

4. In *Newman, et al. v. The Associated Press*, No. 24-cv-20684, 2024 WL 4433465 (S.D. Fla. Oct. 4, 2024), U.S. Magistrate Judge Marty Fulgueira Elfenbein addressed whether the rules of proportionality required Defendant to add its CEO as a custodian.

This litigation involved allegations that Defendant, The Associated Press, aided the October 7, 2023, attack on Israel by publishing pictures taken by freelancers affiliated with Hamas.

Earlier in discovery, the court had ordered Defendant to “provide Plaintiffs with a list of custodians which it searched in pursuit of the discovery materials sought by Plaintiffs” and provided the parties with a procedure to address any additional custodians requested by Plaintiffs. *Id.* at \*1. After following the procedure, the parties disputed whether Defendant’s president and CEO, Daisy Veerasingham, should be added as a custodian.

In support of its motion to compel, Plaintiffs argued that Veerasingham had responsive documents because she appeared 21 times in Defendant’s privilege log and Defendant produced documents showing that Veerasingham was involved in issues relevant to the litigation. These included (1) a document discussing Veerasingham’s son doing work to vet a freelance photographer and alleged Hamas operative/sympathizer; (2) an update Veerasingham provided to Defendant’s board of directors in which she informed the board that she responded to a letter from U.S. Sen. Tom Cotton, Republican of Arkansas, inquiring into allegations that freelance photographers who contributed to Defendant’s coverage of the October 7 attack were colluding with Hamas; (3) an email chain in which Veerasingham discussed the statement Defendant would use in response to inquiries concerning Defendant’s association with freelance photographers in Gaza; and (4) an email chain in which an employee of Defendant’s reported to Veerasingham about the reputational risk Defendant carried due to its association with certain freelance photographers. *Id.* at \*2.

Defendant argued that Veerasingham “had no direct involvement in any of the issues relevant to this case, and there is no relevant information to be gleaned from her documents beyond what is already available from the existing custodians.” In particular, Defendant argued that “as the President and CEO of an organization as large as Defendant’s, [Veerasingham] would not have been involved in either the sourcing or the decision to purchase the photographs taken by the freelance photographers.” Defendant countered Plaintiffs’ arguments based on specific documents by suggesting that Veerasingham merely “needed to become aware of the current state of Defendant’s relationship with the freelance photographers” named in the Plaintiffs’ complaint to respond and protect Defendant’s reputation. For these reasons, Defendant claimed that adding Veerasingham would be “overly burdensome and not proportional to the needs of Plaintiffs in the case.”

Magistrate Judge Elfenbein began her analysis with a description of Federal Rule of Civil Procedure 26(b), which permits a party to obtain discovery of “any matter, not privileged, that is relevant to the claim or defense of any party.” *Id.* at \*3 (quoting Rule 26(b)). She noted that while Rule 26(b) is construed broadly, “it is not without limits” because discovery must also be “proportional to the needs of the case.” She explained that the parties’ claims and defenses determine the scope of permissible, relevant discovery and the party resisting discovery bears the burden of demonstrating specifically how the request is unreasonable or not relevant. If the party is able to do so, the proponent of the motion to compel must then prove the relevance of the requested discovery.

Magistrate Judge Elfenbein first addressed whether Plaintiffs had established that Defendant's custodian list was inadequate. She explained that Defendant had initially designated 20 custodians, and Plaintiffs had identified three additional individuals based on a review of Defendant's privilege log. But she found that Plaintiffs offered no other evidence to suggest that the method Defendant used to designate custodians was inadequate in any way and therefore concluded that Plaintiffs had failed "to show the inadequacy of Defendant's designation process." *Id.* at \*4 (citing *The Sedona Conference, The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 *Sedona Conf. J.1*, 17 (2018)).

Next, Magistrate Judge Elfenbein considered whether Plaintiffs had established that a search of Veerasingham's documents "would provide unique relevant information not already obtained." This inquiry focused on the documents identified by Plaintiffs, but Magistrate Judge Elfenbein concluded that they "fail[ed] to establish that [Veerasingham] has unique discovery material, a finding which weighs heavily against designating her as a custodian." In particular, Magistrate Judge Elfenbein explained that while the documents reflected that Veerasingham was updated on relevant topics and approved certain relevant decisions, she "was not involved in the micro-level decision-making" and therefore none of the documents demonstrated that she possessed responsive documents "that would not be otherwise produced during Defendant's search" of other designated custodians. *Id.* at \*5.

Finally, Magistrate Judge Elfenbein concluded that a search of Veerasingham's documents would not be proportional to the needs of the case. She pointed out that Veerasingham, as CEO of "a non-profit organization with over one thousand employees and a global footprint," would possess "countless documents concerning Defendant's global operations unrelated to the instant action." Because Plaintiff had not demonstrated that Veerasingham was in possession of unique discovery documents, she would not "force Defendant to search through the countless documents in her possession."

Accordingly, Magistrate Judge Elfenbein denied Plaintiff's motion to add Veerasingham as a custodian.