. It concerns allegations that the Defendant participated in a blackmail scheme to extort money from the Plaintiff and that the Defendant, having failed to succeed at the blackmail, undertook efforts to defame the Plaintiff and ruin his reputation professionally and personally. Since near this case's beginning, Plaintiff has sought in discovery to examine electronic devices that the Defendant used or may have used in communicating about him and/or in engaging in or arranging the blackmail communications and defamatory internet postings involved in this case. The Defendant has maintained that he had no involvement with these blackmail communications and internet postings.

Following years of disagreement about discovery and two previous motions to compel, the parties entered into a consent order filed on August 21, 2020, under which the Plaintiff agreed to serve supplemental interrogatories and requests to produce and the court ordered as follows:

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With regard to requests to produce seeking the production of electronic devices, Defendant Monarch may initially comply with the requests by providing a list of such devices. The parties are ordered to cooperate concerning the expeditious provision of such devices from the list as the Plaintiff may select for examination by the Plaintiff or such persons as he may choose.

Following the Plaintiff's service of the supplemental interrogatories and requests to produce, the Defendant served discovery responses in late September of 2020 in which he, for the first time, identified two such electronic devices, a 2013 MacBook Pro and an iPhone 5, from which, according to him, he had the data transferred or removed. The Defendant got rid of the iPhone 5, despite the pendency of discovery requests seeking it; his counsel advises that he kept the 2013 MacBook Pro but transferred data from it to a new MacBook Pro. However, Defendant's counsel later advised the Court and Plaintiff's counsel that Defendant found the 2013 MacBook Pro, and allegedly discovered that he did *not* have data transferred from the device.

Plaintiff's counsel attempted to arrange cooperative provision by the Defendant of the devices for examination, but Defendant's counsel objected to providing the devices, despite the agreed language in the consent order requiring it. Plaintiff's motion to compel production followed. At the hearing, Defendant's counsel argued that the Defendant was not required under the consent order to provide the devices for examination. Based on the plain language of the consent order, the court disagrees with the Defendant. As he previously agreed to do under the consent order, the Defendant shall provide the devices for examination. The Defendant raised concerns about the Plaintiff having access to privileged or irrelevant information through the examination of the devices, and the court agrees steps should be taken to prevent disclosure to the Plaintiff of privileged or truly irrelevant material through the examination.

Discovery rights afford a litigant the opportunity to prepare for trial. Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 308, 609 S.E.2d 838, 842 (Ct. App. 2005). Where discovery rights are not afforded, prejudice is presumed. Id. As examination of the devices to be produced

may shed further light on whether and to what extent sanctions are proper, the court finds it appropriate to continue the Plaintiff's motion for sanctions.

Accordingly, IT IS THEREFORE HEREBY ORDERED that:

- 1) Within twenty-one (21) days of the date of this Order, Defendant Monarch shall provide to a neutral third party forensic expert (hereinafter "independent expert"; at the office of _____, addressed to the attention of _____), to be agreed upon by the parties and to be made an officer of the court, all electronic devices subject of a consent order filed on August 21, 2020, and subject of the Plaintiff's supplemental interrogatories and supplemental requests for production that are of record in this action (including the devices' the hard drives, internal flash memory, and/or solid-state drives, the Defendant's 2013 MacBook Pro and the MacBook to which Defendant transferred data from the 2013 MacBook Pro, all of which are hereinafter collectively referred to as "the drives" or "the hard drives"). Prior to turning over the hard drives, Defendant shall complete a log of what he believes to be privileged information. If Defendant cannot sufficiently produce or complete a privilege log, Defendant shall provide the neutral expert with a list of keywords and/or key phrases to be searched by the expert. Inadvertent production of information yielded from the keywords and/or key phrases shall not constitute waiver of privilege.
- 2) Within the twenty-one (21) days, the neutral expert shall examine the drives and summarize their contents. The neutral expert shall make and preserve two (2) copies of each hard drive. One (1) copy shall be preserved by the neutral expert unmodified in the event *in camera* review of the hard drives by the Court were to become necessary. From the second copy, the neutral expert shall parse and index the forensic images using industry standard forensic tools, and then execute a search of any keywords and/or key phrases provided by

Defendant. Any and all positive search results shall be flagged for exclusion from the copy. The neutral expert shall make note of and export any relevant information pertaining to the flagged data to be included in the privilege log and document the physical locations of the flagged data. The physical location/addresses shall include the beginning of the selection or file extent, to the end of the selection or file extent.

