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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT L. VAZZO,
Plaintiff,

vs.

CITY OF TAMPA, FLORIDA,
et al,
Defendants.

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: CIVIL 8:17-cv-2896
: NO.:
:
: DATE: 9/13/2018
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: TIME: 9:00 a.m.
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: PAGES: 1 - 47
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TRANSCRIPT OF TELEPHONIC STATUS HEARING
BEFORE THE HONORABLE AMANDA ARNOLD SANSONE
UNITED STATES MAGISTRATE JUDGE

Court Reporter: Lynann Nicely, RPR, RMR, CRR
Official Court Reporter
801 N. Florida Avenue
Suite 13B
Tampa, Florida 33602

Proceedings recorded and transcribed by computer-aided
stenography.

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P R O C E E D I N G S

THE COURT: Hi, this is U.S. Magistrate Judge Amanda Arnold Sansone. This is Case 17-cv-2896-T-36AAS, Vazzo vs. City of Tampa. Could counsel state their appearances, starting with counsel for the plaintiffs?

MR. MIHET: Good morning, Your Honor, Horatio Mihet on behalf of the plaintiff.

THE COURT: Thank you, Mr. Mihet. Is there anybody else on the phone for the plaintiffs?

MR. GANNAM: Yes, Your Honor, good morning; Roger Gannam for the plaintiffs.

THE COURT: And anyone else?

MR. MIHET: I think that's it for us, Your Honor.

THE COURT: Thank you. And then for the defendants?

MR. WILLIAMS: Good morning, Your Honor, Robert Williams representing the City of Tampa.

MR. GEWIRTZ: Your Honor, Jerry Gewirtz on behalf of the City.

THE COURT: We're having difficulty hearing you. Are you on a land line or are you on a cell phone? Are you there? We're not hearing anything. No, it's coming in and out. Are you on

1 speakerphone? That could be the problem as well.

2 MR. WILLIAMS: Actually the connection is not
3 very good on our end as well.

4 THE COURT: Do you want to try to hang up and
5 then call back in?

6 MR. WILLIAMS: That's probably the right thing
7 to do. Thank you.

8 THE COURT: We won't say anything, we'll just
9 wait for you to call back in.

10 (Brief pause)

11 MR. GEWIRTZ: Your Honor, Rob Williams back
12 on. Is this better?

13 THE COURT: That sounds great for me.
14 Mr. Mihet, are you able to hear Mr. Williams better
15 now?

16 MR. MIHET: Much better, thank you.

17 THE COURT: And who else is there with you,
18 Mr. Williams?

19 MR. GEWIRTZ: Mr. Gewirtz and Mr. Harvey.

20 THE COURT: Perfect. Thank you, I'm not
21 having any difficulty hearing you, so it seems that
22 calling back in did the trick.

23 So we set this hearing so that you all,
24 Mr. Williams, the city, and Mr. Ruggiero, that you
25 all could let us know what happened in terms of the

1 number of hits based on my narrowing of the
2 custodian, the search terms, the devices. And then
3 I had proposed three different date ranges so that
4 we could compare the number of hits as to each
5 range. So have you been able to perform those
6 searches and do you have that information?

7 MR. WILLIAMS: We have, Your Honor, actually
8 my paralegal and I worked over the weekend, and I
9 know that Mr. Gordsmith probably also did, to figure
10 all this out. Let me, if I may, give you the
11 information and make the suggestion from at least
12 the defendant's point of view. The total number of
13 hits starting with --

14 THE COURT: Mr. Williams, we can't hear you
15 again, you're fading in and out again.

16 MR. MIHET: We can't hear either, Your Honor.

17 THE COURT: I think he hung up to try to dial
18 back in again.

19 (Brief pause.)

20 MR. MIHET: Are we still connected?

21 THE COURT: Yes, we're still connected, I
22 think we're just waiting for them to call back in.

23 MR. MIHET: Okay.

24 THE COURT: I'm guessing they're trying to
25 find a different phone.

1 MR. MIHET: Perhaps if Your Honor would like I
2 can try to call from a separate line Mr. Williams.

3 THE COURT: And try to conference him?

4 MR. MIHET: Yeah.

5 THE COURT: That's fine with me if you want to
6 try that.

7 MR. MIHET: Okay. I'll be right back on the
8 line.

9 THE COURT: Hello. Who joined? Hello?
10 Hello? Who is on the line, is that you, Mr. Mihet,
11 or is that Mr. Williams?

12 MR. GANNAM: Your Honor, Mr. Mihet --

13 MR. MIHET: I got back on. I was not able to
14 reach Mr. Williams at the number that I have for
15 him. Hopefully he's not still pleading his case,
16 thinking we can hear him. But I thought I heard
17 him -- that was not me dialing in, I never left the
18 line and I thought I heard his voice just now.

19 THE COURT: I thought I did too. Sounded like
20 maybe -- I heard something about going to another
21 room so maybe they'll going to dial in from another
22 room.

23 MR. MIHET: Perhaps.

24 THE COURT: I hear somebody talking. Is that
25 from your office, Mr. Mihet, or is that from another

1 line?

2 MR. MIHET: No, Your Honor, I'm alone here so
3 it must be from the other line. It almost sounds
4 like we are on mute and they were not aware that we
5 can hear.

6 THE COURT: We'll try to call them from the
7 chambers too.

8 MR. WILLIAMS: Judge?

9 THE COURT: Yes.

10 MR. WILLIAMS: I apologize. We were in a
11 conference room and I've never had a problem with
12 that phone, but apparently there is a problem today.

13 THE COURT: That's okay, Mr. Williams. So are
14 you now on a different phone, is that where you are?

15 MR. WILLIAMS: Yes, I'm in my office now and
16 Mr. Gewirtz and Mr. Harvey are following me.

17 THE COURT: No problem.

18 MR. WILLIAMS: I don't know if you heard the
19 prior presentation --

20 THE COURT: We did not. I will tell you, it
21 was as if I was going to compare it to when you're
22 watching a movie and the film runs out. These days
23 it was like watching a Netflix show and then you're
24 getting ready to find out exactly what the answer is
25 and all of a sudden your internet goes out. So I

1 think the last thing we heard was the total was, and
2 we didn't hear anything after that.

