

**ROWE ENTERTAINMENT, INC. v. THE WILLIAM MORRIS AGENCY, INC.**  
SOUTHERN DISTRICT OF NEW YORK  
205 F.R.D. 421; 2002 U.S. Dist. LEXIS 488 (2002)

JAMES C. FRANCIS IV UNITED STATES MAGISTRATE [\*\*3] JUDGE

Too often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter. As this case illustrates, discovery expenses frequently escalate when information is stored in electronic form.

The plaintiffs are black concert promoters who contend that they have been frozen out of the market for promoting events with white bands by the discriminatory and anti-competitive practices of the defendants. The defendants fall into two categories: some are booking agencies that represent white artists and allegedly steer their clients away from the plaintiffs; others are promoters like the plaintiffs, but they purportedly collude with the booking agency defendants to monopolize the concert industry.

During discovery in this action, each defendant has responded to the plaintiffs' requests by permitting inspection of its concert files, which contain documents relating to the promotion of concerts. Four sets of defendants, however, have now moved pursuant to Rules 26(b)(2)(iii) and 26(c) of the Federal Rules of Civil Procedure for a protective order relieving them of the obligation of producing electronic mail, commonly known as e-mail, [\*\*4] that may be responsive to the plaintiffs' discovery requests.

[\*424] Background

A. The Discovery Demands

The plaintiffs' document demands are sweeping. For example, they demand production of all documents concerning any communication between any defendants relating to the selection of concert promoters and bids to promote concerts. (Plaintiffs' First Request for Documents ("Pl. Doc. Req."), attached as Exh. A to Declaration of Richard G. Primoff dated Oct. 26, 2001 ("Primoff Decl."), Request No. 1). Similarly, the plaintiffs have requested "all documents concerning the selection of concert promoters, and the solicitation, and bidding processes relating to concert promotions." (Pl. Doc. Req., Request No. 7). They have also demanded "all documents concerning market shares, market share values, market conditions, or geographic boundaries in which any . . . concert promoter operates." (Pl. Doc. Req., Request No. 12). These are but three examples of the thirty-five requests made in the plaintiffs' first document demand.

B. The Defendants' Motions

Each of the moving defendants contends that it should be relieved of the obligation of producing e-mail responsive to the plaintiffs' [\*\*5] requests because the burden and expense involved would far outweigh any possible benefit in terms of discovery of additional information. If production is nevertheless required, the defendants ask that the plaintiffs bear the cost. Because the burden to each defendant depends upon the specific structure of its e-mail retention and on the related means

for retrieving and producing responsive e-mails, each defendant's position will be outlined separately.

### 1. William Morris Agency

The William Morris Agency, Inc. ("WMA"), one of the booking agency defendants, argues that the chances are small that a search of its e-mails would turn up responsive documents. According to its Senior Vice President, WMA's music agents have historically conducted business by telephone and fax and have been slow to utilize e-mail. (Affidavit of David Snyder dated Sept. 20, 2001 ("Snyder Aff."), P 2). Moreover, to the extent an e-mail was deemed important, it would likely have been printed and saved in the appropriate concert file -- files that have been produced for inspection by the plaintiffs. (Snyder Aff. P 2).

WMA further contends that the production of its e-mails would be exorbitantly expensive [\*\*6] and, to some extent, a technical impossibility. Prior to May 1998, WMA's Music Division had utilized Quickmail for Macintosh for its e-mail communications. (Affidavit of John F. Porter dated Sept. 20, 2001 ("Porter Aff."), P 6). The e-mail files were backed up using a software program called Retrospect that is no longer commercially available. (Porter Aff. P 13). Consequently, WMA has neither the computer hardware nor the software to read these tapes. (Porter Aff. P 14). And, although WMA has given them to an outside vendor for examination, that vendor has thus far been unable to recover enough data to determine what is stored on the tapes. (Porter Aff. P 15).

In May 1998, WMA's Music Department converted to Lotus Notes for e-mail communications. (Porter Aff. P 6). It backs up its e-mail files along with other electronic files such as word processing and spreadsheet documents five times each week, using a software program called Arcserve (Porter Aff. PP 8, 9).

The plaintiffs agreed, at least as a first cut, to limit their discovery demands to e-mail generated or received by 56 WMA employees located in the defendant's New York and Beverly Hills offices. (Porter Aff. P 4). Likewise, [\*\*7] they proposed an initial search limited to a sample of one back-up session for each quarter of 1998 and 1999, for a total of eight sessions. (Affidavit of Sandra C. McCallion dated Sept. 19, 2001, P 10). According to WMA, in order to comply with this request, it must engage in a three-step process: cataloguing, restoring, and processing. (Porter Aff. P 18). Cataloguing involves identifying the tapes that contain the mailbox files of the designated employees and marking them for restoration. (Porter Aff. PP 18, 19). Restoration consists of saving all e-mails from the identified files to a master database and then removing all duplicates. [\*425] (Porter Aff. P 21). Finally, each file must be processed so that it is not only readable on a computer screen, but also may be printed and Bates-stamped. (Porter Aff. P 24). Where an e-mail contains an attached file such as a word processing document, WMA proposes converting the attachment into a Tagged Image File Format or "TIFF" file. (Porter Aff. P 27). According to WMA, this would be necessary in order to make any redactions. (Reply Declaration of Sandra C. McCallion dated Nov. 12, 2001, P 12).

WMA obtained an estimate from Fios, Inc., a computer [\*\*8] consultant, of the cost of such an undertaking. (Porter Aff., Exh. 1). Fios projects that the cost for eight selected back up sessions would include \$7,864 for cataloguing, \$8,960 for restoration, and \$379,120 for processing, for a

total of \$395,944. (Porter Aff. P 28 & Exh. 1). If the e-mails on all of the back-up tapes were produced instead of a sample of eight sessions, the total cost would mushroom to almost \$9,750,000. (Porter Aff. P 28).

## 2. Monterey Peninsula Artists

Like WMA, Monterey Peninsula Artists, Inc. ("Monterey") is a booking agency. It currently employs nine agents, each of whom is supplied with a personal Macintosh computer. (Declaration of Dan Weiner dated Sept. 20, 2001 ("Weiner Decl."), P 3). The agents' personal computers use a variety of different e-mail programs, so that all files cannot be reviewed by a single search program. (Declaration of Tary McConnell dated Sept. 19, 2001 ("McConnell Decl."), P 4). In total, there are almost 200,000 e-mails stored on the hard drives of these computers. (McConnell Decl. P 5).

According to the President of Monterey, the company still does ninety percent of its business by means other than e-mail, including telephone [\*\*9] and fax. (Weiner Decl. P 4). It is estimated that fifty to seventy percent of the use of e-mail consists of alerting agents about telephone calls received by a receptionist. (Weiner Decl. P 6). In addition, some portion of the e-mail relates to advice of counsel. (Weiner Decl. P 8). Significant e-mails may be printed as hard copy and placed in the relevant files. (Weiner Decl. P 7).

Monterey Computer Corporation ("MCC") has provided three alternative cost estimates for producing the e-mail of Monterey's agents. First, a computer operator could be employed to retrieve and print all e-mails from each personal computer. (McConnell Decl. P 7). This is a labor-intensive option estimated to cost \$84,060. (McConnell Decl. PP 8-11). Alternatively, a programmer could archive all e-mails on the computer in which they are located and then print them more efficiently in "batch" mode. (McConnell Decl. PP 12, 15). MCC projects that this option would entail approximately \$57,860 in costs. (McConnell Decl. PP 14-16). Finally, an information systems analyst could import all of the agents' e-mail into a single common format, creating a single database. The entire database could then be reviewed using [\*\*10] one search engine. (McConnell Decl. P 17). Assuming that all of the e-mails would nevertheless be printed, MCC estimates the cost of this third option to be \$43,110. (McConnell Decl. PP 19-22). None of the alternatives proposed by MCC require the creation of TIFF files. (Reply Declaration of Tary McConnell dated Nov. 8, 2001, P 6).

