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Unless Manifestly Unreasonable, Courts Defer to Responding Party's Custodian Designations

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It has become a matter of course in e-discovery to target for collection the electronically stored information (ESI) of individuals or groups likely to have potentially relevant information. And even though requesting and responding parties generally work to balance discovery obligations and protections through the meet-and-confer process, which "custodians" to include in the scope of discovery is often a point of contention.

While such disputes may be common, published decisions on motions to compel designation of additional custodians are not. Bucking this trend, two recent cases provide helpful authority on this topic, with both demonstrating that courts will defer to the custodian designations made by the responding party unless the requesting party can show them to be manifestly unreasonable.

'SF v. AIC'—Motion Denied

In *Servicios Funerarios GG v. Advent International*, 2023 WL 7332836 (D. Mass. Nov. 7, 2023), plaintiff Servicios Funerarios (SF) alleged that defendant Advent International Corporation (AIC) fraudulently induced it to purchase a funeral services company by misrepresenting the company's financial condition. During discovery, the parties conferred on proposed custodians, reaching

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an impasse as to three executives that AIC refused to include. As a result, SF filed a motion to compel requesting that the court order AIC to search the ESI of these disputed custodians.

The court began its analysis by underscoring the lack of precedent on this topic, noting "[r]elatively little legal authority exists on the standards a court should apply when parties are unable to agree on designated ESI custodians and a party seeks to compel another party to designate an additional ESI custodian or custodians."

However, other courts have set some "general principles when ruling on a party's request to compel designation of ESI custodians," including that "absent agreement among the parties, the party who will be responding to discovery requests is entitled to select the custodians it deems most likely to possess responsive information and to search the files of those individuals" and that "unless the party's choice is manifestly unreasonable or the requesting party demonstrates that the resulting

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production is deficient, the court should not dictate the designation of ESI custodians."

Highlighting the deference to responding parties in such situations, the court added that "the party seeking to compel the designation of a particular ESI custodian bears the burden of demonstrating that the additional requested custodian would provide *unique* relevant information not already obtained," explaining that "this is because the party responding to the discovery requests is typically in the best position to know and identify those individuals within its organization likely to have information relevant to the case."

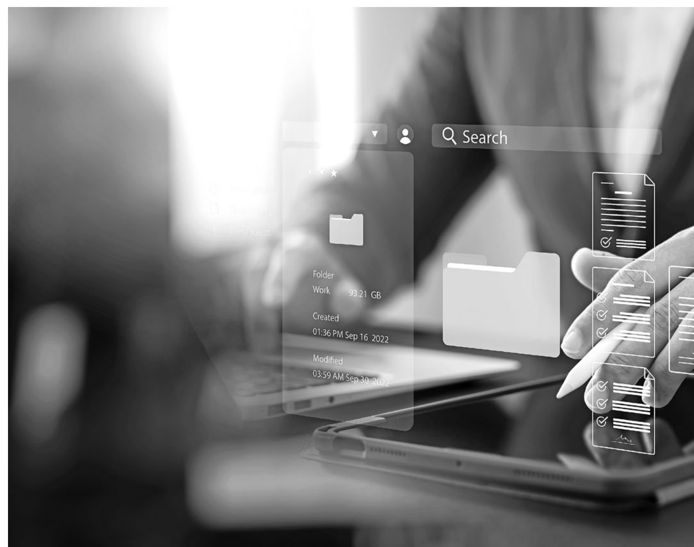
While AIC did not challenge whether the three disputed custodians might have relevant ESI, it argued that any such ESI would likely be duplicative of data already being produced from the designated custodians. SF countered by claiming that AIC's representations were without support and, thus, "speculative."

The court disagreed with SF, noting that "AIC is in the best position to know and identify appropriate custodians and it is SF who bears the burden of showing that the additional requested custodians are in the possession of 'uniquely relevant information.' . . . SF has not met its burden." Based on this, the court denied SF's motion to compel AIC to search the documents of the disputed custodians.

'LifeScan v. Smith'— Motion Granted

In *LifeScan v. Smith*, 2023 WL 7089662 (D. N.J. Oct. 11, 2023), a retired judge serving as special master for discovery addressed a motion similar to that in *SF v. AIC*, though under rather different circumstances. In this coordinated lawsuit, the plaintiffs, manufacturers of diabetic test strips, or DTS, alleged "that a now defunct entity known as Alliance Medical Holdings LLC (Alliance) schemed to sell non-retail DTS to diabetic patients, but were reimbursed by pharmacy benefit managers (PBMs) for sales of retail DTS, substantially profiting from the difference.

