UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

THOMAS J. HOLMES, et al.,

Plaintiffs,

v. Case No: 14-CV-208

JOHN DICKERT, et al.,

Defendants.

MUNICIPAL DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO THE PLAINTIFFS' MOTION TO COMPEL ELECTRONICALLY STORED INFORMATION AND IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Defendants John Dickert, City of Racine, Gary E. Becker, Kurt S. Wahlen, James Kaplan, Gregory T. Helding, David L. Maack, Aron M. Wisneski, Robert E. Mozol, Mark L. Levine, and Joseph G. LeGath (collectively, the "Municipal Defendants"), by their attorneys, Meissner Tierney Fisher & Nichols S.C., hereby submit this Memorandum of Law in Opposition to the Plaintiffs'[1] Motion to Compel Electronically Stored Information ("ESI") and in Support of their Motion for Protective Order.

INTRODUCTION

Responding to the Plaintiffs' discovery in this case has been an extremely costly enormous undertaking. To date, the City of Racine alone has produced 435,818 pages of documents and 74 gigabytes of data. (Declaration of Matthew Stippich, "Stippich Decl.", ¶ 6). The production has included, *inter alia*, licensing and renewal information for liquor license

[1] The Plaintiffs in this action are Thomas Holmes, individually and d/b/a Park 6; Otha Keith Fair, individually and d/b/a The Place on 6th, LLC; Pythaphone Khampane and Omajai Nueakeaw, individually and d/b/a Ginger's Lounge; Wilbur Jones, individually and d/b/a Viper's Lounge; Jose Maldonado and Maria Maldonado, individually and d/b/a The Cruise Inn.

holders for approximately six (6) years, police reports of incidents at eighty-two (82) bars hand-picked by the Plaintiffs and at every business located within sixteen (16) different blocks hand-picked by the Plaintiffs all back to January 1, 2006, bar history reports from the City of Racine for 82 bars hand-picked by the Plaintiffs back to January 1, 2006, and an entire database of bar history reports for bars located in the City of Racine back to January 1, 2005. (Declaration of William Stuart, "Stuart Decl.", ¶ 4). The City of Racine has also committed to and is in the process of producing agendas, minutes and other information in connection with meetings of the Common Council and Public Safety & Licensing Committee for the City of Racine, and licensed premises reports generated by the Racine Police Department. (*Id.* ¶ 4). In addition, the City of Racine collected electronic information from thirty-six (36) custodians consisting of 3,165,391 items of data and ran 270 search terms (in various configurations and syntax) selected by the Plaintiffs against that data set. (Stippich Decl., ¶¶ 6, 11). The results from those searches, which consisted of 376,435 pages of documents and 50.6 gigabytes of data, has been produced to the Plaintiffs. (Stuart Decl., ¶ 4). To say that the Plaintiffs' scope of discovery in this case has been "scorched-earth" would be a gross understatement.

The Plaintiffs now claim that the Municipal Defendants—and more specifically, the City of Racine—must fully restore (at its own cost) all information contained on thirty (30) back-up tapes. They argue that such effort and expense are justified because (1) certain racially derogatory terms "hits" were found in City employees' e-mails on the City's computer system; (2) one witness claims that Mayor John Dickert ("Mayor Dickert") made a racially derogatory statement; and (3) the Plaintiffs believe that two e-mails from Mayor Dickert's campaign show the campaign accepted "several illegal contributions". (Plaintiffs' Memorandum of Law in Support of Their Motion To Compel Electronically Stored Information, at 2; Plaintiffs'

Supplemental Memorandum of Law in Support of Their Motion to Compel Electronically Stored Information, at 2).[2] As demonstrated herein, none of these arguments have merit.

A. Hits on Racially Derogatory Terms.

The Plaintiffs incorrectly state that that all "hits" of derogatory search terms were "found in certain City employees' e-mails" and imply, in a highly inflammatory manner, that such employees were actually using those terms in a racially derogatory context. (Plaintiffs' Br., at 2, 6). Nothing could be further from the truth.

At the outset, the Plaintiffs grossly mischaracterize the meaning and purpose of the "hits" on these terms. The search term report referenced in the Plaintiffs' motion ("Search Term Report") does nothing more than identify the raw count of items (which could be an e-mail, attachment, or other electronic document) with "hits" of specific search terms that have been applied against a data set. (Stippich Decl., ¶ 13). It does not account for context (e.g., spam e-mail), relevance, duplication or privilege (e.g., communications from counsel to the Municipal Defendants regarding the proposed string searches themselves), nor does it provide any information on how the term was actually used. (*Id.*). And, neither context nor relevance can be inferred from the fact that a term exists in a data set. (*Id.*, ¶ 15). Without context, the presence of such word is meaningless and potentially misleading.

For example, the Plaintiffs requested that the City of Racine apply the search term "Charlie" across the City of Racine's data set presumably intending to find instances where that term was used in a racially derogatory manner. (*Id.*, ¶ 13). The Search Term Report indicated that the term had "hit" 14,683 times. (*Id.*). Yet, a review of that term shows that the majority of

[2] Plaintiffs' Memorandum of Law in Support of Their Motion To Compel Electronically Stored Information shall be referred to as "Plaintiffs' Br.", and Plaintiffs' Supplemental Memorandum of Law in Support of Their Motion to Compel Electronically Stored Information shall be referred to as "Plaintiffs' Supp. Br.".

those e-mails generated communications with individuals named "Charlie", as opposed to being used in any type of racially derogatory manner.[3] (*Id.*).

Here, the mere fact that racially offensive terms were identified in items within the City of Racine's data set does not establish (or even suggest) that any such terms were being used by any of the Municipal Defendants in a racially derogatory manner. Consider the following:

- The term "**nigger**" was identified in 436 items, 34 of which were duplicates. (*Id.*, ¶ 15). Of the remaining 402 items, 390 items were in criminal or public safety documents such as police or public safety documents where the term was used by a third party. (*Id.*). The remaining items involved SPAM, bulk e-mail or unsolicited messages not generated by or otherwise sent by any of the Municipal Defendants. (*Id.*).