3 MR. WILLIAMS: All right. So let me, if I
4 may, I apologize again, let me repeat what I said
5 earlier. We obviously took the time over the
6 weekend -- and kudos to my paralegal, she was here
7 until 10:30 on Saturday night; I left at 6. So we
8 have a total of 1,185 hits starting from October 1st
9 of 2016 through August 31st of 2018, or about
10 23 months.

11 The number of hits per period of the four
12 periods, first period was October 1st of 2016 to
13 4/15/17; that's 536 hits. April 16th, 2017, to
14 12/04/2017, the date of the filing, is 259 hits.
15 From 12/05/17 to 12/15/17 is 102. And from 12/16/17
16 through 8/31/18 is 288. I realize I went pretty
17 fast there, but the total is 1,185.

18 And so what we did, to repeat what I said
19 earlier that unfortunately you didn't hear, we tried
20 to decide what was the best way to approach this
21 situation. So the number of pages that those hits
22 generated for the entire timeframe, using Your
23 Honor's order, is around 22,000, give or take
24 5 percent. I don't have the exact number, we're
25 still working on that, but 22,000 is a good round

1 number.

2 And the number of pages prior to the filing of
3 the complaint and after the filing of the complaint
4 is about the same, 11,000. And what we thought was
5 an appropriate way to approach this, given the
6 October 10th hearing, is that we could go through
7 the 11,000 pages pre-filing because those likely
8 will not include any privilege -- if there are any,
9 it would be minimal. So that saves us the vetting
10 process that can be very, very time consuming and we
11 can produce those documents by October 1st. We
12 believe we can get that done if we use the requisite
13 people and then we can just go from there.

14 As to post filing, our position, as Your Honor
15 knows, is that the city -- the defendants take the
16 position that anything post filing is irrelevant
17 from a discovery point of view, much less from an
18 evidentiary point of view; and even if remotely
19 relevant, it is disproportional and we shouldn't
20 have to produce that. And there is a case out of
21 the Middle District, Magistrate Judge Smith, that I
22 think supports that.

23 But if Your Honor were to require us to
24 produce those documents, then it would take us
25 probably until December 10th to go through that

1 vetting process, given the hours that it would take
2 to do it carefully, which we would do, and then we
3 would need another 30 days until January 9th to --
4 just as we put in our motion for extension.

5 But our proposal I suppose would allow the
6 plaintiff to have the pre-filing documents in time
7 for the October 10th hearing and we could go forward
8 with the October 10th hearing. At a minimum we
9 could go forward on the motion to dismiss on
10 October 10th. Mr. Mihet mentioned something
11 yesterday about possibly postponing the hearing and
12 I'll let him speak to that. But hopefully that
13 gives you an idea of what we've been able to
14 accomplish.

15 THE COURT: Okay. And let me hear from you --
16 I appreciate those efforts, Mr. Williams, and I
17 actually appreciate you giving accolades to your
18 paralegal. It seems that too often I'm hearing
19 people blaming their paralegal and legal assistants
20 for things and that tends to be like nails on a
21 chalkboard to my ears. So to hear someone giving
22 accolades to their paralegal is refreshing.

23 MR. WILLIAMS: Next to my wife and daughter,
24 she's the most important woman in my life.

25 THE COURT: Well, hopefully you tell her that

1 too so that she'll stick around.

2 MR. WILLIAMS: I do.

3 THE COURT: Mr. Mihet, turning to you, what is
4 your response? Obviously the city and Mr. Ruggiero,
5 their counsel is recommending to cut it off at the
6 filing of the complaint, which would be the
7 December 4th, 2017 date, and that then to the extent
8 that anything additional from after the filing of
9 the complaint, that that would either require a much
10 longer time because then there would be more
11 privileged documents to review, and that also that
12 it is largely irrelevant and even if it is somewhat
13 relevant, it's not proportional to the needs of the
14 case, given that the crux of the complaint is really
15 more focused on the enactment of the ordinance. So
16 let me hear your response, Mr. Mihet.

17 MR. MIHET: Thank you, Your Honor. I actually
18 have several things to address, but I'll start with
19 the fact that the total number of hits is 1,185.
20 That is significantly lower than the 5,000 that we
21 were trying to get under and that I believe the
22 parties felt would be a reasonable number. So we
23 have succeeded. 1,185, and the breakdown that I
24 have is 795 of those hits are prior to the filing of
25 the complaint and only 390 hits are after the filing

1 of the complaint.

2 Now, we have asked Mr. Williams to tell us two
3 key pieces of information that I think are still
4 necessary and he was not able to: Number one, have
5 these hits been de-duplicated, and he does not know;
6 and number two --

7 MR. WILLIAMS: I do now, Eric.

8 MR. MIHET: Okay. All right.

9 MR. WILLIAMS: Why don't you [inaudible] the
10 questions and I'll answer them.

11 MR. MIHET: Okay. So that was a question that
12 we asked yesterday afternoon and we didn't have an
13 answer to. And number two, how many of the 390 hits
14 post filing of the complaint have an attorney as a
15 recipient or a CC or a BCC on them. That was also
16 something that we thought could be gathered
17 automatically without reviewing every document, but
18 they didn't have that information.

19 Now, if the city is trying to obtain an
20 additional three months to review 390 documents,
21 Your Honor, they would have the burden of showing
22 you that all of those include attorneys in them,
23 which we don't even know at this point. So they
24 haven't met the burden to obtain the excessive
25 extension that they are seeking.

1 I would point out, Your Honor, that as of
2 right now the city and the defendants are
3 represented not only by the city's in-house
4 attorneys but also by two outside firms, two
5 separate outside private firms.

6 And so we're talking about reviewing 390
7 documents post filing of the complaint. We don't
8 see how that could be such an insurmountable burden
9 to require an extension until January.

10 I'm sorry, let me pause for just a second, I'm
11 hearing some feedback. I wonder if I could ask
12 Mr. Williams to put his phone on mute; I think that
13 may be causing it.