Monterey has also proffered an estimate of the cost involved in reviewing the e-mails for privilege. By using paralegals to review the production at the rate of two e-mails per minute at fees of \$150 per hour, it is estimated that the privilege analysis would cost approximately \$247,000. (Declaration of Matthew P. Kanny dated Sept. 20, 2001, P 8).

## 3. Creative Artist Agency

The third moving defendant, Creative Artist Agency, LLC ("CAA"), is also a booking agency. It currently employs approximately 50 music agents and assistants. (Declaration of Michael Keithley dated Oct. 1, 2001 ("Keithley Decl."), attached as Exh. B to Creative Artist Agency, LLC's Notice of Motion for a Protective Order ("CAA Notice of Motion"), P 10(c)). These personnel use Microsoft Exchange software for e-mail. (Keithley Decl. P 8). Since January 1999, CAA has

backed up its [\*\*11] corporate electronic data including e-mails on a daily basis, using [\*426] either Backup Exec or Omniback II software. (Keithley Decl. PP 4, 7). It has accumulated a total of 523 back-up tapes for this period, of which 261 have been catalogued and contain e-mails. The remaining 262, ten of which may predate 1999, have not been catalogued and may or may not include e-mails. (Keithley Dec. PP 5, 6).

Prior to 1999, CAA's computer system went through a series of transformations. From 1993 through March 1996, CAA used a Mac OS-based system. (Keithley Decl. P 15). From March 1996 through August 1997, the company converted to a Windows NT 4.0 system. (Keithley Decl. P 16). CAA first acquired access to the Internet and external e-mail capacity in February 1996. (Keithley Decl. P 20). Until January 1999, CAA backed up its corporate data on a daily basis but only saved the last week of each month for archival purposes. (Keithley Decl. P 21). CAA has located 376 back-up tapes from its Mac system and 64 digital audio tapes ("DAT's") with pre-1999 back up data, of which 18 contain e-mails. (Keithley Decl. PP 22, 23, 26, 29). The remaining 46 DAT's and the other back-up tapes have not been catalogued [\*\*12] and may or may not contain e-mail data. (Keithley Decl. PP 23, 26, 29).

As with WMA, production of the e-mail would require cataloguing the tapes for which this has not been done, then restoring and retrieving the e-mails. (Keithley Decl. P 10). CAA's Director of Information Technology estimates for the period from 1999 on, this process would cost \$187,500 to \$237,500 for labor and \$48,000 for necessary hardware and software and would take two and one-half years to complete. (Keithley Decl. PP 11, 12).

With respect to the pre-1999 period, it would cost \$25,000-\$31,000 to retrieve the e-mails from the DAT's and \$78,500 to restore them from the Mac back-up tapes. (Keithley Decl. PP 32-33). CAA thus estimates that its total cost would be a minimum of \$395,000. (Keithley Decl. P 34).

In addition, like Monterey, CAA has calculated the cost of conducting a privilege review. It estimates that one employee earning \$60,000 per year would take two years to complete the task, for a total cost of \$120,000. (Declaration of Michael Rubel dated Sept. 20, 2001, attached as Exh. C to CAA Notice of Motion, P 8).

#### 4. SFX and QBQ

The last group of moving defendants consists of QBQ Entertainment, [\*\*13] a booking agency, along with twenty-two concert promoters, collectively referred to as "SFX." n1 The e-mails for this group are contained in SFX's exchange server, 23 back-up tapes for SFX's exchange server, 24 back-up tapes for the exchange server of Contemporary Productions, Inc., and the personal computers of 126 e-mail users. (Declaration of Kevin Crawford dated Oct. 2, 2001, P 4).

n1 These promoter defendants are: Belkin Productions, Inc.; Bill Graham Enterprises, Inc.; The Cellar Door Companies, Inc.; Cellar Door Concerts of the Carolinas, Inc.; Cellar Door Concerts of Florida, Inc.; Cellar Door Productions of Michigan, Inc.; Cellar Door North Central, Inc.; Cellar Door Productions, Inc.; Cellar Door Productions of D.C., Inc.; Cellar Door (Southern) Corporation; Cellar Door Entertainment, Inc.; Concert/Southern Promotions, Inc.; Contemporary Productions, Inc.; Delsener/Slater Enterprises, Ltd.; DiCesare-Engler, Inc.; Don

Law Company, Inc.; Electric Factory Concerts, Inc.; Evening Star Productions, Inc.; Magicworks Concerts, Inc.; Pace Concerts, Inc.; SFX Entertainment, Inc.; and Sunshine Promotions, Inc.

Ontrack Data International, Inc. ("Ontrack") provided an estimate of the cost of retrieving the e-mail from these sources. The total estimate, including printing costs, management fees, and travel expenses, comes to over \$403,000. (Declaration of Deborah Hagen dated Oct. 2, 2001 ("Hagen Decl."), P 7). Of this, approximately \$126,000 is attributable to the cost of creating TIFF files, based on the assumption that 10,000 pages would be retrieved for each of the 126 e-mail users. (Hagen Decl. PP 6(e), 7).

### C. The Plaintiffs' Response

The plaintiffs argue first that the discovery of e-mail is critical to their case. They dispute the assumptions that little business is conducted by the defendants through e-mail and that important e-mails would have been reduced to hard copy in any event. (Declaration of Richard G. Primoff dated Oct. 26, [\*427] 2001 ("Primoff Decl."), PP 20-25). Furthermore, the plaintiffs maintain that the paper discovery taken to date supports their claims that the defendants have engaged in discriminatory and anti-competitive practices. For example a CAA memorandum refers to how the head of its music department kept the "black promoter issue" "under control" in connection [\*\*15] with a tour by Janet Jackson in 1998. (Primoff Decl., Exh. K). The plaintiffs interpret this to mean that CAA deterred black promoters from participating in the tour by imposing on them more onerous financial terms than were offered to white promoters. (Primoff Decl. PP 11-14 & Exhs. G, H, I, J). Similarly, the plaintiffs argue that a letter by Beaver Productions, a white-owned promotion company, advocating that the City of Memphis should not enter into an exclusive contract with a black promoter, illustrates the collusive relationship between white promoters and white booking agencies. (Primoff Decl. PP 16, 17 & Exh. M).

The plaintiffs also contend that the defendants' cost estimates are wildly inflated. In general terms, the plaintiffs propose to reduce the expense of e-mail production by: (1) identifying key personnel rather than retrieving the e-mail of all employees; (2) restoring only a portion of the archival tapes, based on date restrictions and sampling; (3) producing e-mail in electronic rather than paper form; and (4) conducting automated searches for privilege and responsiveness. (Primoff Decl. P 26). The plaintiffs would also forego the use of TIFF files, which they argue [\*\*16] is unnecessary and unduly expensive. (Primoff Decl. P 29). According to one of the plaintiffs' consultants, Charles R. Kellner of Electronic Evidence Discovery, Inc. ("EED"), TIFF files are not themselves searchable, since they are merely graphic depictions of electronic text. (Affidavit of Charles R. Kellner dated Oct. 26, 2001 ("Kellner Aff."), PP 24, 35). Because they are not searchable, they do not facilitate the removal of duplicate documents from a file. (Kellner Aff. PP 29, 30). And, as an image of an electronic document, the TIFF version contains less information than the original document. (Kellner Aff. P 33). These principles underlie the plaintiffs' cost estimates with respect to production by each of the moving defendants.

#### 1. WMA

The plaintiffs agree to limit production of WMA's e-mails to a sample of eight sessions of the archive tapes for 30 e-mail accounts. (Primoff Decl. P 34(d); Kellner Aff. P 63). By also eliminating conversion to TIFF files, they estimate that WMA could provide responsive e-mails at a cost ranging from \$24,000 to \$87,000 depending upon assumptions about the volume of e-mail and the amount of duplication. (Primoff Decl. P 34(d); Kellner Aff. [\*\*17] P 62).

## 2. Monterey

The plaintiffs' second expert, Andrew S. Rosen of ASR Data Acquisition & Analysis, LLC ("ASR"), proposes to create a "mirror image" of the hard drive of each personal computer at Monterey. (Affidavit of Andrew S. Rosen dated Oct. 18, 2001 ("Rosen Aff."), P 10). The plaintiffs would then identify potentially responsive directories and files, convert them to a common format, and create a single database that could be searched for privilege and responsiveness. (Rosen Aff. PP 10, 11). ASR estimates the cost for this project to be \$10,000-\$15,000. (Rosen Aff. PP 10, 17).

