

**2. A decision from the U.S. District Court for the Northern District of California granting a motion to modify the parties' ESI protocol to remove the obligation to produce hyperlinked documents, finding that it was "technologically impossible" for the Defendant to comply with the obligation.**

In *In re StubHub Refund Litigation*, No. 20-md-02951-HSG (TSH), 2024 WL 2305604 (N.D. Cal. May 20, 2024), U.S. Magistrate Judge Thomas S. Hixson addressed whether to relieve a party from an obligation in a stipulated order regarding hyperlinked documents with which the party was unable to comply.

In this putative nationwide class action concerning StubHub's refund policy for events affected by the COVID-19 pandemic, the parties entered into an order governing the production of ESI in the case (ESI Order) providing that emails should be produced with parent and child files and with the parent-child relationship preserved. *Id.* at \*1. Under the ESI Order, "child files" were defined to include "hyperlinks to internal or nonpublic documents," and "family groups" were defined to include "documents referenced by document stubs or via links to internal document sources." The ESI Order further provided that it "may be modified ... by the Court for good cause shown."

During discovery, StubHub concluded that it could not systematically produce hyperlinked documents, "despite having spent hundreds of hours trying to find linked documents and despite having retained an outside e-discovery vendor to assist with this effort." As a result, StubHub filed a motion to modify the ESI Order to remove the requirements to produce hyperlinked documents. Plaintiffs opposed the motion.

In opposition to StubHub's motion to modify the ESI Order, Plaintiffs submitted an expert declaration from Paul McVoy. McVoy asserted that StubHub's e-discovery vendor (Epiq) could have located "more" hyperlinked documents if it had searched for hyperlinked documents in StubHub's native email files. StubHub disagreed with this contention, arguing that many of the hyperlinks in StubHub's emails no longer worked. Magistrate Judge Hixson noted that McVoy did not dispute StubHub's argument and concluded that McVoy's declaration did not provide a basis for denying StubHub's motion to modify the ESI Order because "all McVoy's declaration actually says is that it might have been possible for Epiq to find a hyperlinked document more than 17% of the time." Magistrate Judge Hixson concluded that even if Epiq could have found hyperlinked documents at twice that rate, "the Court is not going to keep a production requirement in the ESI Order if two-thirds of the time it is impossible to comply with."

Plaintiffs also submitted a declaration from Douglas Forrest asserting that "hyperlinks are widely used and should be thought about as part of discovery." *Id.* at \*2. Forrest's

declaration further asserted that “[a] proper, technically sound approach to collecting and processing of documents with linked attachments is possible and will enable the review and production of emails and documents with linked attachments as family groups so that their relevance may be identified regardless of whether relevant words, phrases or concepts appear in the parent document or in a linked attachment or both.” Magistrate Judge Hixson found these statements to be conclusory and not probative of whether hyperlinked documents are attachments at all. Magistrate Judge Hixson also found that while Forrest described different methods to search for hyperlinked documents, his declaration did “not actually identify technology that would do this.”

Magistrate Judge Hixson ultimately concluded that Forrest’s declaration “falls short of establishing that the hyperlink requirement in the ESI Order is broadly possible to comply with.” Magistrate Judge Hixson noted that the parties were seemingly in agreement that there was “no commercially available or custom program in existence that could collect all of StubHub’s hyperlinked documents,” and he found this “tips strongly in StubHub’s favor.” He disagreed with Forrest’s implied contention that something was “technologically possible even if no commercially available software can perform the function, and the litigant would need to develop or commission new software.”

Magistrate Judge Hixson found that StubHub had demonstrated good cause to remove the requirement that hyperlinked documents should be produced as if they were attachments to emails, because it “made a persuasive evidentiary showing that despite having spent hundreds of hours trying to find linked documents and despite having retained an outside e-discovery vendor to assist with this effort, the hyperlink requirement is technologically impossible to fulfill most of the time.” Accordingly, Magistrate Judge Hixson modified the parties’ ESI Order to remove “hyperlinks to internal or nonpublic documents” from the categories describing “child files” to emails. *Id.* at \*3.