14 MR. WILLIAMS: If I do it on mute, then you
15 can't hear me.

16 MR. MIHET: When you want to speak you can
17 unmute it.

18 MR. WILLIAMS: All right.

19 THE COURT: Was there any more you wanted to
20 say? Go ahead, Mr. Mihet, anything more you wanted
21 to say?

22 MR. MIHET: Yeah, just a couple of things,
23 Your Honor. Because Mr. Williams has raised the
24 issue, we have -- I would like to give the court
25 four authorities, very briefly, standing for the

1 proposition that discovery post filing of the
2 complaint is not only relevant and permissible but
3 also warranted.

4 He mentioned a Middle District of Florida case
5 involving Magistrate Judge Smith. I think he may
6 have misread the import of that case. It is Badger
7 Auctioneers Inc. vs. Ali, and the cite is 2017 WL
8 4423618. In that case -- if that's the case
9 Mr. Williams was thinking about, in that case
10 Magistrate Judge Smith recounts the arguments made
11 by the party opposing post complaint discovery and
12 perhaps that may be the section that Mr. Williams
13 has read. However, Magistrate Smith then goes on to
14 reject that argument and to hold that post complaint
15 discovery can be just as relevant as pre complaint
16 discovery and ordering the parties to produce post
17 complaint emails.

18 Very quickly, I would add to that a couple of
19 other authorities. We have King vs. E. F. Hutton &
20 Co, that's 117FRD2, it's a DC district case. And
21 the court there again deals with exactly the same
22 argument that the defendants are making here. And
23 the court says that the documents which were
24 generated after the filing of the complaint may shed
25 issues on facts and things that occurred prior to

1 the filing of the complaint and are therefore
2 relevant.

3 And I'll just give you one more, Your Honor,
4 Charvat vs. Valente, 82 F.Supp. 3d 713. That's a
5 Northern District of Illinois case. And the court
6 there again rejects the same argument that the
7 defendants are making here and it says "it is common
8 sense that information and documents created after
9 filing the complaint can be relevant and must be
10 produced." That was a quote.

11 And so Your Honor, I just bring you back to
12 the fact that we have 390 hits that we're talking
13 about. We don't think that's an insurmountable
14 burden, even if they included attorneys in the
15 communications which we don't know.

16 And so we would ask the court to do then,
17 rather than the extension that Mr. Williams
18 contemplates, we would ask the court to do this.
19 We've already said September 17th we would have the
20 written responses from the defendant. Then
21 Mr. Williams has said that October 1st could be the
22 date when he would produce the 795 pre-filing hits,
23 so we would be okay with that. Then we would ask
24 the court to give the defendant until October 15th
25 to produce the additional 390 hits, to the extent

1 that we are not actually privileged.

2 Then we would ask the court to allow us to
3 take the two depositions that we seek during the
4 week of October 28th to be scheduled at the parties'
5 mutual convenience.

6 And then lastly, we would ask the court to
7 have the preliminary injunction and a motion to
8 dismiss hearing sometime in the week of
9 November 12th.

10 And so, Your Honor, I have some arguments on
11 the idea that we should decouple the motion to
12 dismiss versus the preliminary injunction hearing,
13 but I won't go into that unless the court is
14 actually contemplating that.

15 I would note that under our proposal the
16 defendants would have over an additional month to
17 respond to this discovery.

18 And I would also note that under their
19 proposal, dumping all of these documents that they
20 intend to dump on us eight days before the hearing
21 as currently scheduled would not work for us and it
22 certainly wouldn't allow us to take the two
23 depositions that we need to take for the hearing in
24 order to avoid an evidentiary -- a full-on
25 evidentiary hearing.

1 So thank you, Your Honor, that's all I have
2 for now.

3 THE COURT: Okay. Let me turn back to
4 Mr. Williams. Mr. Williams, go ahead and first
5 answer the two questions. So one is have they been
6 deduplicated?

7 MR. WILLIAMS: The answer to both questions,
8 Your Honor, is no and no, and I'm going to let
9 Mr. Harvey provide a little more detail because he
10 had a specific conversation with the person at the
11 city that answered those questions.

12 THE COURT: Go ahead Mr. Harvey.

13 MR. HARVEY: Good morning, Judge. I did speak
14 to our IT person and he advised that we do not have
15 the capability to run a -- there is no software to
16 do a de-duping, and then there is no way for him to
17 exclude certain email recipients, or senders for
18 that matter, to narrow down in attempt to try to
19 exclude things that were sent to or where attorneys
20 were copied on.

21 THE COURT: Okay.

22 MR. WILLIAMS: And in response to Mr. Mihet's
23 argument as to the case by Magistrate Judge Tom
24 Smith, that's not the case that I was referring to.
25 The case that I'm referring to, Your Honor, is

1 Teledyne Instruments Inc., vs. Cairns, 2013 WL
2 5781274. And in that decision Magistrate Judge
3 Smith says -- I'll just paraphrase -- at least two
4 federal district courts have adopted Local Rules
5 exempting post complaint communications from the
6 scope of discovery. He cites the Southern District
7 Local Rule 26.1(g)(3)(C), and Northern District of
8 Oklahoma Local Rule 26.4.

9 He goes on to say one judge explained that the
10 Southern District of Florida's rules reflects, "A
11 policy that despite the relevancy of a given
12 document in most cases there is no good reason to
13 require a party to go through the expense of a
14 privilege log with respect to documents created
15 after the commencement of the case." And he cites
16 Stearn vs. O'Quinn, 253 FRD 663, a Southern
17 District, a 2008 decision.

18 Now, in our case, while Mr. Mihet talks about
19 390 hits, that's 11,000 pages, not -- so the hits
20 are not exactly the accurate barometer to use at
21 all. And so it would be a laborious process for us,
22 and particularly laborious because as Magistrate
23 Judge Smith, there is really no reason to do that.