## 3. CAA

By engaging again in a sampling process, the plaintiffs estimate that they could reduce the cost of production of CAA's pre-1999 e-mail to \$20,000. (Kellner Aff. P 46). Likewise, by limiting production for 1999 to quarterly samples for 30 e-mail accounts, they project costs of \$40,000-\$50,000. (Kellner Aff. P 43). Thus, the plaintiffs' total cost estimate for production by CAA is \$60,000-\$70,000. (Primoff Decl. P 34).

## 4. SFX and QBQ

Apparently, the plaintiffs are willing to forego any review of the back-up tapes of SFX and QBQ. Instead, they propose to work from the hard [\*\*18] drives of approximately 60 users who store e-mail on their individual computers. (Kellner Aff. PP 17, 19). As with Monterey, the plaintiffs would take an image [\*428] of the hard drive and create a database of potentially responsive files. They estimate that this would cost \$64,000. (Kellner Aff. P 19; Primoff Decl. P 34).

## Discussion

### A. Discoverability and Relevance

The plaintiffs have successfully demonstrated that the discovery they seek is generally relevant. Although the defendants vigorously contest the plaintiffs' interpretation of the documents that have already been produced (Declaration of Robert Light dated Nov. 9, 2001, PP 4-37; Declaration of Carole Kinzel dated Nov. 9, 2001 ("Kinzel Decl."), PP 19-23; Reply Declaration of Matthew P. Kanny dated Nov. 8, 2001, P 6 & Exh. C), those documents are plainly pertinent to the plaintiffs' claims. To the extent that the defendants' e-mails contain similar information, they are equally discoverable. Electronic documents are no less subject to disclosure than paper records. See *Simon Property Group L.P. v. my Simon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000); *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999); [\*\*19] *Daewoo Electronics Co. v. United States*, 10 C.I.T. 754, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 461 (D. Utah 1985).

Nor are the defendants' claims that the e-mail is unlikely to yield relevant information persuasive. General representations by WMA and Monterey that their employees do little business by e-mail are undocumented and are contradicted by data proffered by these same defendants. Monterey, for example, estimates that its eight computers contain 198,000 e-mail messages (McConnell Decl. P 5), while WMA's figures lead to the conclusion that each of its agents sent or received about 43 e-mails per day. (Kellner Aff. PP 72, 73). It is probable that some significant portion of this traffic related to the conduct of business.

Furthermore, the supposition that important e-mails have been printed in hard copy form is likewise unsupported. In general, nearly one-third of all electronically stored data is never printed out. See Corinne L. Giacobbe, "Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data," 57 Wash. & Lee L. Rev. 257, 259 (2000). [\*\*20] Here, the defendants have not alleged that they had any corporate policy defining which e-mail messages should be reduced to hard copy because they are "important." Finally, to the extent that any employee of the defendants was engaged in discriminatory or anti-competitive practices, it is less likely that communications about such activities would be memorialized in an easily accessible form such as a filed paper document.

The defendants' concern about privacy is also unavailing. To the extent that the corporate defendants' own privacy interests are at issue, they are adequately protected by the confidentiality order in this case. To the degree the defendants seek to assert the privacy concerns of their employees, those interests are severely limited. Although personal communications of employees may appear in hard copy as well as in electronic documents (see, e.g., Kinzel Decl. P 12), the defendants made no effort to exclude personal messages from the search of paper records conducted by plaintiffs' counsel. Moreover, an employee who uses his or her employer's computer for personal communications assumes some risk that they will be accessed by the employer or by others. [\*\*21]

Thus, there is no justification for a blanket order precluding discovery of the defendants' e-mails on the ground that such discovery is unlikely to provide relevant information or will invade the privacy of non-parties.

## B. Cost-Shifting

The more difficult issue is the extent to which each party should pay the costs of production. "Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests [.]" *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978). Nevertheless, a court may protect the responding party from "undue burden or expense" by shifting some or all of the costs of production to the requesting party. *Id.* (citing Fed. R. Civ. P. 26(c)). Here, the expense of locating and extracting responsive e-mails is substantial, [\*429] even if the more modest estimates of the plaintiffs are credited. Therefore, it is appropriate to determine which, if any, of these costs, are "undue," thus justifying allocation of those expenses to the plaintiffs.

### 1. Production

One line of argument, adopted by the plaintiffs, holds that the responding party should [\*\*22] bear the costs of producing electronic data since "if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk." In re Brand Name Prescription Drugs Antitrust Litigation, 1995 U.S. Dist. LEXIS 8281, Nos. 94 C 897, MDL 997, 1995 WL 360526, at \*2 (N.D. Ill. June 15, 1995); see also Daewoo, 650 F. Supp. at 1006 ("The normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship."). But even if this principle is unassailable in the context of paper records, it does not translate well into the realm of electronic data. The underlying assumption is that the party retaining information does so because that information is useful to it, as demonstrated by the fact that it is willing to bear the costs of retention. That party may therefore be expected to locate specific data, whether for its own needs or in response to a discovery request. With electronic media, however, the syllogism breaks down because the costs of storage are virtually nil. Information is retained [\*\*23] not because it is expected to be used, but because there is no compelling reason to discard it. And, even if data is retained for limited purposes, it is not necessarily amenable to discovery. Back-up tapes, for example,

are not archives from which documents may easily be retrieved. The data on a backup tape are not organized for retrieval of individual documents or files, but for wholesale, emergency uploading onto a computer system. Therefore, the organization of the data mirrors the computer's structure, not the human records management structure, if there is one.

Kenneth J. Withers, "Computer-Based Discovery in Federal Civil Litigation," SF97 ALI-ABA 1079, 1085 (2001); see also *McPeck v. Ashcroft*, 202 F.R.D. 31, 32 (D.D.C. 2001) ("The purpose of having a backup system and retaining the tapes was to permit recovery from a disaster, not archival preservation."). Thus, it is not enough to say that because a party retained electronic information, it should necessarily bear the cost of producing it.

The contrary argument is that the requesting party should bear the burden since, when the costs of discovery are internalized, that party can perform a [\*\*24] cost-benefit analysis and decide whether the effort is justified. See Marnie H. Pulver, "Electronic Media Discovery: The Economic Benefit of Pay-Per-View," 21 *Cardozo L. Rev.* 1379, 1424 (2000). Yet, this "market" approach has two shortcomings. First, it flies in the face of the well-established legal principle, cited above, that the responding party will pay the expenses of production. Second, it places a price on justice that will not always be acceptable: it would result in the abandonment of meritorious claims by litigants too poor to pay for necessary discovery.

Because of the shortcomings of either bright-line rule, courts have adopted a balancing approach taking into consideration such factors as: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available [\*\*25] to each party. Each of these factors is relevant in determining whether discovery costs should be shifted in this case.

### a. Specificity of Requests

The less specific the requesting party's discovery demands, the more appropriate it is to shift the costs of production to that party. See *In re General Instrument Corp. Securities Litigation*, 1999 U.S. Dist. LEXIS 18182, No. 96 C 1129, 1999 WL 1072507, at \*6 (N.D. Ill. Nov. 18, 1999) (denying motion to compel production [\*430] of e-mails where requesting parties "have not identified any specific factual issue for which additional discovery would help them prove their case"). Where a party multiplies litigation costs by seeking expansive rather than targeted discovery, that party should bear the expense.

As noted above, the plaintiffs' demands in this case are extremely broad. They stand in sharp contrast to cases such as *Daewoo* where the court declined to shift costs. There the plaintiff sought only specific data sets that were utilized in the administrative review that resulted in the challenged governmental order. *Daewoo*, 650 F. Supp. at 1004-05. Similarly, in *McPeck* the court did not shift costs but required production of [\*\*26] only the e-mails of specific persons who purportedly retaliated against the plaintiff. 202 F.R.D. at 33. Here, the plaintiffs' requests are far more nebulous, a factor that favors shifting the costs of discovery to them.