- 3) The neutral expert shall provide an updated privilege log containing any and all relevant information pertaining to the flagged data to Defendant. Defendant shall then have ten (10) days to verify whether this data flagged by the third-party forensic expert is, in fact, privileged. Defendant shall provide the verified privilege log to the neutral expert.
- 4) The neutral expert shall have twenty-one (21) days to refer to the verified privilege log and utilize appropriate forensic software to sanitize the data from the copy of the forensic images that were acquired from Defendant's devices and subject to processing. The process of sanitizing the forensic images shall include navigating to the physical address of each selection of data or file that has been verified as privileged data, and replacing the data contained at that address with zeros, from the beginning to the end of the selection or file extent. The neutral expert shall then re-execute a search for the data contained on the privilege log to ensure the image is sanitized. The neutral expert shall prepare and provide to the parties a detailed report indicating the steps taken to sanitize the forensic images.
- 5) The neutral expert shall create three (3) mirror image copies of the sanitized drive. One shall be preserved by the neutral expert, one shall be sent to Plaintiff (at the office of _____), and one shall be sent to Defendant (at the office of _____).
- 6) The hard drives provided to the neutral expert by Defendant shall be maintained by the neutral expert in a locked and secure room, cabinet, and/or safe when not in use by the

neutral expert. The neutral expert shall have access to and may use information contained on Defendant's hard drives only for the purpose of this action. Plaintiff's counsel shall have access to and may use information contained on the sanitized hard drives only for the purpose of this action. Anyone employed in the office of Plaintiff's counsel and anyone assisting Plaintiff's counsel for purposes of this action is also bound by the terms of this Order.

- 7) Once participation in the litigation of this case by any person obtaining Defendant's hard drives pursuant to this Order has been terminated, all hard drives and electronic data obtained therefrom shall be returned to Defendant within twenty-one (21) days.
- 8) Certain material and information on the hard drives shall be treated as confidential, subject to the following terms:
 - a) Confidential documents shall be so designated by placing or affixing the word "CONFIDENTIAL" on the document in a manner which will not interfere with the legibility of the document, and which will permit complete removal of the designation. Documents shall be designated as confidential prior to, or contemporaneously with, the production or disclosure of the documents. Inadvertent or unintentional production of documents without prior designation as confidential shall not be deemed a waiver, in whole or in part, of the right to designate documents as confidential.
 - b) Any party may designate documents as confidential and develop a privilege log, but only after review of the documents by an attorney who has, in good faith, determined that the documents contain information protected from disclosure by statute, sensitive personal information, privileged information, irrelevant information, or information that is not within the timeframe relevant to this case.

- c) Any confidential designation is subject to challenge in good faith. The burden of proving the necessity of a confidential designation remains with the party asserting confidentiality. A party who contends that documents designated as confidential are not entitled to confidential treatment shall give written notice to the party who affixed the designation. The parties shall confer in good faith prior to bringing all objections before the Court to request an *in camera* review for a determination of whether the challenged information is subject to confidentiality.
- d) Documents designated as confidential under this Order shall not be used or disclosed by the parties, counsel for the parties, or any experts for the parties for any purposes whatsoever other than preparing for and conducting the litigation in which the documents were disclosed (including any appeal of the litigation).
- e) The parties and counsel for the parties shall not disclose or permit the disclosure of any documents designated as confidential under the terms of this Order to any other person or entity except as to, or contemporaneously with, the production or disclosure of the documents to those persons. Persons to whom disclosure is to be made shall execute an acknowledgment (in the form set forth as Attachment A hereto), that he or she has read and understands the terms of this Order and is bound by it. The following categories of persons may be allowed to review documents which have been designated as confidential pursuant to this Order:
 - i) Counsel and employees of counsel for the parties who have responsibility for the preparation and trial of the lawsuit;
 - ii) Parties and certain members or employees of a party to this Order, but only to the extent counsel shall certify that the specifically named individual

party or employee's assistance is necessary to the conduct of the litigation in which the information is disclosed;

- iii) Court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents;
 - iv) Witnesses during depositions, hearings, and trial;
 - v) Consultants, investigators, or experts employed by the parties or counsel for the parties to assist in the preparation of the lawsuit; and
 - vi) Other person only upon consent of the producing party or upon order of the court and on such conditions as are agreed to or ordered.
- f) The parties and counsel for the parties shall not make any information designated as confidential public or use such information in any unlawful manner.
- 9) The provisions of this order may be modified upon good cause shown or by consent of the parties, and any dispute concerning the matters subject of this order, if the parties are unable to resolve it, may be determined by the court upon motion.

And IT IS SO ORDERED.

The Honorable Alex Kinlaw, Jr.
Circuit Judge



Greenville Common Pleas

Case Caption: Richard A Gorman vs. John C Monarch , defendant, et al

Case Number: 2021CP2303414

Type: Order/Compel

So Ordered

s/Alex Kinlaw, Jr., #2763