24 And this case is probably a quintessential
25 example of why it's not necessary because we're

1 talking about the constitutionality of an ordinance
2 that was passed well before the filing of the suit.
3 So anything that's really relevant in my opinion is
4 going to take place prior to the enactment and
5 certainly prior to the filing of the lawsuit. After
6 that, I submit it's utterly irrelevant as to the
7 constitutionality issues that the plaintiffs have
8 raised.

9 Last, let me address the written discovery.
10 We have to go through documents in order to properly
11 respond to those written documents, the request for
12 production, we can make progress there, but the
13 interrogatories and the request for admissions. And
14 we're going to need at least until October 1st for
15 that as well.

16 Your Honor's ruling the other day, and your
17 order reflects it, is that it wasn't a hard and fast
18 ruling as far as the 17th, next Monday. And so I
19 think October 1st we could probably get that done if
20 at all possible, but we'd like to have longer than
21 that, given Mr. Mihet's proposal. I would suggest
22 that we extend it out until probably November 1st
23 and that would allow us to do a number of things
24 that would assure Mr. Mihet and his clients that we
25 have done a thorough job of going through that.

1 So we'd like to stick to the December 10th
2 date as we requested in our motion and the
3 January 9th date as we requested, but I'm giving you
4 some thoughts as to what I think would be absolutely
5 necessary in order for us to do our job correctly
6 and particularly given his proposal.

7 I see no reason, frankly, why that isn't
8 workable because I would remind the court and
9 Mr. Mihet, they filed this in December of '17, they
10 filed a motion for preliminary injunction with their
11 complaint. That preliminary injunction, before I
12 got involved in the case, was scheduled for hearing
13 in April. Then it was postponed to June at their
14 request, I think.

15 They filed an amended complaint. That led to
16 the hearing being bumped all the way up to October.
17 And they made no effort to take any discovery prior
18 to those two earlier dates. And they waited until,
19 as I said in our last hearing, until August 9th to
20 do anything from a discovery point of view. So I
21 would submit that I don't think this motion for
22 preliminary injunction is quite as urgent as they
23 would suggest it is.

24 So I think that --

25 MR. MIHET: [Inaudible]

1 [Overlapping speakers]

2 MR. WILLIAMS -- [inaudible] date and the
3 January 9th date are fair, reasonable, would
4 certainly give us the time to do it thoroughly, as I
5 said at our hearing the other day, and give the
6 court assurance that we have done a thorough job,
7 without really unfairly prejudicing the plaintiff at
8 all.

9 THE COURT: And Mr. Mihet, before you speak,
10 let me ask Mr. Williams a couple follow-up
11 questions.

12 Mr. Williams, Mr. Mihet has also mentioned the
13 issue of taking two depositions. Is that something
14 that you all have discussed and what is the city's
15 position on that? I'm assuming they're corporate
16 rep depositions or maybe it's a corporate rep and a
17 deposition of Mr. Ruggiero, I'm not sure. Have you
18 all discussed that?

19 MR. WILLIAMS: We talked yesterday, I don't
20 know, for 20 minutes. Mr. Mihet didn't raise that
21 at all. So no, we haven't discussed it. That would
22 be a problem. And the reason it would be a problem
23 to discuss it even is because I haven't received any
24 30(b)(6) notice yet. So it's impossible for me to
25 evaluate and analyze a potential 30(b)(6) deposition

1 without the notice in front of me. The specifics of
2 a 30(b)(6) notice in my experience -- and I've done
3 a lot of them -- are very important in terms of how
4 you address that, particularly when you're talking
5 about a public entity like the City of Tampa. So
6 that would take some time, but if he sends us a
7 notice, we would be prepared to address it and
8 communicate with him as soon as possible.

9 MR. MIHET: May I respond, Your Honor?

10 THE COURT: You may, go ahead, Mr. Mihet.

11 MR. MIHET: Taking the last issue that
12 Mr. Williams just raised about the 30(b)(6) notice,
13 the court will find at Docket 111-4, the
14 communication, the written exchange that
15 Mr. Williams and I have had, and on page 6 of that
16 communication, item number 5, I specifically
17 identified for Mr. Williams the topics that we
18 wished to have a 30(b)(6) witness on. And I invited
19 him to let me know availability, as I believe the
20 Local Rules require us to coordinate.

21 So I didn't serve a formal 30(b)(6) notice,
22 but I did spell out in detail the topics as to we
23 seek testimony. And this took place on August 9th,
24 Your Honor, and so what I just heard from him is
25 simply not factual.

1 Number two, the authority that he cited from
2 Judge Smith is completely opposite because it deals
3 with the separate issue of whether or not a party
4 has an obligation to provide a privilege log for a
5 post complaint communication. That is what that
6 case deals with and that is what the local rule in
7 the Southern District of Florida that was cited in
8 that case deals with.

9 It does not deal with whether or not a party
10 must produce nonprivileged communications that took
11 place after the filing of the complaint. The
12 authority that I provided to the court deal with
13 that specific issue and all of them indicate that it
14 should be provided.

15 And number three and last, Your Honor,
16 Mr. Williams has already indicated that his clients
17 intend to assert various objections to our written
18 discovery. They have had our written discovery
19 since August 9th, more than a month ago. We do not
20 want to wait another two weeks or three weeks or
21 four weeks for them to provide our -- to provide the
22 written responses because we will have -- more than
23 likely we will have to litigate the objections that
24 the defendant intend to raise and there is no reason
25 why they cannot provide those responses by

1 September 17th as the court has articulated.

2 On that point, Your Honor, it just doesn't
3 make any sense to us that the city is prepared to
4 provide the 795 hits prior to filing of the
5 complaint by October 1st. They have said they're
6 willing and able and ready to do that, but then they
7 need another three or four months, I lost count,
8 from there to provide just an additional 390 hits to
9 review them. Your Honor, I don't think that makes
10 any sense, I don't think that they have made out a
11 case for that kind of an extension. I think that
12 the schedule that we proposed is reasonable, would
13 allow for this discovery to be completed on more
14 than double the timeframe that the litigants in
15 South Florida have been able to complete it, and
16 would allow us to come to the court with a record
17 that has the deposition testimony, that has the
18 relevant documents, and that I think would be able
19 to avoid a full on evidentiary hearing.

