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Strategies for Litigating the Designation of Senior Executives as ESI Custodians

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Litigators know that many civil cases are won or lost during the discovery period. Indeed, damning emails and other electronically stored information—particularly from senior executives—often force settlement to avoid public backlash and such ESI being shown to an impassioned jury. On the other hand, litigants often demand access to ESI from senior executives (in addition to the rank-and-file employees) for improper reasons, such as to harass, embarrass, pressure, needlessly increase discovery costs, and fish for irrelevant information. The process of designating ESI custodians is, thus, an area ripe for disputes.

However, the case law discussing how courts should determine whether to compel the designation of an ESI custodian is not well developed. Only a small handful of federal district courts across the country have directly addressed this issue, leaving litigators with little guidance on how to argue successfully for or against the designation of an ESI custodian.

This article discusses some of the factors that federal courts have considered and offers strategies for successfully obtaining or defending against the designation of a senior executive as an ESI custodian.

Does the Executive Have Relevant and Unique ESI?

As an initial matter, all discovery requests—including those involving the designation of ESI custodians—must comply with Rule 26. [Fed. R. Civ. P. 26\(b\)\(1\)](#) (providing that parties may obtain discovery on a nonprivileged matter that is relevant to a claim or defense and proportional to the needs of the case). Courts have widely held that Rule 26 requires only that a party responding to a discovery request conduct a reasonable search for responsive information pursuant to a “reasonably comprehensive search strategy.” *Enslin v. Coca-Cola Co.*, No. 2:14-cv-06476, [2016 BL 502275](#) at *4 (E.D. Pa. June 8, 2016). There is no obligation for a responding party to examine every piece of paper from every possible custodian in its voluminous files, especially if there are vast amounts of ESI available for review. *Enslin*, [2016 BL 502275](#) at *4.

Moreover, courts have recognized that the responding party is generally in the best position to know and identify the individuals that have relevant and responsive information. *Houston v. Papa John's Int'l, Inc.*, No. 3:18-cv-00825-CHB, [2020 BL 427719](#), at *3 (W.D. Ky. Oct. 30, 2020). Courts are, therefore, often reluctant to second-guess a responding party's representation that it conducted a reasonable inquiry for responsive information and that its list of custodians from which it collected ESI is reasonable and appropriate. *Enslin*, [2016 BL 502275](#) at *3.

Accordingly, a requesting party seeking to compel the responding party to designate additional ESI custodians must show that the discovery sought is relevant to a claim or defense and also proportional to the needs of the case. Critical to this “fact-specific inquiry” is whether the additional custodian would provide unique information not already obtained through other sources. *In re: EpiPen (Epinephrine Injection, USP) Mktg. Sales Pracs. & Antitrust Litig.*, No. 17-md-2785-DDC-TJJ, [2018 BL 88499](#), at *5-6 (D. Kan. Mar. 15, 2018); *Enslin*, [2016 BL 502275](#), at *5; *Houston*, [2020 BL 427719](#), at *4. In other words, the requesting party must make a compelling showing that all of the lower-level employees already designated are not sufficient and the senior executive's ESI needs to be collected as well.

In determining whether a proposed custodian has unique ESI, the few courts that have directly addressed this issue have considered the following factors.

ESI of Other Custodians

Courts have considered whether the ESI collected from other custodians indicates that the executive possesses unique information not already captured. See *Houston*, [2020 BL 427719](#), at *4 (denying motion to compel designation but noting that it would revisit the issue if any of the ESI produced by the other 26 custodians, once reviewed, reveals that the former executives have unique and relevant information). However, merely producing a large volume of documents from other custodians is likely irrelevant in determining whether an executive has unique ESI. See *Agribase Int'l, Inc. v. Syngenta AG (In re Syngenta AG MIR 162 Corn Litig.)* No. 2:14-md-02591-JWL, [2019 BL 421579](#), at *146 (D. Kan. Oct. 31, 2019) (noting that a party's production of more than 118,000 documents from other custodians was irrelevant if those documents miss a significant portion of the issues in the case).

Corporate Structure

The corporate structure of an entity is also instructive in determining whether an executive's ESI is unlikely to be captured by other custodians and would therefore be unique. See *Sugg v. Virtusa*, No. 18-8036, [2020 BL 436851](#), at *2 (D.N.J. Nov. 10, 2020) (declining to compel the president and CEO as ESI custodians where defendant already designated the top employees and their direct reports in each of the departments with the most relevant knowledge about the issues in the case). On the other hand, courts have held that mere speculation that a person's title as a senior executive might increase the relevance of his files is not a basis for designation. The requesting party must show that the executive sought is likely to have had substantive responsibilities relevant to the claims in the case. See *Mortg. Resol. Servicing LLC v. JPMorgan Chase Bank N.A.*, No. 15 Civ. 0293 (LTS) (JCF), [2017 BL 172750](#), at *4 (S.D.N.Y. May 18, 2017).