- The term "**N-Ville**" was identified in 14 items, 3 of which were duplicates. (*Id.*, ¶ 14). Of the 11 remaining items, 10 involved privileged communications regarding this case, and one involved an address in Mequon, Wisconsin at "N. Ville Du Par Dr." (*Id.*).

- The term "**coon**" was identified in 745 items, 51 of those items were duplicate families. (*Id.*, ¶ 17a.). Of those items, 656 items involved situations were an individual had a family name with "Coon" in it. (*Id.*). Of the remaining items, 10 involved privileged communications regarding this case, 18 were police or incident reports, 1 was an unsolicited e-mail and 9 involved other non-derogatory uses for the term. (*Id.*).

- The term "**ghetto***" was identified in 303 items, 84 of which were duplicates. (*Id.*, ¶ 17b.). Of the remaining items, 10 involved privileged communications regarding this case, 128 related to police or public safety incident reports or complaints, 79 related to unsolicited email messages and 2 were appeared in a person's e-mail address.[4] (*Id.*).

- The term "**monkey**" was identified in 1,675 items, 275 of which were duplicates. (*Id.*, ¶ 17c.). The term appeared in numerous communications about a business called the "Brass Monkey" or referred to actual monkeys. (*Id.*). Of the 1,400 non-duplicate items, 790 are name references, 10 involved privileged communications

[3] The Plaintiffs are fully aware of the meaning and impact of the Search Term Report as they expressly requested that information and then agreed to modify their search strings on the basis of that report. (Stuart Decl., ¶ 15, Ex. I).

[4] The Municipal Defendants do not concede that this term is inherently racist. In Webster's Dictionary, the term is defined as "a quarter of the city in which Jews were formerly required to live" or "a quarter of the city in which members of a minority group live especially because of social, legal, or economic pressure." *See* http://www.merriam-webster.com/dictionary/ghetto. Unlike other terms on the above list, the term is not identified as being derogatory toward any specific racial group.

regarding this case, 310 are non-derogatory uses of the word (such as "monkey business"), and 32 were in police or incident reports, 258 relate to SPAM, bulk e-mail or unsolicited messages not generated by or otherwise sent by any of the Municipal Defendants. (*Id.*).

- The term "**negro**" was identified in 242 items.[5] (*Id.*, ¶ 17d.). Of that amount, 40 were references to organizations with the name "negro" in it (such as the United Negro College Fund), 41 references were in police or incident reports, 45 were non-derogatory uses of the term (i.e., employment applications in Spanish), and the remaining 116 items were in unsolicited email messages. (*Id.*).

- The term "**nig**" was identified in 121 items, 33 of which were duplicates. (*Id.*, ¶ 17e.). Of the remaining items, 47 involved police or incident reports, 10 involved privileged communications regarding this case, 23 related to non-derogatory uses (such as typos), 6 appeared in unsolicited messages and 2 references appeared in relation to names. (*Id.*).

- The term "**oriental**" was identified 484 items, 13 of which were duplicates. (*Id.*, ¶ 17f.). Of the remaining items, 351 referred to names of businesses or objects (such as the "The Oriental Theater", "Oriental Trading Company" or "oriental rug"), 40 referred to other non-derogatory uses (such as "oriental salad" or "oriental ramen"), 14 were included in police or incident reports, 10 involved privileged communications regarding this case, and 56 were in unsolicited e-mail messages. (*Id.*).

- The phrase "**those people**" was identified in 1,765 items, 100 of which were duplicates. (*Id.*, ¶ 17g.). Of the remaining items, 1,663 involved the common, non-derogatory use of the term, or 2 involved unsolicited e-mails. (*Id.*).

- The term "**wetback**" was identified in 31 items, 5 of which were duplicates. (*Id.*, ¶ 17h.). Of the remaining items, 13 involved police or incident reports, 10 involved privileged communications regarding this case, and 3 related to SPAM, bulk email or unsolicited messages not generated or otherwise sent by any of the Municipal Defendants. (*Id.*).

- The term "**bribe**" was identified in 548 items, 116 of which involved police or public safety documents, 57 involved references to unrelated policies, procedures or notices, 61 were SPAM, bulk email or unsolicited messages not generated or otherwise sent by any of the Municipal Defendants. (*Id.*, ¶ 17i.). The remaining items involved search term lists, pleadings or other documents relating to this litigation. (*Id.*).

[5] The Plaintiffs significantly misrepresented the number of hits on "nig" (they attributed 238 hits, but the Search Term Report only showed 121) and "negro" (they attributed 1,675 hits, but the Search Term Report only showed 238, and the term was actually identified 242 times. (*See* Plaintiffs' Br., at 2) (Stippich Decl., ¶ 12, Ex. A).

- The term "**kickback**" was identified in 54 items, 15 of which involved police or public safety documents, 19 were unrelated policies, procedures or notices, 7 involved SPAM, bulk email or unsolicited messages not generated or otherwise sent by any of the Municipal Defendants.. (*Id.*, ¶ 17j.). The remaining items involved search term lists, pleadings or other documents relating to this litigation. (*Id.*).

When put in proper context, the Search Term Results negates the conclusion that these terms were being used by the Municipal Defendants in a racially derogatory manner, and refutes any argument that the Plaintiffs are entitled to additional discovery of electronically stored information. The Plaintiffs should be required to make a proper showing of relevance before seeking any more discovery of the City of Racine's ESI.

