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Relevancy Redactions: Appropriate In Some Cases, Court Finds

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In recent years, a number of news stories have chronicled how lawyers have run into trouble with redactions. The process and technology for handling redactions can complicate discovery efforts, leading to increased time and expense. But the need to apply redactions and safeguard the underlying information is often significant, especially to ensure that the privilege or confidentiality of client materials are sufficiently protected.

A related, but less frequently discussed, issue with redactions is the question of relevancy redactions. While redaction of information that is privileged or otherwise protected is generally accepted as standard operating procedure by courts, regulatory agencies, and counsel, redaction of irrelevant information from otherwise relevant produced documents may not be.

Indeed, although the Federal Rules of Civil Procedure clearly exclude irrelevant information from the permissible scope of discovery, courts still may disallow such relevancy redactions.

A recent decision helps move the law forward on the issue of relevancy redactions, finding that such redactions may be appropriate in some circumstances and providing much-needed guidance on a topic that has prompted many disagreements and motion practice.

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'Kaiser v. US Mag'

In *Kaiser Aluminum Warrick, LLC v. US Magnesium LLC*, 2023 WL 2482933 (S.D.N.Y. Feb. 27, 2023), plaintiff Kaiser sued defendant US Mag for failing to fulfill a contract to supply magnesium. The defendant, citing unexpected equipment failures, relied on the defense of force majeure.

During discovery, the defendant produced some otherwise responsive documents with redactions for relevance, and the plaintiff objected. Plaintiff Kaiser moved the court to require defendant US Mag to reproduce these documents in unredacted form, "arguing that redactions for relevance are disfavored when there is a protective order in place, as one is here." *Id.* at *1. US Mag responded that the redacted information was "irrelevant and competitively sensitive, and therefore, it should not be required to reproduce in unredacted form." *Id.*

In its analysis considering the plaintiff's motion, the court first looked to Federal Rule of Civil Procedure 26(b)(1), which governs the scope of discovery. It noted that under the rule, the permissible scope of discovery includes "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." *Id.* Thus, if "documents contain irrelevant information,

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such information falls outside of the scope of information that is discoverable under the express language of the rule." *Id.*

Even so, when the court looked to case law on relevancy redactions, it found that "courts [generally] have disallowed relevancy redactions from otherwise responsive documents[.]" *Id.*

To justify their decisions, those courts reasoned that: "1) a party should not be permitted to determine whether portions of a document being produced are irrelevant; 2) relevance redactions may eliminate context needed for an adversary to understand the unredacted portions of a document; 3) where a stipulated protective order is in place, the producing party's information is protected; and 4) redactions take time and are expensive and therefore inconsistent with Rule 1's mandate that cases be administered so as to promote a 'just, speedy, and inexpensive' resolution of the case." *Id.* (citations omitted).


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'Relevancy Redactions Can Be Appropriate'

The court here went in a different direction. It found that "[a]lthough many courts do not permit relevancy redactions, this Court believes relevancy redactions can be appropriate in some cases." *Id.* at *2.

The Court first addressed the issue raised by some courts that parties should not be allowed to determine the relevance of portions of otherwise responsive documents. "[S]tandard discovery protocol," noted the court, is that "[e]very party reviews its own documents for relevance and responsiveness and then produces, subject to objections." *Id.* And, under Federal Rule of Civil Procedure 26(g), attorneys must "sign discovery responses certifying that they have made a reasonable inquiry for responsive and relevant documents and that they have fulfilled their production obligations[.]"