20 MR. WILLIAMS: Well, if I may respond very
21 quickly, Your Honor, I don't want to take up a lot
22 of time, but I'm familiar with what Mr. Mihet was
23 talking about, but that's a theory when I get a
24 notice, a 30(b)(6) notice, then I address it. I've
25 had too many experiences where the 30(b)(6) notice

1 was different from what people said it was going to
2 be. That's why I said what I said and I'll stand by
3 that.

4 And to require a 30(b)(6) deposition before
5 the completion of the written discovery is contrary
6 to a number of cases. I can cite them to Your
7 Honor. Bank of America v. SFR Investments Pool,
8 2016 WL 2843802. United States EEOC v. Force One
9 Staffing, 2013, WL2433, and Taser International Inc.
10 vs. Morgan Stanley & Company Inc., 2010, WL
11 11575279. And I have other cases.

12 To take a 30(b)(6) notice of deposition prior
13 to the completion of the written discovery is just
14 contrary to the rule, duplicative, and it would be
15 violative of the case law that I just described.

16 MR. MIHET: Just so we're clear, we're not
17 proposing that, Your Honor. Under our proposal the
18 written discovery as to the PI issues would be
19 completed prior to the 30(b)(6), and the 30(b)(6)
20 would be limited to the PI issues that we believe
21 are necessary and that we identified in our email to
22 Mr. Williams. So we're not proposing what he just
23 rebutted.

24 THE COURT: Okay. Now it's my turn. So with
25 regard to the issue of the case law that you all

1 have cited, I have not had a chance to read it. So
2 far what has been cited to me though is all district
3 court -- well, Magistrate Judge out of the Middle
4 District, the two cases, and then one out of I
5 believe it was Illinois and DC district court.

6 So while -- even if I did have a chance to
7 read them on the fly during this hearing, they
8 would -- none of them would be binding on me,
9 although I do have the utmost respect for Magistrate
10 Judge Smith who perhaps I would be persuaded by what
11 he has to say.

12 That said, my general rule of thumb with cases
13 and discovery in general is that you cut off at the
14 complaint. Now, are there cases where there are
15 exceptional circumstances and where you need to go
16 past the complaint, sure, there is exceptions it
17 seems to most rules, which is where most of the
18 fights end up being when we're having discovery
19 disputes. But that said, again, the general rule is
20 that it's cut off at the filing of the complaint.

21 Here the reason that I was persuaded and the
22 reason that I had the city run the search for post
23 complaint up to August 31, 2018, was simply because
24 that was what had been agreed to and permitted in
25 the Southern District. It does not seem that that

1 was a contested issue in the Southern District,
2 though, so it doesn't seem that it was one that the
3 court addressed the merits of that dispute.

4 But again, the idea here being that I wanted a
5 comparison, a point of comparison. If it had been
6 very few hits, if it had been very few pages, then
7 by all means I would have told the city go ahead and
8 do that work and then you've got at least a similar
9 date range that's been reviewed in both the Southern
10 District and the Middle District. Not because I
11 think it is necessary in this case nor do I find
12 this case to be one of the exceptional cases that
13 would fall within the minority of cases that do need
14 that post filing discovery, but simply because it
15 was what was being done in the Southern District, so
16 why not have them run the hits to see where the hits
17 stand.

18 Now, I do appreciate that the hits number is
19 relatively low, it's about half of the hits in the
20 pre-filing numbers, and then I also do appreciate
21 that it is -- that as the city is saying, there is
22 the same number of pages of documents. And while
23 that may mean that there is one hit in an email, if
24 it's a 20-page email string, the city is having to
25 review all 20 of those pages.

1 Now, I also appreciate that these have not
2 been deduplicated. I would assume, given the
3 custodians to which I limited the searches, that
4 you're going to have multiple of the same emails
5 being reviewed because they have been sent among the
6 group of custodians and so there will be some
7 familiarity that once whoever is reviewing these
8 documents starts reviewing these documents, they'll
9 be able to do so in a timely manner.

10 So that does -- obviously I'm sure the city
11 would prefer that these had been deduplicated
12 because then it's going to result in extra work on
13 their part. Also, even when emails are
14 deduplicated, you end up with email strings that
15 unless they have been deduplicated in such a way
16 that you have the complete string, they're going to
17 be looking at a lot of the same emails over and over
18 again.

19 In the one range that I had required, it was
20 the cut-off of December 15, 2017. So in a sense
21 that would give the plaintiff a bit of a sneak peek
22 of what type of email traffic was occurring right
23 the day of the filing of the complaint and the
24 subsequent days afterwards.

25 So for purposes of merits discovery in this

1 case, should this case get to that point, then I do
2 find that it is necessary at this time to have the
3 cut-off be that December 15th, 2017. That way post
4 preliminary injunction hearing, post motion to
5 dismiss hearing, if the plaintiffs can make an
6 argument to me based on the sneak peek of what they
7 have been able to see in the emails for those
8 11 days after the filing of the complaint, they will
9 then have the tools to make that argument and I
10 don't view that as such an onerous additional review
11 for the city because that would include the original
12 795 hits.

13 So what I will require that the city do is
14 that they review the hits for the date range of the
15 October 1, 2016, through the December 15, 2017,
16 range and then provide a privilege log for any
17 documents that are being withheld on the basis of
18 privilege, and then otherwise produce those
19 documents.

20 Now, the city is saying that they can do that
21 by October 1st. I will say too, in looking,
22 Mr. Mihet, at what you've identified as the
23 Rule 30(b)(6) topics, those topics that were
24 identified in that paragraph 5 of that email
25 attached at 111, that just further impresses upon me

1 that what is appropriate in terms of the discovery
2 for the PI hearing is frankly the pre enactment of
3 the ordinance and up to the enactment of the
4 ordinance.

5 So in a sense, based on that -- the topics
6 that have been identified at 30(b)(6), even getting
7 the documents post ordinance, so post the April 2017
8 date, by me permitting you to have and requiring
9 them to review the April to December 2017, you're
10 already getting a range of documents that appears to
11 be beyond the topics that you identified in the
12 30(b)(6) -- not notice but at least preview that you
13 provided to the city.