B. Penny Sharp Testimony.

The Plaintiffs also cite the testimony of an unidentified witness—Penny Sharp ("Sharp")—as justification to restore the thirty back-up tapes. (Plaintiffs' Br., at 2). Sharp claims that Mayor Dickert made an openly racist statement about African Americans from Waukegan, Illinois at the end of an open candidate forum in January 2011. (Stuart Decl., ¶ 6, Ex. A; Sharp Dep. 84:17–85:17). Sharp also claims that Mayor Dickert made this statement in the presence of Robert Henzl (a long-time prominent attorney in Racine) and his wife Sally Henzl. (*Id.*, at 85:18–90:20, 238:23–239:19).

At the outset, Sharp's outrageous accusations have nothing to do with the relevance of any information on the City of Racine's backup tapes (which, with the exception of one month of data, entirely ***predate*** Mayor Dickert even taking office), and should be completely disregarded. Moreover, Mayor Dickert categorically denies ever making any racist statements and finds Sharp's claims "reprehensible" and politically motivated. (Declaration of John Dickert, "Dickert Decl.", ¶¶ 4, 6, 7). Sharp's accusations have also been thoroughly discredited by Mr. and Mrs. Henzl, the very witnesses she claims were present when Mayor Dickert made the alleged

statement. Robert Henzl and Sally Henzl both unequivocally deny ever hearing Mayor Dickert make any racist statements about African Americans, or any other racial group. (Declaration of Robert R. Henzl, ¶¶ 4–5; Declaration of Sally A. Henzl, ¶¶ 3–4).

Sharp's wild accusations are not surprising since she has a long history of being outspoken against Mayor Dickert, she opposed him in his 2011 and 2015 elections (even attempting to run against him in 2011 when she did not even live in the City of Racine)[6] and she claims that many entities and individuals in Racine are "racist", including African-American leaders in the Racine Branch of the NACCP.[7] (Stuart Decl., ¶ 6, Ex. A; Sharp Dep. 121:14–122:12, 126:24–127:6, 207:4–210:15; Dickert Decl., ¶ 6). Thus, her testimony lacks even a hint of credibility and should be disregarded.

C. The Campaign E-mails.

The Plaintiffs' citation to two internal e-mails from the personal e-mail account of Mary Jerger Osterman to support their claim for restoration of the City of Racine's backup tapes is equally spurious. While Mayor Dickert refutes any allegations of any misconduct in his campaign, the simple fact is neither of the e-mails cited by the Plaintiffs came from the City of Racine's computer system and thus have nothing to do with the backup tapes at issue. Rather, both e-mails involved the personal addresses of all parties involved. In addition, Mayor Dickert was sworn into office as the Mayor for the City of Racine for the first time on May 19, 2009. (Dickert Decl., ¶ 2). The City's "live" data—which the Plaintiffs have—starts in at least June 2009. (Stippich Decl., ¶ 6; Declaration of Allen C. Eubanks, "Eubanks Aff.", ¶ 3). So, even

[6] Sharp's husband was the head of a City of Racine employee union and the lead negotiator against the City of Racine as to union contracts. Sharp claims that, during such negotiations in December 2010, Mayor Dickert "lied" about something in connection with union contract, which apparently fueled her venom towards him. (Stuart Decl., ¶ 6, Ex. A; Sharp Dep. 112:15–115:10, 116:21–119:4, 120:11–122:8) (Dickert Decl. ¶ 6).

[7] Sharp claims that Gloria Rogers (the former President of the NACCP), members of the Cobb Family and Al Gardner are all "racist". (Stuart Decl., ¶ 6, Ex. A; Sharp Dep. 208:24–209:15).

assuming any campaign materials are in fact on the City's system (a fact which has not been established in any manner), at best there would only be approximately one month's worth of data on the backup tapes which could possibly be relevant to Mayor Dickert's campaign. Even then, it would be during a time when the election was over.

As shown herein, the Plaintiffs' motion appears to be nothing more than a transparent attempt to improperly use the judicial process as a conduit to smear Mayor Dickert's reelection campaign.[8] It was no accident that the Plaintiffs filed their motion with exaggerated, sensationalist innuendo about racism the very night that Mayor Dickert won the primary election.[9] The Municipal Defendants hereby request that the Court deny the Plaintiffs' motion to compel or, in the alternative, require the Plaintiffs to assume the entire cost (or at least 75% of the total costs pursuant to the Municipal Defendants' proposal) of the restoration of the backup tapes.

FACTUAL OVERVIEW

A. Status of Discovery.

While the Plaintiffs belittle the costs and effort to restore the City of Racine's backup tapes, they completely ignore the massive effort and expense the Municipal Defendants have incurred in responding to their wide-ranging discovery.[10] To date, the City of Racine alone has produced:

[8] The City of Racine Mayoral election is on April 7, 2015. *See* http://www.jsonline.com/news/statepolitics/racine-mayor-challenger-to-face-off-in-spring-election-b99447390z1-292375111.html.

[9] The substance of the Plaintiffs' motion was posted on websites and the subject of numerous news outlets within twenty-four hours from the filing of the motion. (Stuart Decl., ¶ 7, Ex. B). One of the Plaintiffs' lawyers even gave a live interview about the "evidence" of racism that the Plaintiffs had allegedly discovered. *See* http://fox6now.com/2015/02/19/racist-offensive-words-found-hundreds-of-times-on-computers-owned-by-the-city-of-racine-since-2009/.

[10] The Municipal Defendants have responded to 72 interrogatories and 483 document requests on the Municipal Defendants, including a specific set of search terms improperly styled as a Rule 34 document request. (Stuart Decl., ¶ 2).

- Approximately 24,000 pages of liquor licensing application and renewal materials back to 2008 for establishments holding liquor licenses in the City of Racine.

- Approximately 8,000 pages of documentation containing reports from the Racine Police Department as incidents at 82 bars hand-picked by the Plaintiffs dating back to approximately January 1, 2006.

- Bar history reports on file with the Clerk of the City Racine for the 82 bars hand-picked by the Plaintiffs dating back to at least January 1, 2006.

- Approximately 2,000 pages from a database of bar history reports for establishments holding liquor licenses in Racine dating back to approximately January 1, 2005.

