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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 61

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MILO YIANNOPOULOS,

Plaintiff,

-against-

SIMON & SHUSTER, INC.,

Defendant.

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Index No. 654668/17

60 Centre Street
New York, New York
December 19, 2017

B E F O R E:

HONORABLE BARRY R. OSTRAGER,
Supreme Court Justice

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THE COURT: So, this is a compliance conference.

There's a lot of activity in the case. When you were last here in November, we made some progress on the scope of various document requests and objections and I had asked you to meet and confer about other things, which apparently hasn't happened.

So what's the nature of the present dispute?

MR. WEINGART: Your Honor, Jeff Weingart for the Plaintiff.

We have met and conferred at least twice, I think. We've been working hard to try to resolve the matter. In fact we tried to call you yesterday to postpone this conference to see if we could continue to try to work things out. There's still a few things that are not resolved. Just --I would like to explain what they are.

So, as you may know, CBS Corporation is the parent company of Simon & Schuster, the Defendant in this case. We say that our document requests should be construed and responded to as though they were directed to both Simon & Schuster and CBS. The reason we say this is because the CBS people at the highest level of CBS were involved and consulted and participated in the termination of my client's publishing contract.

The reason I know this is because the documents that have been produced to us, and they include documents,

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communications to and from Leslie Moonves who is the CEO and Chairman of CBS, also to the Senior Vice President of Communications Gil Schwartz, for example, at CBS; also numerous other people at CBS. The parties Simon & Schuster produced a privilege log in this case; it's a rather lengthy document. I have copies if you would like to see it. But in that privilege log, which is a number of pages --giants actually, they also produced a list of custodians that are named on the privileged log. A list of custodian documents, custodians include more than 20 people from CBS, and they include people at the top, at the top of the company, like I said.

So on the one hand, they're withholding numerous documents from us based on privilege, and this is the privilege log based on privilege including more than 20 custodians. On the other hand they're not agreeing to search for ESI held by those parties.

Another point on this is that we have numerous communications and notes which reflect that the CEO of Simon & Schuster was in close touch with many people at the top at CBS, about whether or not to terminate the publishing contract of the Plaintiff.

I've got examples of some of those documents to show you if you would like to see them.

THE COURT: All right. Let me hear what the

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2 Defendant has to say.

3 MS. McNAMARA: Your Honor, Elizabeth McNamara for
4 the Defendants Simon & Schuster.

5 We had produced in response to the document
6 requests any and all communications with CBS as well as any
7 other third-party. CBS is the parent corporation, it is
8 obviously an independent entity. To the degree that there
9 are any communications between Simon & Shuster and CBS they
10 have been fully produced to the Plaintiff. In any
11 depositions that proceed in this action they will be
12 entitled to inquire about any conversations or other verbal
13 communications that were had with anybody at CBS, and so it
14 seems to me that given that this is a contractual action
15 against Simon & Schuster, Inc., an independent corporation,
16 the -- what was communicated internally but never
17 disseminated verbally or in writing to Simon & Schuster
18 strikes me to be of little to no relevance to this action.

19 It is, the decision to terminate this contract was
20 made by the Simon & Schuster, the Chief Executive of
21 Simon & Schuster. Understandably, this was a huge thing at
22 the time and she was reporting up to others and there were
23 communications with CBS as you would in any corporation
24 where you have a duty to report up. All those
25 communications, whether to or from have been produced.

26 Now, notwithstanding all of that, we -- you know,

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we searched all the custodians. We have 58 custodians at Simon & Shuster that were searched. We produced thousands and thousands and thousands of documents and we believe that if there's further specific inquiries, we've been trying to, I communicated with Mr. Weingart yesterday that we didn't collect documents from the separate corporation, from the parent, but I'm speaking with my client to see if there might be a potential compromise of, some limiting factor of further production.

But at bottom, we really believe this is --they haven't pierced the corporate veil. This is a contract action against Simon & Schuster and I, you know, am at a loss for why we need to be going to sister corporations, parent corporations and doing extensive broad searches.

MR. WEINGART: Your Honor, may I respond, please?

So, CBS's fingerprints were all over this. First of all --

THE COURT: She doesn't deny that.

MR. WEINGART: Okay. Well, for example, now, what I'm not getting, what I haven't received so far are communications, for example, between Leslie Moonves and Gil Schwartz. Those are just two examples that I know of, and I know they must have been corresponding about this because this was very active.