### b. Likelihood of a Successful Search

In *McPeck*, the court utilized the concept of marginal utility in determining whether to shift costs:

The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense. The less likely it is, the more unjust it would be to make [that party] search at its own expense. The difference is "at the margin."

202 F.R.D. at 34. Here, there is a high enough probability that a broad search of the defendants' e-mails will elicit some relevant information that the search should not be precluded altogether. However, there has certainly been no showing that the e-mails are likely to be a gold mine. No witness has testified, for example, about any e-mail communications that allegedly reflect discriminatory or anti-competitive practices. Thus, the marginal value of searching the e-mails [\*\*27] is modest at best, and this factor, too, militates in favor of imposing the costs of discovery on the plaintiffs.

### C. Availability From Other Sources

Some cases that have denied discovery of electronic evidence or have shifted costs to the requesting party have done so because equivalent information either has already been made available or is accessible in a different format at less expense. In *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1996 U.S. Dist. LEXIS 563, No. 94 Civ. 2120, 1996 WL 22976, at \*1 (S.D.N.Y. Jan. 23, 1996), the defendant had already produced the requested data in hard copy. However, the plaintiff sought the same information in electronic form, presumably to facilitate computerized analysis. While recognizing that prior production in one form did not foreclose the plaintiff's demand, the court held that "[if] plaintiff wants the computerized information, it will have to pay defendants' reasonable costs of creating computer programs to extract the requested data from defendants'

computers." Id. Similarly, in *Williams v. E.I. du Pont de Nemours & Co.*, 119 F.R.D. 648, 649-50 (W.D. Ky. 1987), the defendant had originally supplied data to the EEOC, a plaintiff [\*\*28] in the action, in hard copy form, and then demanded disclosure of the computer files created by the agency from that data. The court granted the discovery, but required the defendant to pay a reasonable share of the costs that the EEOC had incurred in formulating the database. Id. at 651.

In the instant case there has been no showing that the defendants' e-mails are generally available other than by a search of the defendants' hard drives or back-up tapes. The representations that "important" e-mails were probably printed out are entirely speculative. Accordingly, this consideration favors requiring the defendants to produce the e-mails at their own expense.

#### d. Purposes of Retention

If a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense. Under such circumstances, the guiding principle is that "information which is stored, used, or transmitted in new forms should be available through discovery with the same openness as traditional forms." [\*\*431] *Daewoo*, 650 F. Supp. at 1006. A party that expects to be able to access information [\*\*29] for business purposes will be obligated to produce that same information in discovery.

Conversely, however, a party that happens to retain vestigial data for no current business purposes, but only in case of an emergency or simply because it has neglected to discard it, should not be put to the expense of producing it. In this case, the back-up tapes clearly fall into this category. There is no evidence that the defendants themselves ever search these tapes for information or even have a means for doing so. Cost-shifting is therefore warranted with respect to the back-up tapes. See *Withers*, supra, at 1085 ("retrieving documents from backup tapes may be conditioned on the requesting party paying some or all of the costs").

The same is true of e-mails which, although deleted from the user's active files, remain on the hard drive. "Aside from the occasional practice of 'dumpster diving,' the discovery of deleted computer documents does not have a close analogue in conventional, paper-based discovery." Id. Just as a party would not be required to sort through its trash to resurrect discarded paper documents, so it should not be obligated to pay the cost of retrieving deleted [\*\*30] e-mails. n2 Thus, since there has been no showing that the defendants access either their back-up tapes or their deleted e-mails in the normal course of business, this factors tips in favor of shifting the costs of discovery to the plaintiffs.

n2 To be sure, some users may store recent e-mails in electronic files for ease of access. Such files would presumptively be discoverable at the expense of the producing party. But in this case, it is likely that those costs would be swamped by the expense of obtaining deleted or backed up data.

#### e. Benefit to the Parties

Where the responding party itself benefits from the production, there is less rationale for shifting costs to the requesting party. See *Bills*, 108 F.R.D. at 464. Such a benefit could come in one of two

forms. First, the process of production could have collateral benefits for the responding party's business. For example, a computer program created to conduct a search for purposes of discovery could also be useful in the regular activities [\*\*31] of the business. Second, the responding party may benefit in litigation from the review of its own records.

Neither circumstance is present here. Since the computer data at issue is not regularly used by the defendants, cataloguing or searching it would have little business value to them. Similarly, recovery of e-mail will not benefit the defendants in this litigation since the e-mails are not relevant to any issue on which the defendants bear the burden of proof. The situation might be different if there were a universe of data that either party might be able to use to support its position: for example, hiring or promotion statistics in an employment discrimination case. But that is not the case here, and the absence of any benefit to the defendants makes cost-shifting more appropriate.

#### f. Total Costs

If the total cost of the requested discovery is not substantial, then there is no cause to deviate from the presumption that the responding party will bear the expense. See *Oppenheimer Fund*, 437 U.S. at 361-62; *Anti-Monopoly*, 1996 U.S. Dist. LEXIS 563, 1996 WL 22976, at \*2; *Bills*, 108 F.R.D. at 464. In *Oppenheimer Fund*, the Supreme Court found that [\*\*32] "a threshold expense of \$16,000 . . . hardly can be viewed as an insubstantial burden," even for a defendant with assets exceeding one-half billion dollars. 437 U.S. at 361-62. In *Anti-Monopoly*, the court considered costs of \$1,680 to one defendant and \$5,000-6,000 to another to be sufficiently significant to warrant cost-shifting. 1996 U.S. Dist. LEXIS 563, 1996 WL 22976, at \*2. Here, the costs of the proposed discovery would be substantial by any definition. Even the plaintiffs project that the costs for WMA would be between \$24,000 and \$87,000, for Monterey between \$10,000 and \$15,000, for CAA between \$60,000 and \$70,000, and for SFX and QBQ approximately \$64,000. The magnitude of these expenses favors cost-shifting.

#### g. Ability to Control Costs

The plaintiffs have professed an ability to limit the costs of discovery of e-mails to a [\*432] much greater extent than defendants. Of course, this factor alone does not dictate cost-shifting; the defendants could be required to pay the bill for the less expensive methodologies proposed by the plaintiffs. However, where the discovery process is going to be incremental, it is more efficient to place the burden on the party that [\*\*33] will decide how expansive the discovery will be. Cf. *Bills*, 108 F.R.D. at 464 (declining to shift costs where "the relative expense and burden in obtaining the data would be substantially greater to the requesting party as compared with the responding party"). The plaintiffs here will be able to calibrate their discovery based on the information obtained from initial sampling. They are in the best position to decide whether further searches would be justified. See *McPeck*, 202 F.R.D. at 33-34 (requiring producing party to pay all costs is disincentive to requesting party to narrow its demands). This consideration, then, also militates in favor of cost-shifting.

#### h. The Parties' Resources

Finally, the ability of each party to bear the costs of discovery may be an appropriate consideration. See *Oppenheimer Fund*, 437 U.S. at 361-62; *Bills*, 108 F.R.D. at 464. In some cases, the cost, even if modest in absolute terms, might outstrip the resources of one of the parties, justifying an allocation of those expenses to the other. But in this case, all parties have sufficient resources to conduct this litigation. Although [\*\*34] the plaintiffs argue that the defendants are some of the most powerful players in the concert promotion business, the plaintiffs purport to be able to compete with them in the marketplace. The relative financial strength of the parties, then, is at most a neutral factor.

The relevant factors thus tip heavily in favor of shifting to the plaintiffs the costs of obtaining discovery of e-mails in this case. The protocol to be followed will be addressed below.

