



Production Madness: The *Covad* Story Continues with New ESI Pitfalls

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Understandably, taking an electronic document such as a spreadsheet, printing it, cutting it up, and telling one's opponent to paste it back together again, when the electronic document can be produced with a keystroke is madness in the world in which we live.

Magistrate Judge John M. Facciola, *Covad Communs. Co. v. Revonet, Inc.*, 2009 U.S. Dist. LEXIS 75325 (D.D.C. Aug. 25, 2009).



Magistrate Judge John M Facciola has addressed ESI issues before in *Covad Communs. Co. v. Revonet, Inc.* (see, [Playing with Fire: Producing ESI as Paper](#), [Discovery Production Workflow: Lessons from Magistrate Judges Facciola & Grimm](#) and [The Return of Covad Communications: Forensic Imaging of Databases & Email Servers](#)). On August 25, the Court issued a new opinion and I have a feeling another will be published before Christmas.

Procedural History

The *Covad* opinion is a “direct sequel” to the “Christmas Eve” opinion of last year. The second opinion is from May 27, 2009, which has must read analysis on forensic imaging of hard drives and email servers. However, no one is calling the second opinion the “[Sink the Bismark](#)” Order, in recognition of the events of May 27, 1941.

In the new opinion (which history fans could call the [Voyage 2](#) Opinion), the Plaintiff brought a motion to compel compliance with the “Christmas Eve” opinion due to the

“adequacy” of the Defendants’ responses and email searches. *Covad*, 1-2.

The Case at Bar: Format and Completeness

There are two intertwined issues of *Covad* 3: Format and Completeness.

“Format” addressed the December 24, 2008 Order regarding:

(1) The 35,000 pages the Defendant produced in hard copy prior to the Motion to Compel; *Covad*, 2-3.

(2) The 2,832 pages of documents originally produced in hard copy while the Motion to Compel was pending; *Covad*, 3.

(3) Any other information that have been produced since the December 24, 2008 Order or will be produced in the future. *Covad*, 3.

“Completeness” addressed whether the Defendants had produced anything pursuant to the discovery requests. *Covad*, 3. Plaintiff Covad advanced the following arguments in support of their motion:

(1) Only a subset of all the documents that should have been produced in response to the original 44 Requests to Produce Documents have been produced; *Covad*, 3.

(2) The e-mail search, no matter what it produced, was not designed to find the relevant e-mails because of the narrow and under-inclusive search terms that were used; *Covad*, 3.

(3) The litigation hold and search term documents have never been produced in electronic format, *Covad*, 3.

(4) Defendant Revonet has not produced many of the documents identified in its own initial disclosures. *Covad*, 3.

Many of these issues were still pending from the ordered forensic search in *Covad 2* at the time of the *Covad 3* opinion was issued. (See, [The Return of Covad Communications: Forensic Imaging of Databases & Email Servers](#)). Thus, the Court did not address the “completeness” issues, because the forensic search may make some of the issues moot. *Covad*, 3-4.

Judge Facciola set the stage for possibly limiting any more productions of relevant electronically stored information under the Federal Rule of Civil Procedure Rule 26(b)(2)(C) “balancing factors” that “...include....(i) whether the discovery is “unreasonably cumulative or duplicative,” and (ii) whether the party seeking discovery “has had ample opportunity to obtain the information by discovery in the action.” *Covad*, 4.

The Court acknowledged that discovery was ongoing and procedurally the Defendants could not respond to some of the issues in the Plaintiff’s Reply brief. However, the Court wanted answers to these four issues:

1. Is it Revonet’s position that its production to date satisfies all the demands made of it by Covad’s Request for Production of Documents? *Covad*, 5.
2. Will Revonet produce what Covad calls the litigation hold and search term documents in native format? *Covad*, 5.
3. Does Revonet consider itself bound, by either the Requests for Production or by some agreement with counsel to produce the litigation hold and search term documents? If not, why not? *Covad*, 5.
4. Has Revonet produced or will it produce the items that Covad argues were identified in Revonet’s initial disclosures? *Covad*, 5-6.

The Court ordered a neutral statement of facts to answer the above issues. Moreover, the Court would deem these answers certified under Federal Rule of Civil Procedure Rule 26(g)(1). *Covad*, 5-6. The Court alluded in *Covad 2* that it would potentially take violating Rule 26(g)(1)(A) to compel a forensic search of the Defendant's email servers. *Covad Communs. Co. v. Revonet, Inc.*, 2009 U.S. Dist. LEXIS 47841, 22 (D.D.C. May 27, 2009).

When Production Sets Don't Match

The Plaintiff claimed the Defendant did not produce all of the emails in native file format, thus resulting in a discrepancy between the paper and native file productions. *Covad*, 7.



The Defendant explained that the review platform they used for the first paper production was only able to export email in an HTML format. *Covad*, 7. After the first Court order, the Defendants re-produced email messages with a PST using a different production method. *Covad*, 7.

As one can imagine, there was a difference between the first production in paper and the second in native file format. The Defendants claimed it was too burdensome to cross-reference the two productions to define the size and scope of the discrepancy. *Covad*, 7.

This is an avoidable situation. While I am not sure exactly what was done in this case, ESI should be collected in a documented methodology and processed in a defensible manner. This should give the party MD5 Hash Values and an index of the processed ESI. All litigation support review software creates a document index and almost all a production log. This should enable a party to track what has and has not been produced in discovery. Instead, the Defendant has to cross-reference a HTML system to a PST production. This situation could have been avoided with treating ESI as ESI and

not producing paper in the first place.

As Judge Facciola stated:

More to the point, I have already resolved the issue of whether, on balance, Revonet should be required to produce the 35,000 pages in native format, and I have not seen any new information that causes me to revisit my conclusion on that point. Obviously, I contemplated that the e-mails be produced in native format; I was not granting a license to produce fewer e-mails in native format than were produced in hard copy. Hence, Revonet is going to have to produce the missing e-mails. *Covad*, 8-9.

A Bad Form of Production Plan

The Defendants also produced “useless” paper printouts of spreadsheets that “run horizontally across several sheets of paper, resulting in a sea of seemingly random numbers and data, with no effective labels, column headings, or other identifying information.” *Covad*, 10. The Plaintiff’s attorney was told he “could paste these hundreds of pages together,” to make the “paper-ized” spreadsheets useable. *Covad*, 10.



The Parties were attempting to resolve this form of production debacle outside of court at the time of the opinion. Judge Facciola reminded the Parties that “...documents that were originally created in an electronic format (which must be the vast majority, if not all, of them) must be produced in an electronic format that is ‘the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.’” *Covad*, 12, Fed. R. Civ. P. 34 (b)(2)(E)(ii).

It is an understatement to say Courts frown on parties producing ESI in a way that degrades its searchability.

Covad, 12-13. As Judge Facciola stated:

Understandably, taking an electronic document such as a spreadsheet, printing it, cutting it up, and telling one’s opponent to paste it back together again, when the electronic document can be produced with a keystroke is madness in the world in which we live. *Covad*, 14.

The clock is ticking for the Defendants to respond to the Court’s questions. I am waiting for what happens next in *Covad* 4. Depending on the timing of the pleadings and the Defendants’ actions, Judge Facciola might be issuing an “Antietam” or “Trafalgar” order this fall.