THE COURT: Who is --

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MR. WEINGART: Leslie Moonves is the CEO and Chairman of CBS, Gil Schwartz is the Senior Vice President in charge of all communications at CBS. He was in constant contact with Carolyn Reidy, the CEO of Simon & Shuster. We have --

THE COURT: Look, time out. You know, there's a rule of proportionality in the Commercial Division. If I understand Ms. McNamara correctly, she's representing that every communication that was exchanged between CBS and Simon & Schuster that's non-privileged has been produced to you.

MS. McNAMARA: That's correct, Your Honor.

THE COURT: And if that's the case, what CBS discussed internally is of little or no relevance to your case because you have the final decisions or instructions that the senior people at CBS communicated to the senior people at Simon & Schuster.

So, there's two degrees of separation between what CBS discussed internally as a non-party and what CBS communicated to its subsidiary, all of which you have. So, you can prove your case, to the extent it's actionable, utilizing the communications that were exchanged between CBS and Simon & Schuster.

You're also not precluded from taking depositions of people at CBS about what they told Simon & Schuster and

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2 why they told Simon & Schuster what they told
3 Simon & Schuster. And Ms. McNamara has agreed to meet and
4 confer with you with respect to potentially producing
5 certain e-mails or correspondence that's internal to CBS
6 that hasn't been produced in this case.

7 So on balance, I don't believe that you're
8 prejudiced in any way by your inability to discover all
9 communications that are internal to CBS.

10 MR. WEINGART: Your Honor, we don't have resolution
11 from her about what she's willing to produce from internal
12 CBS communications, which is one of the reasons we tried to
13 postpone this conference. In the absence of that
14 resolution, though, I would say that any of the 20 people
15 from CBS that are listed on this privileged log we should be
16 able to get their communications. That would include Leslie
17 Moonves, the CEO of CBS, Anthony Bongiorno, who is the
18 Senior Vice President in charge of litigation at CBS has
19 actually put his name on the papers in this lawsuit and the
20 motion to dismiss papers. He was on the front of that, on
21 the cover, he's been here in the arguments. They are very
22 involved. He's all over this privileged log.

23 THE COURT: Let's assume hypothetically that
24 internally at CBS the most senior people at CBS agreed among
25 themselves, hypothetically, that under no circumstances
26 would they allow Simon & Schuster to proceed with publishing

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2 your client's work and then they communicated to
3 Simon & Schuster in communications that you have, under no
4 circumstances are you to proceed to publish the Plaintiff's
5 work, what difference does it make what the people at CBS
6 discussed internally?

7 MR. WEINGART: Because here is an example. If
8 Leslie Moonves wrote a note to himself or wrote a note to
9 Gil Schwartz stating that, I told Carolyn Reidy, the CEO of
10 Simon & Schuster she must terminate this agreement without
11 question, and he wrote that in a text or e-mail or note,
12 that's directly on point, obviously, down the middle, in my
13 lawsuit and I should be able to discover communications such
14 as those.

15 THE COURT: I think she's going to produce such a
16 document if it exists.

17 Aren't you.

18 MS. McNAMARA: Yes. I don't think any such document
19 exists but we're -- I mean, the reason we haven't collected
20 this.--I don't really honestly know what is internal to CBS
21 in this, so I can't speak to what is there but I'm happy to
22 try to gather it, to try to look at it in some discrete way
23 and come up with some parameters as to what makes sense here
24 but I think it's really difficult in the abstract right now
25 for us to define those parameters.

26 THE COURT: Well, I think that's reasonable.

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MR. WEINGART: I have a suggestion. There are a number of executives, direct level people on the privilege log and attorneys, and I would like to ask that the same search terms that the Defendants have applied to ESI for Simon & Schuster custodians be applied to those custodians.

THE COURT: I'm not going to order a wholesale exhumation of all of the e-mails within CBS.

What I will direct counsel for Simon & Schuster to do would be to provide to you any communications at CBS which explicitly refer to instructions that CBS is giving to Simon & Schuster without prejudice to whether any of those e-mails would be admissible at trial.

So, if somebody at CBS said we're going to tell the people at Simon & Shuster that they can't publish the Plaintiff's work, even though you have the e-mails from CBS to Simon & Schuster that may say do not publish the Plaintiff's work, you'll get those CBS documents. Beyond that, it's just a disproportional business on CBS with respect to documents that are really not relevant to the issues in this case.

MR. WEINGART: One more pitch on that, Your Honor. If Leslie Moonves, the CEO and Chairman of CBS and Gil Schwartz, the senior most Senior VP of Communications are exchanging e-mails and notes or texts about what to do, and exchanging ideas about how it could be handled, what their

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view of it is, at least those two parties, if there are documents relating to Milo Yiannopoulos, Dangerous I would request that those be produced.