- Approximately 4,000 voicemails (and associated e-mails) from three general categories requested by the Plaintiffs—Administrative, Bar-Related, and Messages Between City Officials.

- Racine Police Department materials in connection with due process hearings.

- Approximately 4,000 pages of hard documents including side agreements, individual personal files, organizational charts, liquor licensing lists, façade grant documents, and downtown Business Improvement District documents.

(Stuart Decl., ¶ 4).

The City of Racine is in the process of producing even more documents, including agendas, minutes and other materials relating to the City of Racine Common Council and Public Safety and Licensing Committee. (*Id.*). Moreover, the individual Municipal Defendants are in the process of producing 7.03 gigabytes of documentation in response to the Plaintiffs' Rule 34 Requests for Production. (*Id.*, ¶ 5).

B. The Backup Tapes at Issue.

This motion involves the production of additional e-mails from the City of Racine's computer systems.[11] The City of Racine has electronically stored e-mail information that is

[11] The Plaintiffs have limited the issues in this motion to e-mails on backup tapes from the City of Racine, (Plaintiffs' Br., at 4 n.1), so the Municipal Defendants are limiting their analysis to that issue. The Municipal Defendants are not addressing the location of other types of data on the City of Racine's computer systems, or the

active and accessible on the City's computer network from at least June 2009 to the present (the "City's Active Data"). (Stippich Decl., ¶ 6; Eubanks Decl., ¶ 3). Thus, the time frame at issue for this dispute relates to data from between January 1, 2006 (the Plaintiffs' defined start time for electronically stored information) and June 2009.

The City's Active Data is in part located on and managed by the Datacove archive system, which appears to have been put in service sometime in January 2009. (Eubanks Decl., ¶ 3). Active information on the Datacove system is periodically transferred to backup tapes if the system determines that it needs more memory in the active storage space. (*Id.*, ¶ 5). The data transferred is typically the oldest data on the system. (*Id.*). The transfer process is done automatically by the Datacove, which determines how much data to transfer to the backup tapes. (*Id.*). Accordingly, the City of Racine does not know how much data was transferred, or for which time periods the data that was transferred relates. (*Id.*). The City is currently in possession of twenty-two (22) backup tapes from the Datacove system (the "Datacove Backup Tapes"), which are believed to be 160GB random access, in a compressed format and not encrypted. (*Id.*; Stippich Decl., ¶ 7).

The Datacove Backup Tapes are only accessible through Datacove's proprietary hardware. (Eubanks Decl., ¶ 6). Because the City of Racine does not know what data is located on the Datacove Backup Tapes, it may have upload all information on all the tapes to determine what data actually exists. (*Id.*). The City of Racine fears that uploading all of this data would fill the system's capacity, compromise the stability of the system and jeopardize its e-mail data. (*Id.*). Thus, the restoration of these tapes would require setting up a parallel system to upload the tapes. *(Id.).*

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search of electronically stored information on the individual Municipal Defendant's personal devices (which is still on-going).

The City of Racine has never accessed the information on any of the Datacove Backup Tapes and does not know whether it contains any legacy data from before the 2009 conversion. (*Id.*, ¶ 5). Thus, it is not known whether the Datacove Backup Tapes contain any information from before January 2009. (*Id.*).

E-mail data from before June 2009 may also be located on eight DLT-4 tapes created with BackupExec on or about January 10, 2009 (the "DLT Backup Tapes"). (*Id.*, ¶ 7). The DLT Backup Tapes are believed to contain data from the City's old system before the conversion to Datacove. (*Id.*). The DLT Backup Tapes were being stored in a cemetery and were only retrieved for purposes of this litigation. (*Id.*). These tapes have never been accessed by anyone currently with the City of Racine, and were intended for true disaster recovery. (*Id.*).

The Municipal Defendants' consultant estimates that it would cost between $23,455 and $40,605 to restore the e-mail data on the Datacove Tapes and the DLT Backup Tapes (collectively, the "Backup Tapes").[12] (Stippich Decl., ¶ 9). This amount does not include the time for any further review of the data sets for privilege or confidentiality.

C. Application of Search Terms to the City's Active Data.

After exchanging a series of communications over the course of two months, on December 23, 2014, the parties reached an agreement regarding the protocol for the production of the City of Racine's electronically stored information. (Stuart Decl., ¶ 9, Ex. D, ¶ 10, Ex. E.) While the Municipal Defendants objected to the Plaintiffs' discovery as overly-broad, unduly burdensome and seeking irrelevant information, they agreed to collect e-mail and file data from

[12] The Plaintiffs gratuitously removed $4,355 from the total cost of the restoration on the basis that the Municipal Defendants have already absorbed that cost. (Plaintiffs' Br., at 4). That amount was incurred by the Municipal Defendants to catalogue the tapes to identify a potential set of pre-2009 data. (Stippich Decl., ¶ 9). Those efforts reduced the restoration efforts from a universe of sixty-seven (67) DLT-4 Tapes to potential universe of eight (8) tapes. (*Id.*). If the Court determines that the DLT Backup Tapes must be restored, the Municipal Defendants believe the entire cost (or at least 75% of the total costs pursuant to the Municipal Defendants' proposal) of that restoration should be shifted to the Plaintiffs.

thirty-six (36) custodians, including the eight (8) individual defendants, thirteen (13) alderpersons, seven (7) police officers, and seven (7) other city employees. (Stuart Decl., ¶ 9, Ex. D). Further, the City of Racine agreed to apply the Plaintiffs' requested 270 search terms (in various configurations and syntax) against the City's Active Data. (*Id.*).

In late December 2014, the Municipal Defendants applied the Plaintiffs' search strings against the City's Active ESI. (Stippich Decl., ¶ 11). In total, 3,165,391 items were searched yielding 125,115 unique "parents" and 220,584 total "family members". (*Id.*).

