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 (Cite as: 2005 WL 689468 (N.Y.Sup.))

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Supreme Court, Nassau County, New York.  
 Deborah ETZION, Plaintiff,  
 v.  
 Rafael ETZION, Defendant.  
 No. 202179/02.

Feb. 17, 2005.

ELAINE JACKSON STACK, J.

\*1 Plaintiff moved by order to show cause for an order (1) permitting Plaintiff and her **computer** forensic experts to "impound, clone and inspect the **computer servers, hard drives,** individual workstation P.C., **laptops** and other items containing **digital data**" or **electronic data** from the Defendant's residence in Great Neck, New York or any other location where Variety Accessories, Inc. ("Variety") conducts business; (2) directing that Plaintiff and or her **computer** forensic experts "gain access" into Defendant's residence in Port Washington, NY, into Variety's Great Neck, N.Y. location or any other New York location where Variety's **computer** equipment can be found; (3) directing that deputy sheriff's from Nassau County shall accompany Plaintiff and/or her **computer** forensic experts and that they should "take whatever steps are necessary, including but not limited to breaking down, breaking open, searching for, and/or removing any obstacles that may impede such entrance .... "; (4) directing that the Sheriff's Department shall be held harmless from any liability occasioned through gaining control of Defendant's **computers**; (5) directing that Defendant "cease the rotation, alteration and/or destruction of **electronic** media that would result in the inability to recover the sought over **computer data** regarding all actual and potential business interests involving the Defendant; (6) directing the Defendant to pay Plaintiff's counsel \$15,000; (7) directing the Defendant to pay Plaintiff's "Certified **Computer** Forensic Specialist" \$15,000 in fees. These requests were denied in the Order to Show Cause dated September 27, 2004. On October 1, 2004, the Order was modified by the Appellate Division to the extent only of granting Paragraph 5, above.

Defendant opposed Plaintiff's application and cross-moved for the following relief: (1) requiring Plaintiff to post a bond in the sum of fifteen million dollars to cover potential losses if the expert should cause

information to be lost relative to sales or shipping or other client **data**, if the **computer** work causes a disruption or other interruption in business services, or the expert divulges any proprietary business information; (2) directing that Plaintiff be responsible for any diminution in value of Variety if any proprietary information is disclosed or any information is lost as a result of the forensic inspection.

Plaintiff alleges that the history of the Defendant's "past fraudulent conduct" including the "diversion of eight or nine million dollars in money and real estate from Variety, in which [she] is a fifty percent shareholder" *Plaintiff's affidavit*, 9/22/04, ¶ 2, compel her to seek a "preemptive strike to clone the **computer** records" *Id.*, ¶ 4.

Plaintiff's affidavit recites the history of Defendant's alleged conduct in creating "shell" companies, transferring ownership to his 92 year old father, purchasing four million dollars in real estate through a convoluted transfer of funds in and out of several Channel Island trusts. Plaintiff asserts all these transfers were "bogus and fraudulent and [were] a common scheme to deprive [her] of [her] fair share of marital assets...." *Id.*, ¶ 7.

\*2 Defendant, in his opposition affidavit, asserts that Plaintiff's application is "outrageous" and that Plaintiff has shown "absolutely no basis whatsoever for the extraordinary relief she seeks." *Defendant's affidavit*, 10/22/04, ¶ 1. Defendant further asserts that the relief sought by Plaintiff is "overbroad, intrusive, burdensome...." *Id.*, ¶ 21. Defendant further asserts that his past experiences with Plaintiff's attorneys give him no confidence that proprietary information which would be obtained from such a search of **computer data**, would be safeguarded since they have a history with him of "reckless and careless handling of company information and assets." Defendant asserts that Plaintiff's counsel "lost" a tape he provided to them which contained confidential documents and that Plaintiff's counsel shared these "sensitive, confidential documents" with third parties without his permission. *Id.*, ¶ 20.

Defendant asserts his uncertainty over the qualifications of Plaintiff's expert and offers, as an

alternative, that he "would be amenable to having my very experienced Management Systems Director ... meet with ... plaintiff's '**computer** expert' to discuss how a search can be done on Variety's operating system to segregate the documents, **emails**, etc. relating to the entities specified in plaintiff's order to show cause from all of the other documents, **emails** etc on the **computer** and safely copied in a manner that would pose the least risk to Variety's operating system." *Id.*, ¶ 22 ..

### Discussion

When discovery which is sought is relevant and material, pursuant to [CPLR § 3101\(a\)](#) and not subject to claims of privilege, pursuant to [CPLR § 3103\(a\)](#), disclosure is proper and should be permitted. In matrimonial matters parties are entitled to full disclosure of all financial information concerning marital assets held during the marriage, including business records, real estate transactions, examinations of accounting procedures, financial records, both hard copy and **computer** stored **data**. Courts have held that the contents of a **computer** are analogous to the contents of a filing cabinet. [Byrne v. Byrne](#), 168 Misc.2d 321, 650 N.Y.S.2d 499 (Kings Cty. Supreme Ct., 1996).

There can be no quarrel that the information being sought fulfills the "material and necessary" requirement of statute. Material demanded through discovery that can possibly be used as evidence in chief, for rebuttal or for cross-examination must be produced. [Lipco Electrical v. ASG Consulting Corp.](#), 2004 WL 1949062 (N.Y.Sup.)

As the court stated in *Lipco, supra*, some of the questions presented in the quest for **electronic** discovery include a determination that the sought-after documents still exist on a **computer's hard drive**, whether certain documents have been deleted, the type of software used to create and store documents, and whether the software is commercially available or was created solely for the user.