I also would like --I would also request one further thing; if there are any minutes of the Board of Directors of CBS that reference Milo Yiannopoulos or Dangerous I would like those produced as well.

THE COURT: I'm having a hard time understanding the relevance of these requests. I'm going to refer you back to the meet and confer process to come to some consensual understanding here.

At the end of the day if it's the case that counsel has demonstrated that Simon & Schuster was directed by CBS not to publish your client's work for no good reason and I'm of course making no such finding, but if that's the case and you have those documents I do not understand why you need any wide-ranging discovery of CBS.

MR. WEINGART: Let me try one more example. If Leslie Moonves, the CEO and Chairman of CBS says in an e-mail, note or text that, this book is going to be a financial disaster for Simon & Shuster and it's going to harm its other revenue strings and something has to be done about it, that is exactly one of the theories of our case and so that is not a direction that the, per se, that the contract be terminated but it's directly relevant to our

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2 theory of the case.

3 THE COURT: Okay. You heard Mr. Weingart. I'm
4 going to rely on you, Ms. McNamara, if you can't satisfy him
5 in a meet and confer process --

6 MS. McNAMARA: I will obviously continue to do that
7 as we have done that, although as you can hear I suspect
8 we'll be back because I'm not sure he's ever going to
9 reason --

10 THE COURT: All right, you have the transcript of
11 today's conference which provides some guidance.

12 And when is discovery? I have that order right
13 here.

14 MR. WEINGART: There are several other issues we
15 need to talk about.

16 THE COURT: All right.

17 MR. WEINGART: The second topic is that except for
18 one individual at Simon & Schuster, the Defendants have not
19 agreed to search for any text or instant messages and
20 devices that any of its custodians on this list have
21 provided and they have years, and we're really talking about
22 Simon & Shuster people. Their position is that
23 Simon & Schuster has a policy where it's essentially, bring
24 your own device environment, where employees apparently--
25 and if I am misstating I'm sure Ms. McNamara will tell me,
26 but as I understand from her, the position is because the

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2 company doesn't issue these phones, for example, that to the
3 extent that the employees may use their phones for business
4 purposes for, such as sending texts or calling, if that
5 happens, she's relying on the corporate policy that the
6 parties are not supposed to use normal devices that they
7 bring to the office for business.

8 On the other hand, we have examples of iPads for
9 example being used for business. They say that to the
10 extent they sent e-mails from the iPads, for example, they
11 would be caught under servers, but that's not the same for
12 texts. And we have stated in the Amended Complaint in this
13 action many examples of Mitch Iverson, who is the editor at
14 Simon & Schuster dealing with Mr. Yiannopoulos, texting back
15 and forth. They say that just because Mr. Iverson used his
16 phone doesn't mean everybody was texting.

17 THE COURT: All right, I understand your position.
18 If you want that type of search done you're entitled to have
19 that type of search done as long as you pay for it.

20 MR. WEINGART: Your Honor, I don't think that's
21 reasonable.

22 THE COURT: I don't think it's reasonable to have
23 twenty different people's phones that are not issued for the
24 purpose of conducting business search for texts. That's a
25 huge, huge project. That's extremely burdensome and
26 extremely expensive but if you want that process undertaken

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for the marginal benefit to your case that it could possibly provide it has to be at your expense.

MR. WEINGART: So, in terms of procedure, Your Honor, what I would like to say is that I would like to provide a list of devices that I want searched, including Simon & Schuster devices and CBS devices, and I would like to provide them to Ms. McNamara and then she'll tell me, and I would like to use my own vendor so that I know what it would cost. And those phones would have to be imaged, they will have to be searched and, I imagine and --

THE COURT: I'm not sure you'll be able to use your own vendor because you're not going to invade the privacy of all of these people whose individual phones contain undoubtedly thousands and thousands of personal texts. So there would have to be some type of protocol established to determine how to search, if that can even be done, and if so, which phones you want texts from and then that would be all of your expense.

MR. WEINGART: Okay Your Honor.

MS. McNAMARA: Your Honor, might I add there, because I'm concerned hearing him say a large list including CBS phones, I mean this is going far afield.

THE COURT: We're not going into CBS phones. We're just talking about Simon & Schuster phones and we're placing 100 percent of the financial burden on the Plaintiff for

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this exercise, which frankly is of dubious incremental relevance to this case.