On January 8, 2015, the parties held an in-person "meet and confer" and the Municipal Defendants' counsel informed Plaintiffs' counsel of the search results and that processing of the data had begun and with a targeted production date on or before January 27, 2015. (Stuart Decl., ¶ 12). On January 9, 2015, the Plaintiffs requested that the Municipal Defendants provide a search string "hits" chart for purposes of possibly reducing the search terms. (Stuart Decl., ¶ 13, Ex. G). In doing so, the Plaintiffs "recognize[d] it may cause a delay in processing." (*Id.*)

On January 12, 2015, the Municipal Defendants provided the Plaintiffs with two charts summarizing the "hits" from the search strings. (Stuart Decl., ¶ 14, Ex. H). The first chart showed the total "hits" from each search, while the second chart was the Search Term Report showing the number of "hits" for each search term. (*Id.*). Thereafter, on January 13, 2015, the Plaintiffs agreed to eliminate certain terms in their requested search strings. (*Id.* ¶ 15, Ex. I.)

To date, the City of Racine has produced 435,818 pages of documents and 74 gigabytes of data. (Stippich Decl., ¶ 6). The Municipal Defendants have also incurred $123,913 in total costs in connection with the gathering, analysis and production to respond to Plaintiffs' discovery in this case, without consideration of attorney or paralegal time to search for and review those documents for privilege and confidential information. (*Id.*, ¶ 10).

D. Meet and Confer on the Backup Tapes.

The parties have been engaged in discussions about the Datacove Backup Tapes since November 2014. (Stuart Decl., ¶ 8, Ex. C). From the outset, the Municipal Defendants have made clear that this data was not reasonably accessible and that any costs associated with the recovery and processing of the data would have to be paid by the Plaintiffs. (*Id.* ¶ 16, Ex. J).

Prior to the January 8, 2015 meet and confer, the Municipal Defendants provided the Plaintiffs with a chart detailing the costs of obtaining the backup tape data. (*Id.* ¶ 11, Ex. F). At the meet and confer, the Plaintiffs informed the Municipal Defendants that they would submit a proposal for a cost sharing. (*Id.* ¶ 12). The Plaintiffs thereafter requested additional information about the Backup Tapes, which the Municipal Defendants answered on January 12, 2015 and January 21, 2015. (*Id*. ¶ 14, Ex. H, ¶ 17, Ex. K).

The Plaintiffs, however, never offered any cost sharing proposal. Instead, the afternoon before their filing, Plaintiffs' counsel advised the Municipal Defendants they were filing a motion to compel. (*Id.* ¶ 18, Ex. L). The Municipal Defendants attempted to resolve the issue by offering to pay 25% of the costs associated with the restoration, but the Plaintiffs summarily rejected that proposal. (*Id.*).

Despite the fact that the Plaintiffs had all of the information to address this issue as of January 21, 2015, they waited until February 17, 2015—the night of the primary election—to file their motion.

LEGAL STANDARDS

"District courts have broad discretion in matters relating to discovery." *See Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002). When considering discovery disputes, a court should "consider the totality of the circumstances, weighing the value of the material

sought against the burden of providing it [while] taking into account society's interest in furthering the truth-seeking function in the particular case before the court." *Brunker v. Schwan's Home Serv., Inc.*, 583 F.3d 1004, 1010 (7th Cir. 2009) (internal quotation marks omitted). Applying this standard, a court should independently decide a motion to compel discovery based on the arguments of the parties. *Gile v. United Airlines, Inc.*, 95 F.3d 492, 495–96 (7th Cir. 1996).

Federal Rule of Civil Procedure 26(b)(1) allows a party to discover "any nonprivileged matter that is relevant to any party's claim or defense". FED. R. CIV. P. 26(b)(1). Although broad in scope, the reach of Rule 26(b)(1) is not unlimited: "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." FED. R. CIV. P. 26(b)(2)(B). The responding party has the burden to show that the source containing the ESI is not reasonably accessible. *Id.* Once the responding party carries its burden, the court may order the production of the ESI only if the requesting party shows good cause to do so. *Id.* If a court orders production of the electronically stored information, it must limit the production of that information as required by Rule 26(b)(2)(C). *Id.*

Once Rule 26(b)(2)(C) is satisfied, a court has broad discretion "to fashion a ruling appropriate for the circumstances of the case". *See Gile*, 95 F.3d at 495–96. Such a ruling may include an order that the production of the requested information is unnecessary or an order that shifts the cost of producing the requested information to the requesting party. *Id.* (court's authority to fashion ruling in context of motion to compel is "similar to ruling on a protective

order under Rule 26(c)"); *cf. Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (explaining authority to shift discovery costs under Rule 26(c)).[13]

ARGUMENT

I. THE PLAINTIFFS ARE NOT ENTITLED TO THE RESTORATION OF ANY INFORMATION ON THE BACKUP TAPES.

A. The Information on the Backup Tapes is not "Reasonably Accessible" under Rule 26(b)(2)(B).

1. The Tapes are Technologically Inaccessible.

"Courts generally agree that backup tapes are presumptively inaccessible." *Kleen Prods. LLC v. Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 44984465, at *17 (N.D. Ill. Sept. 28, 2012). Here, the Datacove Backup Tapes and DLT Backup Tapes—which can only be characterized as "backup tapes" under any reasonable definition of that term—are both entitled to this presumption of inaccessibility.