## 2. Privileged and Confidential Documents

Beyond the cost of isolating and producing the requested e-mails, the defendants argue that the expense of reviewing these documents for privilege and confidentiality would be enormous. Monterey, for example, estimates that it would expend nearly \$250,000, while CAA projects costs of \$120,000 and two years of work. However, the sanctity of the defendants' documents can be adequately preserved at little cost by enforcement of the confidentiality order and by the additional elements of the protocol described below, including requirements that the e-mails be reviewed on an attorneys'-eyes-only basis and that review of attorney-client documents shall not be deemed a waiver of the privilege. [\*\*35] See *Playboy*, 60 F. Supp. 2d at 1054-55 (use of protective order and provision precluding waiver of attorney-client privilege sufficient). But see *Anti-Monopoly*, 1996 U.S. Dist. LEXIS 563, 1996 WL 22976, at \*2 (notwithstanding confidentiality order, business data should not be viewed by competitors).

Even with such protections, however, the disclosure of privileged documents cannot be compelled. See *In re Dow Corning Corp.*, 261 F.3d 280, 284 (2d Cir. 2001). Therefore, it must be determined who should bear the costs if, notwithstanding the recommended precautions, the defendants still choose to conduct a complete review prior to production. Apparently, the defendants retained privileged or confidential documents in electronic form but failed to designate them to specific files. This situation is analogous to one in which a company fails to shred its confidential paper documents and instead leaves them intermingled with non-confidential, discoverable papers. The expense of sorting such documents is properly borne by the responding party, and the same principle applies to electronic data. Accordingly, if any defendant elects to conduct a full privilege review of [\*\*36] its e-mails prior to production, it shall do so at its own expense.

## C. Protocol

The protocol set forth here for the defendants' production of e-mails is necessarily only a set of guidelines, and the parties are free to add detail and otherwise modify the protocol by agreement.

Initially, the plaintiffs shall designate one or more experts who shall be responsible for isolating each defendant's e-mails and preparing them for review. The defendants shall have the opportunity

to object to any expert so designated. The expert shall be bound by the terms of this order as well as any confidentiality order entered in the case.

With the assistance and cooperation of the defendants' technical personnel, the plaintiffs' expert shall then obtain a mirror image of any hard drive containing e-mails as well as a copy of any back-up tape. The plaintiffs may choose to review a sample of hard drives and tapes in lieu of all such devices.

Plaintiffs' counsel shall formulate a search procedure for identifying responsive e-mails and shall notify each defendant's counsel of the procedure chosen, including any specific word searches. Defendants' counsel may object to any search proposed by the plaintiffs. [\*\*37]

Once an appropriate search method has been established, it shall be implemented by the plaintiffs' expert. Plaintiffs' counsel may then review the documents elicited by the search on an attorneys'-eyes-only basis. The plaintiffs may choose the format for this review; they may, for example, view the documents on a computer screen or print out hard copy. Once plaintiffs' counsel have identified those e-mails they consider material to this litigation, however, they shall provide those documents to defendants' counsel in hard copy form with Bates stamps. The plaintiffs shall bear all costs associated with the production described thus far. However, the defendants shall pay for any procedures beyond those adopted by the plaintiffs, such as the creation of TIFF files.

Defendants' counsel shall then have the opportunity to review the documents produced in order to designate those that are confidential and assert any privilege. Any purportedly confidential or privileged document shall be retained on an attorneys'-eyes-only basis until any dispute about the designation is resolved. The fact that such a document has been reviewed by counsel or by the expert shall not constitute a waiver of [\*\*38] any claim of privilege or confidentiality.

Should any defendant elect to review its database prior to production, it shall do so at its own expense. In that event, the defendant shall review those hard drives and back-up tapes selected by the plaintiffs and shall create copies from which privileged or confidential and unresponsive material has been deleted. The defendant shall then provide plaintiffs' counsel with each "redacted" hard drive or tape, together with a privilege log identifying the documents removed. The process would then continue as described above.

## Conclusion

For the reasons discussed here, the defendants' motion for a protective order is denied insofar as it sought to preclude altogether the discovery of e-mail. It is granted to the extent that the plaintiffs shall bear the costs of production, though the defendants shall continue to be responsible for the expense of any review for privileged or confidential material. Production shall be accomplished in accordance with the protocol outlined above.

**ROWE ENTERTAINMENT, INC. v. THE WILLIAM MORRIS AGENCY, INC.**  
SDNY 2002 U.S. Dist. LEXIS 8308 (2002)

ROBERT P. PATTERSON, JR., U.S.D.J.

Pursuant to Fed.R.Civ.P. 72(a) plaintiffs filed written objections to the January 15, 2002 order of U.S. Magistrate Judge Francis respecting plaintiffs' discovery of e-mail communications (the "Order"), together with a motion dated February 4, 2002 seeking reversal of that portion of the Order that granted defendants' William Morris Agency, Inc. ("WMA"), Creative Artists Agency, LLC ("CAA"), Monterey Peninsula Artists Agency ("Monterey") and the SFX defendants ("SFX") ("the moving defendants") motion pursuant to Fed.R.Civ.P. 26(b)(2)(iii) and 26(c) to shift the costs of production of their e-mail communications to plaintiffs. Plaintiffs' motion is denied.

Under Fed.R.Civ.P 26(c) courts have the power to exercise discretion to protect parties from "undue burden or expense." In shifting the costs of production to plaintiffs, Judge Francis weighed eight factors: (1) the specificity of the discovery requests; (2) the likelihood of a successful search; (3) the availability from other sources; (4) the purposes of retention; (5) the benefit[\*4] to the parties; (6) the total costs; (7) the ability of each party to control costs; and (8) the parties' resources. Judge Francis found all of the factors weighed in favor of shifting the costs of discovery to the plaintiffs except factor (3) and found that factor (8) was neutral.

At the argument on March 19, 2002, plaintiffs' arguments were 1) that moving defendants had waived their right to object to the production of their e-mail communications, with the exception of defendant CAA, with whom plaintiffs had a side agreement; and 2) that Judge Francis decided the following factors in a manner that they assert is contradicted by the record: the likelihood of a successful search; the specificity of the request; the relative resources of the parties; and the total costs. In their moving papers, plaintiffs also contested Judge Francis' findings regarding the purposes of retention of e-mail communications, benefit to the parties, and the ability to control costs, but did not press them at the oral argument.

## Background

Plaintiffs are black concert promoters who assert that they have been excluded from the market for promoting events with white music artists and major black music[\*5] artists by the racially discriminatory practices and anti-competitive practices of the defendants. There are two category of defendants: some are booking talent agencies that represent white artists and major black artists and allegedly exclude plaintiffs from bidding on promotions of concerts by these artists; others like the plaintiffs are promoters who allegedly collude with the booking agency defendants to exclude plaintiffs from promoting concerts by white music artists and major black artists.

## Procedural Background

The complaint was filed on or about November 20, 1998. Thereafter, a motion to dismiss was granted and an Amended Complaint was filed on August 9, 1999. The Amended Complaint contains six claims: the first two claims, brought by the corporate plaintiffs, are for damages under Section 1 of the Sherman Act and for an injunction under that statute; the third claim charges defendants with racial discrimination in violation of 42 U.S.C. § 1981; the fourth claim alleges a conspiracy by the defendants in violation of 42 U.S.C. § 1985(3); the fifth claim seeks an injunction under §§ 1981 and 1985(3); and the sixth claim[\*6] is for damages under 42 U.S.C. § 1986.

Discovery in this case has been the subject of considerable controversy. In August 2000 the Court suggested that in view of the breadth of the plaintiffs' claims and the plaintiffs' document requests that the parties agree that to save time and expense the plaintiff could inspect the defendants' concert and other files without waiver of defendants' right to claim the lawyer-client privilege. Nonetheless the parties continued to dispute the scope and relevancy of plaintiffs' requests and the need for a confidentiality order.

On November 22, 2000 plaintiffs moved before this Court to compel all defendants to produce documents and information responsive to plaintiffs' request for documents in view of defendants' resistance to the broad scope of the discovery requested and defendants' demands for a confidentiality order. Oral argument was heard by this Court on February 27, 2001 and a conference on March 19, 2001. On March 19, 2001 the Court entered an Order of Confidentiality and a separate order that granted plaintiffs' motion to compel with express exceptions.