Plaintiffs contend that, as retail DTS manufacturers, they reimbursed the PBMs for rebates paid out to pharmacies to Plaintiffs' financial detriment." Additionally, the plaintiffs alleged that defendant Zions Bancorporation ("Zions") had "willingly participated in and effectively funded this wide-ranging scheme."



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Here, Zions sought to compel discovery from plaintiff LifeScan relating to PBMs, moving to designate additional custodians and to compel LifeScan to search the documents of these custodians. In a prior order, the special master had denied an earlier attempt by Zions to add custodians, finding "that Zions had failed to meet its burden to demonstrate LifeScan had designated inadequate custodians and that the Special Master was not in position to second guess that company's choice of custodians."

While AIC did not challenge whether the three disputed custodians might have relevant ESI, it argued that any such ESI would likely be duplicative of data already being produced from the designated custodians.

The special master noted here that "Zions then—and now—contends that LifeScan has produced a dearth of discovery as to communications with PBMs concerning overpayment of rebates arising from the Alliance fraud. The crux of Zions' argument has been that LifeScan designated inappropriate records custodians thereby severely limiting the amount of discovery produced related to PBMs."

LifeScan had represented that it was unaware of any additional custodians who might have had relevant communications with PBMs. As part of its motion, though, Zions was able to include as exhibits certain documents

that LifeScan had produced relating to PBMs. Zions claimed that these documents clearly demonstrated that LifeScan had a "PBM project team" that addressed the very issues in this matter and which consisted of seventeen employees who had not previously been designated as custodians.

Zions argued that these documents demonstrated that LifeScan "must have had extensive communications with PBMs including communications concerning Alliance's business practices. Nevertheless, except for a small number of documents, LifeScan has failed to search for relevant materials in any systematic way." Thus, Zions moved to designate these additional custodians and to compel LifeScan to search their documents.

Reviewing the applicable legal standard, the special master began his analysis by stating, "[w]hen a requesting party is dissatisfied with ESI discovery responses obtained through a custodial search, our courts have placed a noticeably heavy burden on the requesting party to demonstrate that the custodial choices, meaning the individuals or entities whose records were accessed, are deficient or lacking."

Even with such "significant deference" to the responding party, however, "court intervention may be appropriate when it is demonstrated that the choices of those items are 'manifestly unreasonable' or when the requesting party 'demonstrates that the resulting production is deficient.'" The burden falls on the requesting party to "show that the responding party 'either withheld relevant documents or failed to conduct a reasonable search'" as well as to "articulate a basis for a court to find that ESI in the possession of these additional or newly designated custodians would be different from and not simply duplicative of, information that the responding party has already produced."

Here, the special master determined that "Zions has made a convincing argument [of] the existence of the PBM project team" and "a meritorious, cogent argument that there is a legitimate likelihood that some of the newly identified project team members may possess relevant communications relating to PBMs and to Alliance." As such, the special master found "that Zions has made a sufficient showing that LifeScan's previous production is deficient and has articulated a basis for this court to find that there may exist ESI in the possession of additional custodians that is 'unique,' meaning distinctly different from and not simply duplicative of information LifeScan has already produced."

Having found Zions to have met its burden, the special master granted Zions' motion to compel discovery from additional custodians. However, taking "into consideration how time-consuming, costly and burdensome additional discovery would be to LifeScan," the special master limited the additional discovery to eight "core" PBM project team members instead of the full team originally requested.

Even with such "significant deference" to the responding party, however, "court intervention may be appropriate when it is demonstrated that the choices of those items are 'manifestly unreasonable' or when the requesting party 'demonstrates that the resulting production is deficient.'"

A Shared Legal Standard

While the outcomes in *SF* and *LifeScan* differ, the cases outline a shared legal standard, providing helpful direction to both responding and requesting parties on a topic that has suffered from a dearth of precedential authority.

First, absent agreement among the parties, the responding party is typically best situated to know who is likely to have information relevant to the case and thus is entitled to select the custodians most likely to have potentially responsive information. And, second, while courts usually would not have a role in the designation of custodians, court intervention may be appropriate when the requesting party meets its burden to demonstrate that the responding party's custodian choices were manifestly unreasonable or that the resulting production was deficient, and additionally that information from requested new custodians would be relevant and unique—not duplicative of information already obtained.

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