MR. WEINGART: Your Honor, in response to your statement about the relevancy of this information, I point you to Paragraph 73, just as an example of the Amended Complaint. This is a paragraph which says that Mitch Iverson on February 15, 2017, texted to Mr. Yiannopoulos, "Don't quote me, but you done good." And that referenced revisions that he made to his manuscript. That shows that texts are very important in this case.

Now they say that they have produced all of Mr. Iverson's texts but we have at least one e-mail that says that he and Ms. Burke who headed up the threshold imprints, the threshold editions imprints exchanged texts about this topic.

MS. McNAMARA: And Your Honor, may I interject?

In that regard, Mr. Weingart is right, because he cited in the complaint texts from Mr. Iverson and Mr. Iverson apparently his client mainly operates in text and so the editor found himself in the position of texting with him, which is, I think an unusual circumstances for people.

But I would ask that there be a foundation laid that there's a reason to believe that someone was texting in a way that's relevant to this case. We produced all of Mr.

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2 Iverson's, if there's a foundation laid. We asked
3 Mr. Iverson to produce any texts with Ms. Burke as well. He
4 didn't have any, but it seems to me there's a proper
5 foundation arguably laid for relevance of potential texts
6 from Ms. Burke given that reference, but I don't understand
7 that, there's no foundation to be invading these people's
8 personal privacy on their personal phones on the off
9 chance --

10 THE COURT: I'm agreeing that this seems like a
11 burdensome request. To the extent we can agree on this in a
12 meet and confer process, the expense of doing this would be
13 borne by the Plaintiff. And it may be that you'll wind up
14 going down a very many dry holes at great expense, which is
15 not an expense that I would tax on Simon & Schuster. And
16 that's consistent with the Commercial Division rules on
17 proportionality and --

18 MR. WEINGART: Your Honor, respectfully --

19 THE COURT: --requiring people who seek overbroad
20 discovery to pay for the cost of it.

21 MR. WEINGART: I would just say, Your Honor,
22 respectfully, that neither the Commercial Division rules or
23 emergent case law that's treated texts as ESI and made any
24 distinction that, between the ESI that happens to be on
25 someone's phone and the ESI that happens to be on a
26 corporate server in the form of an e-mail, that's all the

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ESI that could be important in the case; that is what the cases have said.

So I take your point. We don't intend to be overly burdensome with this, we intend to be targeted. And I think we can work something out where we give, you know, a modest list to the other side if we work out what the costs will be and then we can proceed.

THE COURT: Okay. When do you want to come back?

MR. WEINGART: I have just a couple more --at least one other point.

As far as I understand it, and if I misconstrue this, please let me know, but the Defendants have only produced documents up to May 5th of 2017 as opposed to producing documents through the date that the lawsuit was commenced on July 7, 2017. The rationale for this --I'm not really sure what the rationale for this is because there's at least two months of an important time period that have not been produced and we object to that. We would like that missing two months to be produced.

THE COURT: All right. Well, the Defendant has a continuing obligation to produce information that's relevant to the lawsuit, even if it's generated yesterday. So I take your point and I agree with it.

So you'll come back on February 6th and you'll report to the Court on whether you have any additional

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disputes.

MR. WEINGART: Thank you, Your Honor.

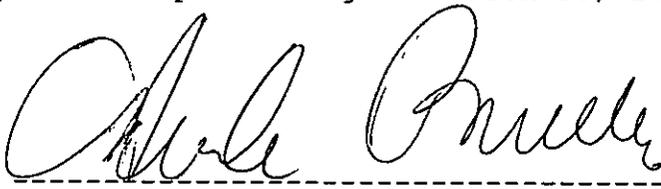
THE COURT: And you'll order a copy of the transcript.

MS. McNAMARA: Thank you very much, Your Honor.

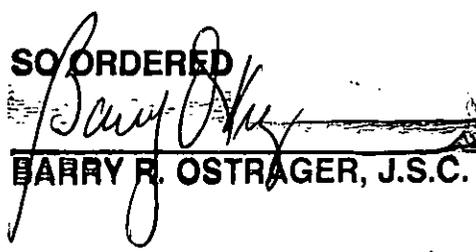
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C E R T I F I C A T E

It is hereby certified that the foregoing is a true and accurate transcript of the proceedings or March 30, 2017.



ANGELA BONELLO
SENIOR COURT REPORTER
SUPREME COURT-NEW YORK COUNTY

SO ORDERED

BARRY R. OSTRAGER, J.S.C.