\*3 In cases in which it is suggested that some files may have been deleted or altered, the services of a **computer** expert is required to insure complete and accurate discovery of relevant **data**. Notwithstanding an effort to delete certain information, **computer** experts assert that they can nonetheless "clone" a **hard drive** and restore or rescue deleted documents. Some files may need review by the court or by a referee to determine if they contain privileged **data**. See, [Antioch Co., v. Scrapbook Borders, Inc.](#) 210

[F.R.D. 645 \(D.Minn, 2002\)](#).

In the case at bar, Plaintiff's request for **computer data** is all-encompassing. She seeks **data** from all **computers**, including Defendant's personal **computer** which may contain **electronic** mail; any information related to Variety, word processing files, calendars and/or schedules regarding Coleccion de Santa S.A. ("S.A."), Coleccion de Santa Export ("Export"), Zhejiang Shaoxing Royal Arts & Crafts Co., Saba Properties Holding, Ltd. ("Saba"), Channel Island Trusts, Inversiones del Mediterraneo ("Inversiones"). Defendant refers to these companies as the "Foreign Entities."

Plaintiff's application, according to Defendant, is so over broad as to constitute a violation of Defendant's rights both to privacy and to privilege, as it involves communication with his attorney, his employees and with third parties unconnected to this litigation.

Defendant consents to discovery of financial matters related to the Foreign Entities, but takes exception to the broad demand for all documents on the **computers**. He does not agree, as Plaintiff asserts, that he has somehow waived attorney-client privilege in this matrimonial litigation or in the related commercial case. [CPLR § 3103\(a\)](#) permits the court to issue protective orders which are designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person by limiting or conditioning the use of any disclosure device.

The court finds that disclosure of communications between Defendant and his counsel are privileged communications and as such are not to be disclosed to Plaintiff or her attorneys. Personal **emails** between Defendant and third parties, unrelated to any business matter, are also not discoverable. The means to limit such disclosure is delineated below.

Both Plaintiff and Defendant have identified **computer** experts, persons able to extract **data** from a **computer**, copy or clone the **hard drive**. This process can be accomplished in a relatively short time. Neither party has identified how many **computer hard drives** are involved and what their location is. Plaintiff indicates Defendant has business records in both Port Washington and Great Neck locations and a personal **computer**. There may be other locations at which Variety does business and at which records are kept. Defendant is directed to disclose these locations.

The court previously appointed Richard N. Tannenbaum, Esq. as attorney referee to supervise discovery. Defendant shall notify the referee of the locations of **computers** on which business records are maintained or entered.

\*4 Thereafter, Plaintiff's expert, accompanied by Defendant's expert and the attorney referee, shall be present at the locations designated as sources of **computer data**. The Plaintiff's expert shall clone or copy the **hard drives** of such **computers**. The resultant **hard drive** shall be immediately turned over to the Referee. This procedure shall be followed until all **computers** on which business records of Variety and/or the foreign entities appear shall be cloned, with the resultant copy turned over to the Referee.

At a location jointly selected by the aforesaid **computer** experts of each of the parties and the Referee, the **hard drives** shall be examined. Hard copies of any Business Records found on such **hard drives** will be made and distributed to attorneys for both parties. The records must relate to the Foreign Entities and/or Variety. Personal records, **emails** or other correspondence between Defendant and third parties and/or Defendant and his counsel shall not be copied or transmitted to any attorney.

At the conclusion of the review of the cloned **hard drives**, the Referee shall maintain control of the clones until conclusion of this matter, at which time the cloned **hard drives** will be returned to Defendant for disposal. Where questions arise as to the appropriate review of a particular document, the Referee's determination shall be final.

This aspect of discovery shall be entered into as soon as practicable and should be completed by March 21, 2005.

Plaintiff requested that Defendant provide her with the sum of \$15,000 for her attorney and an equal amount, \$15,000 for her **computer** expert. Under the CPLR, the party seeking discovery should incur the costs in the production of discovery material. See, [Schroeder v. Centro Pariso Tropical](#), 233 A.D.2d 314, 649 N.Y.S.2d 820 (2nd Dept.1996); [Rubin v. Alamo Rent-a-Car](#), 190 A.D.2d 661, 593 N.Y.S.2d 284 (2nd Dept.1993).

The court therefore determines that Plaintiff shall bear the cost of the production of the business records she seeks, subject to any possible reallocation of costs at trial. Plaintiff shall pay the expenses of her

expert(s), including the cost of hard copy production. Defendant shall be responsible for the expenses of his own expert(s) who are present to oversee the cloning or copying process. Fees for the Attorney Referee shall be shared in the manner described in the court's prior order of appointment.

The court notes that Plaintiff has substantial assets which are sufficient to pay her attorney's fees, subject to possible reallocation of such fees at trial. Her applications for fees are denied.

Defendant's application for a bond to reimburse him for any potential damage to his **computer** system or diminution of value to Variety or any other business interest, is denied. Defendant's **computer** expert, who will be present with the Referee when the business **computers** are cloned, is able to protect Defendant and his business interests from any potential damage.

\*5 The parties are directed to establish with the Referee precisely what information is still required in order to make financial evaluations of Defendant's business holdings. Plaintiff asserts that many business transactions have occurred which deprived her of the assets of Variety, because Defendant transferred assets to other corporations in which he has an interest or over which he exerts control. Transactions with all of these companies are the subject of this discovery and all such matters must be determined expeditiously.

Further, any documents related to the proposed sale of Variety, offers to purchase and declinations of such offers, are also subject to discovery. Allegations of the reasons that the sale of Variety did not occur must be supported by documentation, if such documents exist.

The parties are reminded that this matter and the related commercial case have been re-assigned to Hon. Ruth Balkin for further and final determination.

This constitutes the decision and order of this court.

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