Thereafter, the case was assigned to Judge Francis for supervision[\*7] of discovery in view of this judge's incapacity due to major surgery. Each of the defendants has complied with the courts' order on discovery, opening its concert files for plaintiffs' inspection and producing other documents as requested by plaintiffs. Plaintiffs then asked the defendants for the defendants' computerized e-mail communications to which the moving defendants raised objections based on the burden and expense of such production outweighed its likely benefit. Fed.R.Civ.P. 26(b)(iii). On July 2, 2001, defendants obtained an order from Judge Francis that permitted them, after another "meet and confer" process to move for a protective order with respect to production of their email. On January 15, 2002, in a comprehensive decision, defendants' motion for a protective order was denied by Judge Francis insofar as it sought to preclude altogether the discovery of e-mail, but granted to the extent that the plaintiffs shall bear the costs of the production of moving defendants' e-mail communications. It is this order to which plaintiffs have filed objections.

### Legal Standard

Magistrate judges are empowered to hear and determine pretrial matters. 28 U.S.C. § 636(b)(1)(A) [\*8]. A magistrate judge's decision as to issues that are not dispositive of a claim or defense is entitled to substantial deference and may be overturned only upon a

showing that the Order was "clearly erroneous or contrary to law." Fed.R.Civ.P. 72(a). *Alpex Computer Corp. v. Nintendo Co., Ltd.*, 1992 U.S. Dist. LEXIS 3129, 1992 WL 51534 (S.D.N.Y. March 10, 1992). Neither party disputes that this is the applicable standard.

#### Rule 26(c): Undue Burden or Expense

Fed.R.Civ.P. 26(c) gives federal courts the authority to issue, for good cause shown, orders to protect parties from undue burden or expense in connection with discovery. Although there are no firm rules, courts may take into account "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed.R.Civ.P. 26(b)(2)(iii).

#### Waiver

In an issue not ruled on by Judge Francis' opinion, plaintiffs argue that the moving defendants waived their right to object to the production of their email communication because the Court entered its March 19, 2001 order granting plaintiffs' motion to[\*9] compel the production of documents. Plaintiffs rely on the Court's statement that if defendants did not respond to issues raised in plaintiffs motion papers, those matters are deemed ruled on for plaintiffs. (2/27/01 Tr. at 55.; 3/19/01 Tr. at 27.) Accordingly, plaintiffs argue that these defendants' right to object to the production of the electronically stored e-mail has been ruled on. They point to a letter of October 23, 2000 from WMA's counsel predating the Court's statement as support for their position. The letter states WMA was "looking into whether there are any electronic mail communications that relate to the promotion of particular concert engagements and whether these are even retrievable and, if so, on what basis. We will discuss this with you at a future date and we, therefore, reserve our client's rights accordingly." (Primoff Dec. Ex. E, at 2.) Plaintiffs also argue that since CAA sought to preserve its objections to production of e-mails prior to the February 27, 2001 argument, that "clearly establishes that defendants were well aware that production of these materials were the subject of plaintiffs' requests, and their motion to compel." (Pls.' Written Objections [\*10]to Magistrate Judge Francis' January 15, 2002 Email Order ("Pls.' Objections"), at 11.) Therefore, plaintiffs assert that Judge Francis, to whom this issue was presented, should have denied defendants' motion, and the Order's failure to do so is contrary to law and clearly erroneous. n1

n1 Plaintiffs had agreed with moving defendant CCA, however, that e-mail production was not an issue in the motion to compel. (Pls.' Objections, at 10, 11.)

In response, defendants argue that the waiver issue was raised before Judge Francis and implicitly rejected by him in his July 2, 2001 Order that established a detailed procedure for dealing with the issues raised by defendants regarding e-mail discovery and therefore that plaintiffs have waived their right to object now to the procedure in which they engaged. (Mem. of Law in Opp'n to Pls.' Written Objections to Magistrate Judge Francis' January 15, 2002 Order ((Defs.' Opp'n"), at 21.) Nowhere in the extensive submission in connection with the motion to compel is the burden[\*11] and expense of producing e-mail communications raised. The principal focus of the motion was a massive search of defendants' files sought by plaintiffs for evidence of racially discriminatory conduct and anti-trust violations charged in the Amended Complaint.

Rules 26(b) and 34 of the Federal Rules of Civil Procedure instruct that computer-stored information is discoverable under the same rules that pertain to tangible, written materials. The 1970 Advisory Committee Notes of Rule 34(a) make clear that electronic data are part of the definition of 'document,' and states that when discovery of e-mail would create an "undue burden or expense" on the respondent the appropriate relief is a motion under Rule 26(c) to shift costs:

The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronics data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. ... The burden [\*12]thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs.

F.R.Civ.P. 34(a) advisory committee's notes, 1970.

Plaintiffs' argument that the Court decided this issue in the February 27, and March 19, 2001 oral arguments and in the March 19, 2001 order granting plaintiffs' motion to compel the production of documents overlooks the circumstances in which that motion was granted. That motion resolved the disputes of the parties over the scope and relevancy of plaintiffs' discovery of documents from all defendants and the scope of the order of confidentiality. No issue of burden and expense of production of e-mails from defendants computerized data base was raised. Defendants did waive many real and potential disputes in regard to the relevancy and the breadth of plaintiffs' discovery requests by failing to oppose the motion to compel. They did not, however, waive their right to bring a motion under Rule 26(c) of the Federal Rules of Civil Procedure once they determined that the production of e-mails[\*13] from the computerized data base would cause them undue burden and expense. The Federal Rules of Civil Procedure do not set out time limits within which a motion for a protective order must be made. n2

n2 There is an implicit requirement that the motion must be timely made. *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 129 F.R.D. 483, 487 (D.N.J. 1990). "A motion for a protective order is timely if made prior to the date set for producing the discovery." *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 413 (M.D. N.C. 1991) citing *In re Coordinated Pretrial Proceedings, etc.* 669 F.2d 620, 622 n.2 (10th Cir. 1982) (holding that one issue raised on appeal could be dealt with summarily - a motion for a protective order which was filed four days prior to the date set for production was timely).

In considering whether a motion is timely under Rule 26(c), courts have discretion to determine whether the issue of burden and expense of production of electronically stored[\*14] material is timely made in complex litigation such as this. "Rule 26(c) ... confers broad powers on the courts to regulate or prevent discovery even though the material sought are within the scope of 26(b), and these powers have always been freely exercised." F.R.Civ.P. 26(b) advisory committee's notes, 1970. Here the issue was promptly raised after the moving defendants had opened their concert files and had produced the other documents requested by plaintiffs when plaintiffs then raised the issue of e-mail production. Accordingly, Judge Francis did not abuse his discretion in considering the moving defendants' application.

#### Factors Considered by Judge Francis

##### 1. Specificity

Judge Francis found that plaintiffs' "extremely broad" discovery requests favored shifting the costs of discovery to them. He contrasted plaintiffs' requests to other cases such as *Daewoo* where the plaintiff sought only specific data sets that were utilized in the administrative review that resulted in the challenged governmental order. *Daewoo Electronics Co., Ltd v. United States*, 10 C.I.T. 754, 650 F. Supp. 1003, 1004-05 (C.I.T. 1986). Similarly, in *McPeek* the court did not[\*15] shift costs but required production of only the e-mails of specific persons who purportedly retaliated against the plaintiff. *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001).

Plaintiffs argue that Judge Francis's order was based on plaintiffs' document demands from several years earlier. Instead, they argue, their papers discussed at length the proposals and concessions made by plaintiffs to narrow considerably the e-mail sought. (Pls.' Objections, at 18.) These proposals, they assert, involved curtailing discovery to a select group of e-mail users within each user, sampling of materials rather than

restoration of the entire body of e-mail possessed by defendants, the use of automated searching using an agreed list of search terms, and electronic review and production. (Id.)

Defendants, in response, argue that the issue of the breadth of plaintiffs' proposal was squarely before Judge Francis, who rejected plaintiffs' contention that they had narrowed their requests, when they had not. (Defs.' Opp'n, at 11.)

Judge Francis did not find that plaintiffs could not narrow their requests as they suggest, rather he found that the broadness of their discovery requests [\*16] favored shifting the cost of production to them. A review of the record by this Court shows that plaintiffs never made a specific, concrete proposal which narrowed these requests. Judge Francis' finding as to this factor was accurate and certainly not "clearly erroneous."