14 So my understanding then in looking back at my
15 notes of what you said, Mr. Williams, is that by
16 October 1, 2018, that you would be able to have
17 reviewed and produced those documents, again, as
18 well as a privilege log, so that to the extent that
19 Mr. Mihet wishes to challenge the privilege on any
20 of those, he may have the information that he needs
21 to do that.

22 In terms of the written --

23 MR. WILLIAMS: Correct, Your Honor,
24 October 1st is the date.

25 THE COURT: Okay, great. So October 1st will

1 be the deadline for the review of those 795 hits.
2 And am I accurate that the 795 -- that actually may
3 be a little bit more than 795 because I think that
4 was through December 4, 2017, and I'm requiring
5 through December 15, 2017. So I think --

6 MR. WILLIAMS: I'm sure it will be a little
7 more. Not a whole lot though, I don't think.

8 MR. MIHET: I think Mr. Williams told us it
9 was 102 additional hits from the December 5th to
10 December 15th.

11 THE COURT: Okay. So then we're talking about
12 897 hits. And again, because those are -- I think
13 there will be a lot of duplication and a lot of
14 review of the same emails, I'm still comfortable
15 that even those additional 102 documents, that that
16 review can occur by October 1, 2018.

17 So again, that's the 897, approximately, give
18 or take, hits by the October 1, 2018.

19 Now, with regard to the written responses, the
20 written responses for the RFPs, the requests for
21 production of documents, just for purposes, I really
22 at this point want you all to be focused on
23 reviewing these documents and not trying to crank
24 out a document with a bunch of objections in it and
25 responses between now and September 17th.

1 So consistent with the requirement that you
2 produce the documents in a privilege log by
3 October 1, 2018, I'm also going to require that you
4 provide the written response to the request for
5 production of documents by October 1, 2018.

6 And then just to give you a little bit more
7 time after that to have reviewed the documents and
8 better understand them so that you can provide
9 appropriate interrogatory responses and appropriate
10 requests for admission responses, I'm going to give
11 you an additional week to October 8, 2018, for the
12 requests for admission responses and the request for
13 the interrogatory responses.

14 Now, let me think out loud for a minute.
15 Given the way that the RFAs and the interrogatories
16 are drafted with the requests for production of
17 documents following afterwards, that schedule
18 actually probably doesn't make sense. So let's do
19 this. Because again, I don't want -- to the extent
20 that you're able, once you review the documents, to
21 answer the requests for admissions and to answer the
22 interrogatories, that's what it's appropriate for
23 you to be doing, as opposed to simply providing
24 objections or without knowledge responses.

25 So rather than having the request for

1 production of documents written be due on
2 October 1st, I will give you some additional time so
3 that you're able to provide -- simply because of the
4 way that plaintiffs have asked them, you're able to
5 do the RFA, the interrogatories, and the requests
6 for production, written responses, by October 8,
7 2018.

8 So again, the documents themselves and the
9 privilege log by October 1st so that then plaintiffs
10 can start reviewing those documents, and then the
11 actual written discovery responses by October 8,
12 2018.

13 MR. WILLIAMS: Your Honor, if I may add
14 something to this discussion, in reviewing the
15 requests for admissions, like so many requests for
16 admissions, to the extent that they are not
17 specific, it was obvious to me that Mr. Mihet was
18 getting at a certain issue. But the way the request
19 for admission was worded, I have a problem with it.

20 So my solution to that is to work on -- and I
21 have done that -- a stipulation as to those issues,
22 using I think more accurate and appropriate
23 language. And if we can get the stipulation done,
24 that may obviate the necessity of some of those RFA.
25 If Mr. Mihet is interested in going in that

1 direction.

2 THE COURT: It sounds like something that's
3 worthwhile to discuss with Mr. Mihet. And then also
4 obviously the parties have a duty to meet and confer
5 both under the rules; and to the extent that
6 anything is unclear, to try to reach a resolution
7 and reach language that provides more clarity for
8 both sides. That's under the Middle District
9 discovery manual as well as the rules. So by all
10 means feel free to have that discussion.

11 I don't intend to have the parties provide me
12 with the written discovery responses unless of
13 course they are provided in the course of the
14 hearing or if there is a dispute over them. So you
15 both seem like excellent and reasonable attorneys
16 and I'm sure you can reach some agreements on some.
17 I don't expect you to reach agreements on
18 everything, but I'm sure there is some things that
19 you will be able to reach agreement on.

20 MR. GEWIRTZ: Your Honor, this is Mr. Gewirtz.
21 Just by way of clarification, in connection with
22 October 1st the word we're talking relates to the
23 search terms as it relates to the 20 individuals
24 that were identified as the custodians relative to
25 the period up into December 15th. Am I

1 understanding that correctly?

2 THE COURT: Correct. So the rest of my order
3 still -- of my September 6, 2018, order still holds.
4 So it's those 20 custodians that were listed. It's
5 the devices that I had ordered that hopefully that's
6 what's within this 800 or so hits. It's these
7 search terms. And then also the date range is
8 number 2 on page 2, so the October 1, 2016, to
9 December 15, 2017.

10 And to be clear, my intent, with giving that
11 what I'm calling a bit of a sneak peek, is that then
12 gives Mr. Mihet, once when you're in merits
13 discovery or when there is any further requests or
14 further negotiations among the parties or a motion
15 brought to the court, that's giving Mr. Mihet at
16 least a preview of what occurred in the days
17 immediately following the filing of the complaint.

18 MR. WILLIAMS: Correct, Your Honor. And our
19 objective here frankly is to simplify; it's not as
20 complicated as I think counsel may think it is.

21 THE COURT: Then in terms of the depositions,
22 looking back at that email it looks like that the
23 plaintiffs would like to take the deposition of
24 Mr. Ruggiero and then Mr. -- excuse me, a 30(b)(6),
25 and those are at least the topics he outlined at

1 that point, which based on what Mr. Mihet says today
2 it sounds like it's still those topics that are at
3 issue.