The Plaintiffs argue that these tapes are more appropriately characterized as reasonably accessible "offline storage/archive" data under the analysis of *Zubulake v. UBS Warburg LLC (Zubulake I)*, UBS, 217 F.R.D. 309 (S.D.N.Y 2003). (Plaintiffs' Br., at 7–11). This argument distorts the facts of this case and is entirely without merit. The Plaintiffs have not cited a single case in the Seventh Circuit which ever applied the distinction between a "backup tape" and "offline storage/archive" data. The 7th Circuit Electronic Discovery Committee Principles Relating to the Discovery of Electronically Stored Information (the "Committee Principles")

[13] One district court in the Eastern District of Wisconsin indicated that a request for cost-shifting by a responding party must be made through a motion for protective order under Rule 26(c). *See Hagemeyer N. Am. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 599 n.7 (E.D. Wis. 2004) ("Although [the responding party] did not properly file a motion for a protective order under Rule 26(c) of the Federal Rules of Civil Procedure, it affirmatively argued for cost-shifting in its response brief to [the] motion to compel. For purposes of deciding this motion, the Court will regard [the responding party's] arguments concerning cost-shifting as though they were included in a brief accompanying a properly filed motion."). While the Municipal Defendants believe the Court has the authority to shift costs under Rule 26(b)(2)(C)(iii) without an affirmative motion for protective order, they have filed a motion for protective order simultaneously with the response to the motion to compel out of an abundance of caution.

does not draw this distinction and, in fact, appears inconsistent with the Plaintiffs' argument. *See* Seventh Circuit Electronic Discovery Committee, Principles Relating to the Discovery of Electronically Stored Information, Principle 2.04(d)(2) (8/1/2010), *available at* http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf. While the Plaintiffs argue that electronically stored information stored on random access memory devices would be deemed per se discoverable as "reasonably accessible" data, (Plaintiffs' Br., 10), the Committee Principles indicate that such devices are "not discoverable". *Id.* Thus, the Plaintiffs' rigorous application of the *Zubulake* case should be rejected.

Even if the *Zubulake* characterization applied as the Plaintiffs' argue, the Backup Tapes would satisfy the definition of an inaccessible "backup tape" under that case. A "backup tape" under *Zubulake* is a sequential-access device that employs some sort of data compression. *Zubulake I*, 217 F.R.D. at 319. Here, the Datacove Backup Tapes employ data compression, and the DLT Backup Tapes are sequentially-accessed and employ data compression. Thus, they would constitute "backup tapes" under the technological definitions in the *Zubulake* case, and are thus not reasonably accessible under Rule 26(b)(2)(B).[14]

2. The Backup Tapes are Inaccessible Due to Undue Burden and Cost.

The Plaintiffs' attempt to belittle the $23,455–$40,605 cost to restore the Backup Tapes[15] ignores the totality of the Municipal Defendants' production. To date the Municipal Defendants have already produced a substantial amount of electronic data documents at an approximate cost of $123,913, without ever considering attorney and paralegal time. (Stippich Decl., ¶ 10). The Court should resolve discovery motions based on "the totality of the circumstances, weighing the

[14] Plaintiffs argue that *Zubulake* factors include whether the tapes are "continuously recycled", but that factor does not appear anywhere in the decision and should be ignored. (Plaintiffs' Br., at 8-9).
[15] The estimated range of costs does not include the additional time and expense of reviewing the data for privilege or confidentiality.

value of the material sought against the burden of providing it". *Mirbeau of Geneva Lake LLC v. City of Lake Geneva*, No. 08-CV-693, 2009 WL 3347101, at *1 (E.D. Wis. Oct. 15, 2009) (internal quotation marks omitted). Here, any further expense for the restoration is an undue burden and cost under the totality of those circumstances.

Other cases addressing similar issues have found the same cost ranges to be an undue burden and cost, justifying a limitation on the discovery. *See, e.g., Rodriguez-Torres v Gov't Dev. Bank of Puerto Rico*, 265 F.R.D. 40, 44 (D. P.R. 2010) (concluding in an employment discrimination case that $35,000 was "too high of a cost for the production of the requested ESI"); *Byers v. Ill. State Police*, No. 99 C 8105, 2002 WL 1264004, at *11 (N.D. Ill. June 3, 2002) (concluding that cost of $20,000 to $30,000 would impose "significant financial burden on the defendants"). Here, the same burdens apply and should preclude the restoration of the Backup Tapes at the Municipal Defendants' sole cost.

B. The Plaintiffs Have Not Established Good Cause to Require the Restoration of the Backup Tapes.

If electronic information is not reasonably accessible, the Court may only order its production upon a showing of "good cause." FED. R. CIV. P. 26(b)(2)(B). The burden of establishing "good cause" is on the requesting party. *Id.* To demonstrate "good cause" under Rule 26(b)(2)(B), the requesting party must establish that the burden and costs of obtaining the electronically stored information is "justified in the circumstances of the case." *See Thermal Design, Inc. v. Guardian Bldg. Prods.*, No. 08-C-828, 2011 WL 1527025, at *1 (E.D. Wis. April 20, 2011) (internal quotation marks omitted). To make this determination, courts may consider:

> (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from

> other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

FED. R. CIV. P. 26, Advisory Committee Notes (2006 Amendment).

Here, the Plaintiffs have not established any basis to find "good cause" under Rule 26(b)(2)(B).

1. The Plaintiffs Have Not Provided any Evidence to Support a Finding of "Good Cause".

To establish "good cause" a party must present "a particular and specific demonstration of fact [and may not rely on] stereotyped and conclusory statements." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (explaining policies of Federal Rules of Civil Procedure require determinations based on a "clear record and specific findings"); *see also General Elec. Co. v. Wilkins*, No 1:10-CV-00674, 2012 WL 570048, at *6 (E.D. Cal. Feb. 21, 2012) (finding that the plaintiff lacked concrete evidence or an articulable basis in support of production).

Here, the Plaintiffs have not offered any "particular and specific" facts to support any "good cause" showing. The Plaintiffs' only basis upon which they seek the restoration of the Backup Tapes is their own unsubstantiated, self-serving statement that they "expect to find a similar number of racist and conspiratorial terms in e-mails generated by the Municipal Defendants on the archive tapes at issue." (Plaintiffs' Br., at 6). As established above, among other things, plaintiffs have grossly mischaracterized the ""hits" on racially derogatory terms and relied on improperly inflammatory testimony of a well-known political activitist against Mayor Dickert and campaign emails that predate and have nothing to do with the data that may be contained on the backup tapes at issue. The Plaintiffs' "expectations" are not enough to establish "good cause" under Rule 26(b)(2)(B).