Additionally, these Rule 26(g) attorney certifications are "representations that the producing party has acted consistent with the rules and not made objections for any improper purpose." Noting how such certifications apply to "the entirety of a party's discovery responses[,]" the court determined "[t]here is no reason that this Court can discern to find that a party is less able to make good faith relevance determinations as to portions of documents than as to whole documents." *Id.*

Next, the court addressed the argument that the time and expense involved with relevancy redactions are inconsistent with Federal Rule of Civil Procedure 1. On this, it countered, "If a party wishes to undertake the expense voluntarily and it can do so in a timely manner without impacting the discovery schedule set by the Court or prejudicing the other party, then such redactions are consistent with Rule 26(b)(3) and Rule 1." *Id.*

Turning to whether such redactions may deprive the receiving part of necessary context or even "breed suspicions," the court stated that this "need not be so[.]" This can be avoided if the party conducting redactions is "clear about the reason for the redactions and . . . conservative in the amount of redactions." *Id.*

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And lastly, the court addressed the argument that a protective order eliminates the need for relevancy redactions. The court drew a distinction between such an order, which "can help allay concerns that a producing party's confidential information will not be shared outside of the litigation[,]" and other concerns about turning over "irrelevant and confidential information to an adversary[,]" finding that if "redactions can avoid this result, a party should not necessarily be denied the opportunity to redact if redacting would not otherwise prejudice the other side or delay the case." *Id.*

One additional step was found by the court to be important as part of the relevancy redaction process—seeking advance per-

mission. Citing the concern that relevancy redactions could lead to motion practice and, thus, additional delays and costs at odds with Rule 1, the court wrote that "[m]otion practice could be minimized, however, if a producing party discusses its desire to make such redactions with its adversary *in advance* of its production and *seeks advance permission from the Court* to make them." *Id.*

The Court concluded that "relevancy redactions must be evaluated on a case-by-case basis" and found that "[w]here such redactions are consistent with Rule 1 and Rule 26 and do not deprive the other party of context, they may be appropriate. However, a party should request permission to make such redactions in advance of a production." *Id.*

The Plaintiff's Request

Applying its analysis, the court then discussed plaintiff Kaiser's request that US Mag reproduce documents without relevancy redactions. Having conducted an in camera review, the court noted that the documents "consist of monthly reports containing detailed financial information, results of research on competitors in the market, and reports on segments of the business unrelated to magnesium operations (such as information about its lithium plant and production). They also contain information about magnesium production." *Id.* at *1.

While defendant US Mag had not sought permission to make the relevancy redactions, "this Court already resolved discovery disputes in US Mag's favor concerning production of information about its Lithium plant and finances, holding this information to be irrelevant to the force majeure defense and not proportional to the needs of the case." *Id.* at *2.

Thus, not allowing the defendant to redact such information "runs contrary to this Court's prior rulings on discoverability of this information." *Id.*

That said, the court took issue with the extent of the defendant's redactions, stating "[h]ad US Mag sought permission before redacting, the court would have advised it to redact in a different manner than it did." *Id.*

As an example, the court noted the defendant's use of "block redactions" of financial tables and its redaction of titles of graphs. And in stating that the defendant should not have redacted column and row descriptions in tables, the court wrote that with this information removed, "Kaiser was unable to appreciate what was redacted," including the redaction of relevant information on magnesium production to which it was entitled. *Id.* at *3.

In sum, under existing precedent, the court had the authority to order the defendant to reproduce the documents in their entirety in unredacted form, especially in light of the protective order in place.

But such a ruling would have been inconsistent with the court's prior determination that the plaintiff was "not entitled to all the redacted information[.]" *Id.*

In finding that relevancy redactions may be appropriate in some cases, Judge Parker hews closely to the rights and obligations of parties under the Federal Rules of Civil Procedure, while providing guardrails to promote cooperative discovery.

Thus, the court granted and denied the plaintiff's motion in part, holding that the defendant "need not reproduce the documents in fully unredacted form. However,… it will be required to unredact certain information relevant to magnesium production as well as column headers/row descriptors and graph titles to increase transparency as to the nature of the redactions." *Id.* at *1. The Court concluded by requiring the parties to seek permission for any subsequent redactions. *See id.* at *3.

Conclusion

As we have observed in some prior articles in this space, Judge Katharine Parker of the Southern District of New York has become a prominent voice in discovery law, offering a series of decisions that have provided courts and practitioners alike with critically important guidance in navigating challenging discovery topics.

Her decision in *Kaiser v. US Mag* is no exception, taking a fresh look at a problematic issue in discovery—the propriety of relevancy redactions—and providing guidance that may help the evolution of both law and practice on the issue.

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