4 Consistent with Mr. Mihet's proposed schedule,
5 I agree with everybody on the phone that it makes
6 sense for that 30(b)(6) deposition to occur after
7 all of this discovery has occurred. So at this
8 point -- and I agree also that it's pointless to
9 keep the October 10, 2018 hearing on the calendar.

10 Mr. Mihet, I do think it's appropriate to go
11 ahead and keep the motion to dismiss with the
12 preliminary injunction hearing. I know you said you
13 had some reasons for not doing that. I'm happy to
14 listen to them, but my inclination is to keep the
15 two matters together simply because they have both
16 been referred to me.

17 Now, I realize that the motion to dismiss is
18 the four corners of the complaint, versus you intend
19 to put on additional information for the preliminary
20 injunction. I'm fairly confident I can keep those
21 two separate and I did not intend to convert the
22 motion to dismiss into a motion for summary
23 judgment, but if there is anything you would like to
24 say on that issue, otherwise I was going to go ahead
25 and come up with a plan for when we should move that

1 hearing date.

2 MR. MIHET: Your Honor, perhaps I misspoke. I
3 would very much want and insist that the two
4 hearings be kept together. It was my understanding
5 that Mr. Williams was advocating decoupling them and
6 I would have arguments to oppose that request. But
7 it sounds to me like that's not necessary.

8 THE COURT: Okay. And Mr. Williams, I
9 misunderstood, Mr. Williams, if you want to be heard
10 on that, you can. Frankly for me it's just a matter
11 of the simplicity of hearing the issues together.
12 Mr. Williams, if you have a different proposal, I'm
13 willing to hear it.

14 MR. WILLIAMS: I did suggest that they could
15 be decoupled, Your Honor, but I have no real
16 objection to keeping them together. Certainly if
17 that makes it better for the court -- probably makes
18 it better for all.

19 THE COURT: Because otherwise -- the other
20 alternative would be I just rule on the motion to
21 dismiss on the papers and then have the PI hearing
22 or vice versa -- it just seems to me when I've had a
23 similar First Amendment case, we handled it all
24 together. Granted it wasn't an evidentiary hearing,
25 but that process seemed to be appropriate because

1 then there is one order that can then have an
2 interlocutory appeal. And maybe both sides would
3 want -- depending on how I rule, both sides may want
4 to appeal. But we can cross that bridge when we get
5 to it.

6 MR. WILLIAMS: As I told Mr. Mihet yesterday
7 afternoon, he suggested that we may need to postpone
8 the hearing and I said I have no real objection to
9 it. So I don't want the court to think that I'm an
10 obstacle; I'm not.

11 THE COURT: So October 1st and October 8th are
12 the two deadlines I've given so far. There is -- I
13 know the parties have the issue to discuss in terms
14 of these two depositions.

15 I know that you, Mr. Mihet, had proposed the
16 week of November 12th. That is a week I could do
17 the hearing if you all want to go ahead and set it
18 now. Right now the dates I could do that week are
19 the 15th or the 16th of November. I could also do
20 the week before, the week of November 5th.

21 MR. WILLIAMS: Your Honor, November 15th works
22 for me perfectly.

23 MR. MIHET: Your Honor, November 15th works
24 for the plaintiff as well. I think it's probably
25 necessary to do it the week of the 12th just so that

1 we have enough time to get the deposition transcript
2 if the depositions are to take place in that last
3 week of October.

4 THE COURT: And Mr. Gewirtz, I think I heard
5 you wanting to speak as to the date as well.

6 MR. GEWIRTZ: Yeah, November 15th is fine as
7 well. Just so we're clear, the city is not
8 conceding that any 30(b)(6) depositions [inaudible].
9 Mr. Williams was simply making the point that it's
10 premature now, given the fact that we haven't even
11 received the notice and given the case law. We
12 don't want to take Your Honor's time. But just so
13 the record is clear, it is the city's position that
14 there are several topics that have been identified
15 if in fact the 30(b)(6) were to limit those,
16 including such items as the city's responses to
17 discovery requests, items such as [inaudible]
18 responsive documents, information concerning facts
19 that support the city's motion to dismiss. There
20 are several topics there that the city would take
21 the position are inappropriate inquiries, I just
22 didn't want this conference to be concluded without
23 the city stating for the record that it takes issue
24 with several of the topics that are separate and
25 apart from the issue of the prematureness.

1 Also, Your Honor, if I may, while we're on the
2 phone, do I correctly apprehend that unless and
3 until Your Honor changes Your Honor's ruling, that
4 the defined discovery period, subject to Your Honor
5 revisiting it, is not beyond September 15th and that
6 that would also apply as it would relate to any
7 deposition inquiries.

8 THE COURT: Correct. So the time frames -- in
9 other words, if there is some emails that post date
10 the filing of the complaint by a couple of days and
11 if that is -- assuming the parties are able to reach
12 an agreement on a 30(b)(6) -- again, I'm not
13 prejudging the issue of the 30(b)(6). What I was
14 just trying to do was build in enough time to the
15 schedule so that you all could address that if there
16 needs to be some type of motion practice as to that,
17 it can be addressed in an expedited manner, but to
18 still build in enough time for the November 15th
19 hearing.

20 But yes, I view the cut-off -- while normally
21 I would frankly view the cut-off as the date of the
22 filing of the complaint, and frankly here even I
23 think there is an argument to be made that the
24 cut-off should really be the ordinance date.

25 But that said, I was compelled that the date

1 should at least go to the filing of the complaint.
2 And then I was further compelled by Mr. Mihet that
3 perhaps there may have been some chatter post the
4 filing of the complaint. And so in light of that,
5 I've extended the date to December 15, 2017, rather
6 than a December 4, 2017 filing date, so that
7 Mr. Mihet at least is given some view of what post
8 filing chatter may have occurred.

9 MR. WILLIAMS: So I can augment what
10 Mr. Gewirtz just said, my earlier commentary on the
11 30(b)(6) really relates to this hearing because
12 until we had this hearing and Your Honor made
13 definitive rulings, the breadth and depth of those
14 depositions really it would be unknown.