The Plaintiffs have alleged claims under 42 U.S.C § 1983 and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). As for the § 1983 claim, the Plaintiffs have not offered a single e-mail from the City of Racine's computer system where any Municipal Defendant used any offensive term in a racially derogatory manner. Instead, they rely solely on the "hits" from the Search Term Report which, without context and review, is completely meaningless. Thus, the Plaintiffs have not put forth any evidence showing that the restoration of the Backup Tapes will in any way support their § 1983 claim.

Similarly, the Plaintiffs have not established "good cause" to restore the Backup Tapes for the RICO claims. The Plaintiffs allegations state that the first predicate act for the RICO claims—the bribery of Mayor Dickert—did not occur ***until early 2009.***[16] (Pls.' Corrected Am. Compl., ECF No. 62, ¶¶ 230, 240–241.) Yet, Mayor Dickert did not become Mayor until May 19, 2009. (Dickert Decl., ¶ 2; *see also id.* ¶ 241). Thus, the DLT Backup Tapes (which only cover the time period before January 2009) have absolutely no potentially relevant information as to this claim. The City's Active Data contains e-mails as early as June 2009. Accordingly, the Datacove Backup Tapes would (at best) only cover a small gap between May 15, 2009 and June 2009. But, the Plaintiffs have not made any showing that there would be any evidence connected to the RICO claims in that small period of time.

In sum, the Plaintiffs have failed to make provide any "particular and specific" facts that would support the restoration of the Backup Tapes.

[16] Plaintiffs' contention that they "alleged a wide-reaching conspiracy beginning in 2006", (Plaintiffs' Br., at 6), is not consistent with their pleadings. Plaintiffs' Civil Rights Conspiracy claim was dismissed (Dkt# 93 at 18-19) and the first predicate act of their alleged RICO conspiracy did not take place until 2009. (Amended Complaint, Dkt # 62, ¶ 245).

2. The Rule 26(b)(2)(B) Factors Do Not Support a Finding of "Good Cause".

The "court should not treat the 'good cause' factors as a checklist and determine which party has the most checks." *Major Tours Inc. v. Colorel*, Civil No. 05-3091, 2009 WL 3446761, at *4 (D. N.J. Oct. 20, 2009). Rather "[t]he factors should be weighed by importance." *Id.*

Here, the fourth and fifth factors are the most important factors for resolving this issue. The Plaintiffs have made no showing under the fourth or fifth factors that the Backup Tapes contain any relevant information or have any likelihood of generating important or useful information in this case. Instead, the Plaintiffs merely assert that "[i]t is likely that e-mails sent or received by the Municipal Defendants during that time period constitute important relevant evidence", (Plaintiffs' Br., at 12), on the basis of unsubstantiated assumptions as to what is contained in the "hits" on the City's Active Data (not what is actually there). At the time they filed their motion, the Plaintiffs were not in possession of the search results from the City's Active Data and had no idea if any relevant information was generated from the searches. Under these circumstances, it is appropriate for the Court to require the Plaintiffs to review that information before seeking the restoration of Backup Tapes. *See* FED. R. CIV. P. 26, Advisory Committee Notes (2006 Amendment) ("In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible."); *see also Kleen Prods. LLC*, 2012 WL 4498465, at *18. Instead, after not communicating with the Municipal Defendants on the issue for almost a month and not presenting a cost-sharing proposal as promised, Plaintiffs' propounded to file their motion on the night of the primary election and immediately turned to the media with their "evidence" of racism. *See, e.g.*, http://fox6now.com/2015/02/19/racist-offensive-words-found-hundreds-of-times-on-computers-owned-by-the-city-of-racine-since-2009/ .

As to the second factor regarding the availability of other information, the City of Racine has provided a substantial amount of information for the time period before June 2009. The City of Racine provided thousands of pages of licensing and renewal materials, police reports, bar history reports, and some agendas and minutes (with more to come). Yet, the Plaintiffs offer no explanation on why this data is not sufficient discovery to pursue their claims. Similarly, as to the first factor, the application of 270 search terms to a data sets of thirty-six (36) different custodians generating a search set of 3,165,391 items hardly represents a "narrowly tailor[ed]" discovery request. There is no basis to justify repeating that exercise against a data set that is expected to be of a similar size, if not larger, without some proper relevancy (which the Plaintiffs have clearly not established).

The sixth factor relating to the "importance of the issues at stake in the litigation" is similarly unhelpful to the Plaintiffs. As stated herein, the Backup Tapes have no bearing on the RICO claims, and § 1983 discrimination claims have been described as fairly commonplace. *See Zubulake v. USB Warburg LLC (Zubulake III)*, 216 F.R.D. 280, 289 (S.D. N.Y. 2003) ("claims of discrimination are common"). As for the seventh factor relating to the parties' respective resources, case law recognizes that the type of legal counsel can be indicative of a party's resources. *Id.* at 288 (explaining that counsel may "front huge expenses" when they believe recovery is in sight). Here, the Plaintiffs are represented by two law firms, including a large national law firm with one of its many offices located in Chicago, (*see* http://www.smsm.com/), and no less than nine (9) attorneys have made appearances on behalf of the Plaintiffs. From the way they have conducted this litigation and the firms retained, is clear that the Plaintiffs have adequate resources.

Because these factors do not support a finding of good cause, the Municipal Defendants respectfully request that the Court deny the Plaintiffs' motion to compel the restoration of the Backup Tapes altogether and allow the parties to move forward with the expedited discovery.