## 2. Likelihood of a Successful Search

Judge Francis followed the court in McPeek, in using a marginal utility analysis in determining whether to shift costs:

The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense. The less likely it is, the more unjust it would be to make [that party] search at its own expense. The difference is "at the margin."

McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001). Judge Francis found "there has certainly been no showing that the e-mails are likely to be a gold mine," nonetheless he found there was a high enough possibility that a broad search of the defendants' e-mails would elicit some relevant information so that the search should not be precluded altogether. In particular, Judge Francis pointed out that no witness[\*17] has testified about any e-mail communications that allegedly reflect discriminatory or anti-competitive practices. Therefore, he found that the marginal value of searching the e-mails is modest at best, militating in favor of imposing the costs of discovery on the plaintiffs. (Order, at 20.)

Although the plaintiffs have had complete access to the defendants' files and many depositions have been completed, the only things that plaintiffs point to in favor of their "likelihood of a successful search" is one printed e-mail in defendants' concert files, testimony of Mr. Embree who is not involved in concert promotion that e-mail was used by employees of CAA, documents that were not in e-mail form regarding a Janet Jackson tour, handwritten notes the meaning of which is greatly disputed, and the general volume of e-mail communication.

The one printed e-mail that plaintiffs cite to as showing a "likelihood of a successful search" describes an upcoming meeting between CAA and SFX. Plaintiffs assert that this

led them to the discovery that "at this meeting the outlines of an anti-competitive and discriminatory agreement were discussed." (Pls.' Objections, at 4.) The agreement is an alleged[\*18] agreement by SFX, a concert promoter, and CAA, a booking agency, not to compete. Assuming such an agreement exists, which the defendants vigorously dispute, the anti-competition agreement "is not a theory that is alleged in the complaint" as plaintiffs admitted at the March 19, 2002 argument. (3/19/02 Tr. at 12.)

As for the Janet Jackson tour, at the March 19, 2002 plaintiffs assert, "Early 1998 Rowe was attempting to bid on the national tour of Janet Jackson. He was conveyed a set of terms by Mr. Light from CAA that purported to describe terms that were being directed to all interested promoters. It turns out that in fact that was a complete -- that was a fraudulent statement, essentially. At the very same time he was sending those set of terms to Mr. Rowe, he was concluding a deal with Magicworks for far less onerous terms." (3/19/02 Tr. 22-23.) Once again, the facts surrounding this issue are vigorously disputed, but plaintiffs point to nothing in their extensive arguments on this subject that in anyway show a likelihood of a successful search. Plaintiffs do not offer any evidence that even suggests that any e-mails were exchanged in connection with Ms. Jackson's 1998 Tour.

As[\*19] for Mr. Embree's testimony, at the March 19, 2002 Hearing, plaintiffs admitted "...we have not elicited testimony from a witness identifying any particular e-mail beyond what Mr. Embree testified to as relating to a particular subject that we are attempting to discover [sic]." (3/19/02 Tr., 20.) In the deposition testimony cited by plaintiffs, Mr. Embree, a black employee of CAA, testified primarily about an act of racial discrimination by two white mail room employees who were promptly discharged. He also testified that an in-house e-mail advised of a meeting requiring the attendance of all employees and that Mr. Lovett responded by e-mail to a letter Mr. Embree sent him about his concerns about the company not being "colorful" enough. Mr. Embree testified that in that e-mail Mr. Lovett thanked him for his opinions, told him that he appreciated them, and said he would try to do what he could and that his door is open anytime. (Pls.' Reply Ex. C, at 29-30; 50.) This testimony does not point to any e-mails that will be of "explosive importance" as plaintiffs' assert or even that any e-mail discovery may be useful to plaintiffs case. Furthermore, Mr. Embree is not a witness likely[\*20] to have evidence supporting plaintiffs claims: he started as a copier at CAA, Inc. in 1991 (Frank Dec. Ex. A at 8), then moved to the library where he was responsible for filing, data entry, copying, keeping track of files, answering the phone, taking in requests and, on occasion, helping the head researcher (Id. at 9-10.) He now works in the music contracts room handing out faxes, copying and putting the contracts together with riders, bios, pictures, sending the contracts to the promoter, entering the date of the shipment into the computer and checking to see if the other assistants need help when they are overloaded. (Id. at 10; 104-105.) Mr. Embree has no responsibility for the selection of concert promoters or the booking or routing of concerts. n3 Accordingly, Mr. Embree's testimony does not show a likelihood of success in an e-mail search.

n3 The Court ordered discovery of records of complaints of race discrimination by employees filed against the defendants as possibly tending to show a propensity to be racially discriminatory in business contacts. It did not contemplate plaintiffs' attorneys attempting to engender complaints in the discovery process as is suggested by the Embree deposition.

Lastly, the mere volume of e-mail which includes not just inter-company communications but in-house communication of all employees also does not point to a likelihood of a successful search and the couple of handwritten notes that plaintiffs point to, although relevant, do not indicate a that a search of e-mail communications would be helpful to plaintiffs.

Judge Francis did not set up a "goldmine" standard for the "likelihood of a successful search" factor in determining whether to shift costs, rather he used the marginal utility analysis that was completely appropriate and, given the miniscule evidence presented by plaintiffs of the likelihood of success, decided in a manner that was not "clearly erroneous or contrary to law" that "the marginal value of searching the e-mails is modest at best" and decided that "this factor, too militates in favor of imposing the costs of discovery on the plaintiffs." (Order at 20.) The Court agrees with this finding, especially since, as pointed out by the moving defendants, the non-moving defendants, who are alleged co-conspirators, have already produced their e-mail and plaintiffs have not identified any of that production to support their argument[\*22] of the "likelihood of a successful search."

### 3. Availability from Other Sources

Judge Francis found that defendants had not shown that their e-mail communications are generally available other than by a search of the defendants' hard drives or back-up tapes and that the moving defendants' representations that "important" e-mails were probably printed out and contained in other files were entirely speculative. He found this factor favored requiring the defendants to produce the e-mail at their own expense. This finding has not been disputed.

### 4. Purposes of Retention

If a party maintains electronic data for business purposes, they will be obligated to produce that same information in discovery. The guiding principle is "information which is stored, used or transmitted in new forms should be available through discovery with the same openness as traditional forms." *Daewoo Electronics Co., Ltd. v. United States*, 10 C.I.T. 754, 650 F. Supp. 1003, 1006 (C.I.T. 1986). Conversely, a party that happens to retain data only in case of emergency or simply because it has neglected to discard it,

should not be put to the expense of producing it. Judge Francis found that[\*23] the back-up tapes clearly fell into the latter category as there is no evidence that defendants ever search these tapes for information or even have a means for doing so. Accordingly, he found that cost-shifting is warranted with respect to the back-up tapes. He made the same findings with regard to e-mails that, although deleted from the user's active files, remain on the hard drive. "Just as a party would not be required to sort through its trash to resurrect discarded paper documents, so it should not be obligated to pay the costs of retrieving deleted e-mails." (Order at 23.)

Plaintiffs argue that there is no case law that supports including this factor, and that the determination of this factor against the plaintiffs was in the absence of any evidence supporting such a conclusion. (Pls.' Objections, at 21-22.)

Defendants point to both *Daewoo Elecs. Co. v. United States*, 10 C.I.T. 754, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986) and *McPeck*, 202 F.R.D. at 33-34, which refer to whether the producing party has retained the discovery materials for active use in its business. Defendants also argue that plaintiffs have pointed to no business purposes[\*24] for which defendants keep these e-mails and point to their affidavits which state that the back-up tapes and hard drive are retained for "emergency" purposes. (Defs.' Opp'n, at 15.)

Purposes of retention was merely one factor in Judge Francis' Order which found that the e-mails are on the back-up tapes or remained on the hard drive and were not used by defendants in the course of their business, and therefore that this factor tipped in favor of shifting the costs of discovery to plaintiffs. Plaintiffs did not press this argument at the oral argument on March 19, 2002. Certainly this factor relates to the burden and expense of such discovery. There is no reason to find that Judge Francis' opinion on this point was clearly erroneous.