Executive's Level of Involvement

Courts have also considered an executive's level of involvement in the relevant issues in determining whether to compel designation. For example, the *EpiPen* court compelled designation of the defendant's chairman and former CEO who: served as CEO when many of the alleged facts and key events occurred, was actively involved in material transactions regarding the blockbuster drug product at issue, provided important guidance to senior management during the relevant time period, personally edited relevant press releases, and discussed relevant issues in the case during media interviews. *In re: EpiPen*, [2018 BL 88499](#), at *6-7. Conversely, the *EpiPen* court declined to compel designation of plaintiff's former CEO who did not come on board until after many of the alleged facts and key events occurred in the case. *In re: EpiPen*, [2018 BL 88499](#), at *7-8.

Size of the Team

When an executive is part of a small team making the relevant decisions, the court may be more likely to compel designation. See *In re: EpiPen*, [2018 BL 88499](#), at *7.

Is Compelling Designation Proportional to the Needs of the Case?

Even if the requesting party can establish that an executive has unique ESI, courts will still decline to compel designation if it is not proportional to the needs of the case. [Fed. R. Civ. P. 26\(b\)\(1\)](#). Courts have considered the following factors in determining proportionality:

Burden and Expense of Production

Courts will consider the burden and expense of producing the requested ESI compared to its expected utility. For example, in *Mortgage Resolution Servicing* the court held that the cost of more than \$400,000 to restore, review, and produce the requested ESI, given its marginal utility, was not proportional to the needs of the case. [2017 BL 172750](#), at *3. However, courts are more likely to reject allegations of burden and expense that are not supported by an affidavit or other evidence. See *In re Syngenta*, [2019 BL 421579](#), at *145-46.

Requesting Party's Custodians

Courts may also consider fairness arguments based on whether the requesting and responding parties have both designated executives as ESI custodians. See *In re: EpiPen*, [2018 BL 88499](#), at *7 (rejecting responding party's proportionality argument and compelling designation of former CEO, given that the requesting party had already designated executive-level custodians and the court was also compelling the requesting party to designate its former CEO). In other words, courts are more likely to reject a requesting party's motion to compel if the requesting party has refused to designate its own executives as ESI custodians.

Executive's Residence and Related Legal Considerations

Courts also consider where the executive resides and the law of that jurisdiction when deciding whether to compel designation. For example, the *EpiPen* court declined to compel designation of a former executive, in part, because he resided in France and his emails would likely be covered by French privacy and blocking laws. *In re EpiPen*, [2018 BL 88499](#), at *8. Courts have also considered the additional burden and expense of collecting and reviewing emails that are mostly written in a foreign language. *Moore v. Publicis Groupe*, [287 F.R.D. 182](#), 186 (S.D.N.Y. 2012), adopted sub nom. *Moore v. Publicis Groupe SA*, No. 11 CIV. 1279 (ALC) (AJP), [2012 BL 101971](#) (S.D.N.Y. Apr. 26, 2012) (CEO located in France was not

included as a “first-phase custodian” given that his emails were mostly written in French, would be gathered from emails with the New York based executive staff, and likely would be covered by French privacy and blocking laws).

Strategies for Obtaining or Defending Against Designation

Based on the limited case law available and personal experience in successfully litigating these issues, the following strategies should be considered when trying to obtain or defend against the designation of a senior executive as an ESI custodian.

Strategies for Requesting Parties

- When identifying the custodians you want, do not rely solely on the other party's initial disclosures.
- Ask the responding party for organizational charts covering the relevant time periods, and use those charts to show that the executive's ESI would not be captured by custodians from other departments or levels of the company.
- Run targeted searches of the documents already in your possession and find examples of the executive being directly involved in the relevant issues in the case.
- Search all public information that may show the executive's involvement in the relevant issues in the case, including: press releases, news articles, SEC filings, congressional testimony, and social media (particularly professional profiles).
- Monitor related litigations and investigations involving the company or executive for relevant information, including if the executive has previously produced relevant ESI in those related litigations or investigations.
- Raise fairness and proportionality arguments if you have designated more ESI custodians than the responding party and/or if you have already designated current or former executives but the responding party has not.

Strategies for Responding Parties

- Avoid listing a senior executive (either current or former) in your initial disclosures who you do not reasonably expect will be called as a witness at trial.
- Provide an affidavit detailing the time and expense it would take to collect, process, review, and produce the executive's ESI.
- Use organizational charts to show that the relevant ESI will be captured by other custodians.
- Provide custodians that have day-to-day involvement in the key issues in the case, so you can show that you are providing the right witnesses, while the senior executive being sought after is not necessary or appropriate.
- Demonstrate the executive's limited involvement in the relevant issues in the case using evidence of: the executive not being employed during the relevant time period, lack of public information tying the executive to the relevant issues, and the fact that the litigation does not involve an important area of the business that would require the executive's close attention.
- Point out if the requesting party has not designated all of its current and former executives as ESI custodians.
- Highlight the geographic and legal impediments that would make collecting ESI from an executive located outside of the United States unduly burdensome (or even impossible).

In sum, given the heightened importance of a senior executive's emails in civil cases, litigators need to be considering the issues discussed herein on potential ESI custodian disputes from the very beginning of the case.