II. ANY COST ASSOCIATED WITH RESTORATION OF THE BACKUP TAPES SHOULD BE SHIFTED TO THE PLAINTIFFS.

A party responding to discovery may ask the court to protect it from "undue burden or expense" by shifting the costs of such discovery to the requesting party. *Zubulake I*, 217 F.R.D. at 317. Courts frequently impose cost shifting in the context of data from archival sources or backup tapes. *See, e.g., Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 577 (N.D. Ill. 2004); *Rowe Entm't v. William Morris Agency*, 205 F.R.D. 421, 432–33 (S.D. N.Y. 2002).

Courts within the Seventh Circuit have used an eight-factor test to determine when it is appropriate to shift costs for the production of electronically stored information from inaccessible data. The eight-factor test addresses: (1) the likelihood of discovering critical information; (2) the availability of such information from other sources; (3) the amount in controversy compared to the total cost of production; (4) the parties' resources as compared to the total cost of production; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; (7) the importance of the requested discovery in resolving the issues at stake in the litigation; and (8) the relative benefits to the parties of obtaining the information. *Wiginton*, 229 F.R.D. at 573. While courts are guided by these factors, the "proportionality test set forth in Rule 26(b)(2)[C](iii) must shape the test." *Id.*

Applying these factors, it is clear that all costs associated with the restoration of the Backup Tapes (or at least 75% of such costs pursuant to the Municipal Defendants' proposal) should be allocated to the Plaintiffs. Both the first and second factors weigh in favor of cost

shifting. As to the availability of information from other sources, the City of Racine has already produced numerous documents for the time periods allegedly covered by the Backup Tapes. Under these circumstances, cost shifting is appropriate. *Id.* at 574 ("If the information is available from another source, the marginal utility from the e-discovery is low, and would support cost-shifting."). Moreover, there has been no showing that any of the information on the Backup Tapes will be relevant to this case, which again justifies the shifting any costs associated with the restoration of those tapes to the Plaintiffs. *See Byers*, 2002 WL 1264004, at *12.

The third factor—the cost of the production compared to the amount in controversy—does not support the Plaintiffs either. The Plaintiffs state without any support that "the amount in controversy greatly exceeds the estimated cost of production". (Plaintiffs' Br. 15).[17] Yet, case law confirms that a cost of $20,000 to $30,000 is sufficient to justify shifting those costs to the requesting party. *See id.* at *11 (concluding that cost of $20,000 to $30,000 would impose "significant financial burden on the defendants"). Here, since the amount at issue is close to the amount at issue in the *Byers* case, the same outcome is warranted; namely the allocation of the restoration costs to the Plaintiffs.

As to the cost of the production compared to the resources available to each party as set forth in the fourth factor, the proper inquiry is whether both parties "have sufficient resources to conduct this litigation." *Rowe Entm't*, 205 F.R.D. at 432. Here, there is no doubt that the Plaintiffs have sufficient resources. They are represented by two law firms with at least nine (9) attorneys appearing on their behalf. They have conducted extensive discovery requesting voluminous document and ESI discovery, at least twenty-nine (29) depositions, and have served subpoenas for production of documents on nine (9) different entities. (Stuart Decl., ¶ 3). And, if

[17] Plaintiffs' statement that this case "has the potential for a multi-million dollar recovery" (Plantiffs' Br., at 10) is also completely unsupported and should be disregarded.

a search of the Backup Tapes results in the volume of data similar to what was produced from the City's Active Data, Plaintiffs' counsel will have to spend a considerable amount of time reviewing that production. As courts within the Seventh Circuit have recognized, "Plaintiffs' counsel . . . obviously has been willing to front substantial amounts of money, and probably could contribute to these discovery costs." *Wiginton*, 229 F.R.D. at 576. Moreover, contrary to Plaintiffs' comparisons to "wealthy organizations," (Plaintiffs' Br., 13), the Municipal Defendants include a municipality that does not have limitless insurance coverage or resources and is dependent on its tax base for revenue, a mayor who makes a modest salary, and alderman and BID board members who are not paid for their work.

The fifth factor supports an allocation of costs to the Plaintiffs. Case law recognizes that "the requesting party should have an incentive for limiting its requests". *Wiginton*, 229 F.R.D. at 576. With the exception of this motion, the Plaintiffs have demonstrated relatively little regard or incentive to control costs in this case. As detailed above, the Plaintiffs have engaged in "scorched-earth" discovery, which is precisely the situation which favor cost shifting. *See Rowe Entm't*, 205 F.R.D. at 432; *McPeek v. Ashcroft*, 202 F.R.D. 31, 33–34 (D.D.C. 2001) (requiring the producing party to pay all costs is a disincentive for requesting party to narrow its demands).

As to the sixth factor, the importance of the issues at stake in this litigation do not justify imposing the costs of restoration on the Municipal Defendants. Again, the Backup Tapes have no bearing on the RICO claims, and discrimination claims are fairly commonplace. *See Zubulake III*, 216 FRD at 289 ("claims of discrimination are common").

For purposes of the seventh factor, the Plaintiffs argue that the information on the Backup Tapes is essential to their proof of the RICO claims. (Plaintiffs' Br., at 16). As already explained, the DLT Backup Tapes will not have any information related to the RICO claims

because of the date of the alleged first predicate act, and there is only a small chance that the Datacove Tapes will have any meaningful information relating to those claims.

The eighth and final factor supports shifting the cost of production to the Plaintiffs since there has been no proper showing that any information from the Backup Tapes will have any benefit on the Plaintiffs' case. *Zubulake I*, 217 F.R.D. at 323–24. Clearly, all of these factors support the shifting of costs (or at least 75% of the total costs pursuant to the Municipal Defendants' proposal) for the restoration of the Backup Tapes to the Plaintiffs.

CONCLUSION

For all of the above-reasons, the Municipal Defendants hereby request that the Court deny the Plaintiffs motion to compel the restoration of the Backup Tapes or, in the alternative, order that the entire costs (or at least 75% of the total costs pursuant to the Municipal Defendants' proposal) of such restoration be allocated to the Plaintiffs.

Dated this 23rd day of February 2015.

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