##### 5. Benefit to the Parties

Judge Francis noted that where the responding party itself benefits from the production, there is less rationale for shifting costs to the requesting party. However, he found in this case, since the e-mails are not relevant to any issue on which the defendants bear the burden of proof and cataloging or searching e-mail would have little business value to them, there is no possible benefit to the defendants making cost-shifting[\*25] more appropriate.

Plaintiffs assert that any number of relevant issues relating to the manner in which agencies and white promoters (and black promoters) communicate with one another (or internally within each defendant) would be revealed by defendants' email communications, and beneficial to defendants, if their claims are correct. Plaintiffs

contend that whether or not the defendants have the burden of proof should not be significant. (Pls.' Objections, at 23.)

The moving defendants respond that the argument that restoration of years of e-mail would benefit them by proving defendants' contention that they are not engaged in a race-based and antitrust conspiracy is nonsensical. They assert it would only show the absence of support for plaintiffs' meritless claims. (Defs.' Opp'n, at 16.)

Judge Francis specifically found that the recovery of e-mail will not benefit the defendants on any issue on which defendants bear the burden of proof. This finding was not disputed by plaintiffs at the March 19, 2002 and cannot be seriously disputed.

#### 6. Total Costs

Judge Francis found that the costs of the discovery desired by plaintiffs would be substantial by any definition and therefore[\*26] the magnitude of these expenses favors cost-shifting. (Order at 24.)

Plaintiffs argue that the Order disregarded entirely the extensive and uncontradicted case law governing e-mail discovery, cited by plaintiffs, that the cost estimates achieved by plaintiffs are well within the bounds of what has been held not to be so large as to justify cost-shifting. Defendants argue that the principal case on which plaintiffs rely, *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 U.S. Dist. LEXIS 8421, 94 Civ. C 897, 1995 WL 360526 (N.D. Ill. June 15, 1995) has been criticized for simplistically likening electronic files to paper documents and reflexively holding that the producing party should pay the costs citing *Mc Peek v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001). Defendants also argue that the plaintiffs misrepresent the other case they cite, *United States v. Visa USA, Inc.*, 1999 U.S. Dist. LEXIS 10212, 98 Civ. 7076, 1999 WL 476437 at \*2 (S.D.N.Y. July 7, 1999) as the court in that case expressly "reserved decision about which party will ultimately bear the cost of producing e-mail." Defendants also argue that Judge Francis found the costs for e-mail restoration were substantial even[\*27] using plaintiffs lower estimates without making a finding as to whether plaintiffs' or defendants' estimates were reasonable. n4

n4 The issue of costs is strongly contested. Plaintiffs project that the costs of WMA would be between \$24,000 and \$87,000; for Monterey between \$10,000 and \$15,000; and for SFX and QBQ approximately \$64,000. Defendants project that the costs of WMA would be \$395,944 if eight selected back-up sessions were produced and as much as \$9,750,000 if all of the back-up tapes were produced; for Monterey between \$43,110 and \$84,060; for CAA a minimum of \$395,000; and SFX and QBQ for over \$403,000. Monterey also proffered an estimate of \$247,000 to review the e-mails for privilege and CAA approximated \$120,000 for their privilege review.

The cases cited by plaintiffs do not support their position that Judge Francis disregarded the law governing e-mail discovery. The court in *In Re Brand Prescription Drugs Antitrust Litig* does not shift production costs to the plaintiffs, but[\*28] the court in that case recognizes that "Central to any determination of whether a cost should be shifted to a producing party is the issue of whether the expense or burden is 'undue.'" 1995 U.S. Dist. LEXIS 8421, 1995 WL 360526, at\*5-6. The court in that case also required the Class Plaintiffs to narrow their request for the express purpose of "containing costs" which had been estimated at \$50,000 - \$70,000. *Id.* at 7. As defendants point out, in the other case cited by plaintiffs, *United States v. Visa USA, Inc*, 1995 U.S. Dist. LEXIS 10212, 1999 WL 476437 at \*2, the court simply "reserved decision about which party will ultimately bear the cost of producing e-mail. Additionally, simply looking at the costs involved in this case and comparing it to the costs in another case where the court decided not to shift the cost of production, is not a sufficient analysis as there are the other factors that are being taken into account, particularly the likelihood of a successful search and the materiality of the information being sought to the claims in this case. Judge Francis did not base his decision on the substantial costs of the production alone, it was merely one factor in his analysis that favored the shifting[\*29] of costs. In view of the amount in question, the finding that it was a substantial amount that favored cost-shifting was not "clearly erroneous or contrary to law."

#### 7. Ability to Control Costs

Judge Francis found that "where the discovery process is going to be incremental, it is more efficient to place the burden on the party that will decide how expansive the discovery will be." (Order at 25, citing *Bills v. Kennecott Corp*, 108 F.R.D. 459, 464 (D. Utah 1985).) Therefore, he found that plaintiffs are in the best position to decide whether further searches would be justified, militating in favor of cost-shifting.

This factor has not been disputed.

#### 8. The Parties' Resources

Judge Francis noted that all of the parties have sufficient resources to conduct this litigation (Order at 25-26.) As to plaintiffs argument that defendants are some of the most powerful players in the concert promotion business, Judge Francis found that as the plaintiffs purport to be able to compete with them in the market place, the relative financial strength of the parties at most a neutral factor. (Order at 26.)

Plaintiffs argue that defendants are the world's largest concert promotion [\*30] companies and the largest and wealthiest talent agencies all of whom have pointed

out the modest financial condition of plaintiffs whereas plaintiffs' financial situations have "declined precipitously since this action was commenced" and "the Order poses a substantial risk that they will not be able to acquire this material at all." (Pls.' Objections, at 25.) Plaintiffs argue the level of financial resources necessary for plaintiffs to be participants in the concert industry during the relevant period in the complaint "has no bearing on plaintiffs' current financial condition." (Id.)

Defendants argue in response that: 1) plaintiffs failed to present any evidence on this issue to Judge Francis and therefore plaintiffs' current attempt on this motion to introduce, through an attorney's affidavit, information relating to plaintiffs' financial resources is improper and should be disregarded; 2) plaintiffs clearly do have the resources necessary to conduct this litigation, hiring four different law firms to prosecute this action, and do claim to be able to compete with defendants in the marketplace; and 3) plaintiffs' unsupported contention that plaintiffs' financial situation have declined[\*31] precipitously is contradicted by plaintiff Leonard Rowe's testimony that since the lawsuit began he has been making more money. (Defs.' Opp'n, at 20-21.) At oral argument, defendants stated without contradiction that one of the plaintiffs is extremely wealthy. (3/19/02 Tr. at 50-51.)

When objecting to a magistrate judge's report before a district court, a party has "no right to present further testimony when it offer[s] no justification for not offering the testimony at the hearing before the magistrate." *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137-38 (2d Cir. 1994), citing *Pan Am World Airways, Inc. v. International Bhd. of Teamsters*, 894 F.2d 36, 40 n. 3 (2d Cir. 1990). If plaintiffs wanted to argue that their resources had changed since the relevant time period in the suit, they should have brought that argument before the magistrate judge or at least moved for reconsideration with supporting affidavits.

Furthermore, the weighing of the parties' resources is not simply a test of which party has more resources, but as Judge Francis noted, "in some cases, the cost, even if modest in absolute terms, might outstrip the resources of one of [\*32]the parties, justifying an allocation of those expenses to the other." (Order, at 25.) Therefore, finding that this factor is neutral, in light of the ability of both parties to conduct this litigation and plaintiffs' assertion that they are able to compete with defendants on the market place was not "clearly erroneous." Judge Francis' conclusion was not that defendants' and plaintiffs' resources are equal as plaintiffs argue, but that in view of plaintiffs' resources it would not justify an allocation to the defendants.

Judge Francis clearly found the burden or expense of the proposed discovery outweighs its likely benefit, taking into account "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed.R.Civ.P.

26(b)(2)(iii). There has been no showing that Judge Francis' finding was "clearly erroneous."