15 Your Honor has added a lot of clarity here, so
16 hopefully that will assist Mr. Mihet and myself in
17 resolving any 30(b)(6) issues. But I reiterate what
18 Mr. Gewirtz just said because those are right on
19 point. He and I will have to do well with that --
20 "he" being Mr. Mihet.

21 THE COURT: Sure. And I'm confident that you
22 all will. I don't view having a 30(b)(6)
23 deposition, in light of what's being provided and
24 what has been requested, it seems to me that perhaps
25 a 30(b)(6) deposition would benefit both sides in

1 terms of providing clarity, as opposed to Mr. Mihet
2 just trying to offer a bunch of documents into
3 evidence in the course of a hearing.

4 But again, I'm not prejudging it, there may be
5 issues with the topics. I was just looking at the
6 topics in totality in terms of the timing and the
7 general thrust of the topics. I was not doing a
8 topic by topic review and trying to even determine
9 the appropriateness of any of the separate topics.
10 Frankly, I figure that's an issue that you all will
11 be discussing and debating and then hopefully coming
12 up with a 30(b)(6) notice that is agreeable to both
13 sides.

14 MR. MIHET: Your Honor, this is Mr. Mihet, if
15 I may very briefly. We understand the court's
16 cutting off of the discovery for purposes of the
17 preliminary injunction hearing at December 15th.
18 And because the court has made clear that this is
19 without prejudice to our seeking post complaint
20 discovery in the merits phase of the litigation, I
21 think we can live with the court's ruling for
22 present purposes as to the written discovery.

23 Now, Mr. Gewirtz just raised the issue with
24 Your Honor about the deposition questioning being
25 somehow cut off at December 15th as well. That I

1 think we would have a major objection to because,
2 for example, defendants' interpretation, application
3 and enforcement of the ordinance is quite relevant
4 to the preliminary injunction hearing. And to the
5 extent that some of that took place this year in
6 April or May of this year, if they have had occasion
7 to interpret, enforce, apply the ordinance, we don't
8 see why we shouldn't be allowed to ask about that at
9 the deposition so that we can bring that critical
10 information to the court.

11 So we're okay with the documents being cut
12 off, but we don't believe that questioning of a
13 witness should be cut off at December 15th. I hope
14 that makes sense.

15 THE COURT: I understand your position. And
16 if that becomes an issue that you all are fighting
17 over, you can bring that to my attention. I will
18 just point out that right now you're getting
19 six months of enforcement. Even with the current
20 ruling on the document discovery, you're getting
21 six months of the enforcement of the ordinance.

22 Now, if that enforcement changed after the
23 filing of the complaint, I mean, perhaps you could
24 ask that type of a general question. But it's not
25 going to then open the door to being able to get

1 discovery after that December 15, 2017, deadline.

2 And to be clear, Mr. Mihet, you are correct,
3 this is for the purposes of the preliminary
4 injunction hearing, this is not general merits
5 discovery. I fully anticipate that merits discovery
6 would, in the event -- when it occurs, I would
7 expect it would be long from now simply because I
8 fully expect whichever side loses or is not happy
9 with the outcome after Judge Honeywell addresses the
10 report and recommendation that I provide -- and
11 again I'm not prejudging my ruling, but I would
12 suspect that as always one side will be happy and
13 one side will not be happy and perhaps even both
14 sides will be unhappy.

15 So I fully expect there to be an interlocutory
16 appeal, I expect the case to be stayed pending that
17 interlocutory appeal, and so again, a merits
18 discovery may very well be a long way away. And
19 even if it's not, there is plenty of months after
20 this preliminary injunction hearing and the hearing
21 on the motion to dismiss to address merits
22 discovery.

23 MR. MIHET: Understood.

24 MR. WILLIAMS: Thank you, Your Honor.

25 THE COURT: Is there anything else we need to

1 address today?

2 MR. WILLIAMS: No, Your Honor.

3 MR. MIHET: Just so we're clear, have we
4 settled on November 15th as the hearing date?

5 THE COURT: Yes. And our order will do a new
6 notice for the November 15th hearing date. And I
7 will block off the entire day for that.

8 MR. MIHET: Thank you, Your Honor.

9 MR. WILLIAMS: Thank you, Your Honor.

10 MR. MIHET: I do have one other point of
11 clarification, Your Honor. Am I to understand that
12 the court's initial ruling as I understood it still
13 requires the defendants to search for paper copies
14 and to search for documents housed on computers that
15 may not have been completed in the ESI search?

16 THE COURT: Correct. Correct. And part of
17 why I set this hearing so far off from last week's
18 hearing -- because obviously running the hits could
19 have even occurred faster, but yes, I mean, part of
20 it is so that they could do that homework and
21 determine if there were any feasibility issues with
22 that. But yes, that does include asking these
23 custodians if they have any hard paper files that
24 would include responsive documents or if they have
25 any Word files or Excel spreadsheets or anything

1 else that's saved on their computers that would not
2 have been pulled as a results of the searches on the
3 Tampa.gov server.

4 MR. WILLIAMS: We're in the process of doing
5 exactly that, Your Honor.

6 THE COURT: Perfect. Okay. I'm hesitant when
7 I ask this, anything else to address?

8 MR. WILLIAMS: No, Your Honor.

9 MR. MIHET: Not from the plaintiff.

10 THE COURT: Thank you. Then I will enter a
11 written order and we will be in recess. Thank you
12 very much.

13 (The proceedings adjourned at 10:06 a.m.)

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C E R T I F I C A T E

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

I, Lynann Nicely, RMR, CRR, Official Court Reporter for the United States District Court, Middle District, Tampa Division,

DO HEREBY CERTIFY, that I was authorized to and did, through use of Computer Aided Transcription, report in machine shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages, numbered 1 through 47, inclusive, constitute a true and correct transcription of my machine shorthand report of said proceedings and evidence.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Tampa, County of Hillsborough, State of Florida, September 19, 2018.

/s/ Lynann Nicely

Lynann Nicely, RPR, RMR, CRR, CRC
Official Court Reporter