

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

SOREN NIELSEN,
and the **SKYLINE REPUBLICAN
CLUB,**

Plaintiffs,

v.

ANN ARBOR PUBLIC SCHOOLS,
CORY McELMEEL, individually and
in his official capacity as the principal
of Skyline High School, and
JEFFERSON BILSBORROW,
individually and in his official capacity
as a secretary at Skyline High School,

Defendants.

Case No. 22-cv-12632

Hon. F. Kay Behm

Hon. Mag. Judge Curtis
Ivey, Jr.

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR
MOTION TO COMPEL DISCOVERY**

Table of Contents

Table of Authorities.....ii

Reply.....1

I. Plaintiffs Met and Conferred; Defendants Have Been Willfully and Knowingly Uncooperative.....1

II. This Court Should Grant Plaintiffs’ Motion to Compel Discovery.....5

Conclusion.....7

Certificate of Service.....8

Table of Authorities

| | |
|---|---|
| <i>Edwards v. Scripps Media, Inc.</i> , 331 F.R.D. 116 (E.D. Mich. 2019)..... | 3 |
| <i>Gertcher v. Therrian</i> , 2022 WL 21296151 (W.D. Mich. Mar. 23, 2022)..... | 7 |
| <i>Nielsen v. Ann Arbor Pub. Sch.</i> , 2022 WL 16744371 (E.D. Mich. Nov. 7, 2022)..... | 7 |
| <i>Stryker Corp. v. Ridgeway</i> , 2016 WL 7626229 (W.D. Mich. Mar. 9, 2016)..... | 7 |
| <i>Vickers v. Mt. Morris Twp. Police Dep’t</i> , 2022 WL 1404664 (E.D. Mich. May 4, 2022)..... | 3 |
| <i>West v. Lake State Ry. Co.</i> , 321 F.R.D. 566 (E.D. Mich. 2017)..... | 4 |
| <i>William Beaumont Hosp. v. Medtronic, Inc.</i> , 2010 WL 2534207 (E.D. Mich. June 18, 2010)..... | 3 |

Rules and Other Authorities

| | |
|----------------------------------|---------|
| 28 U.S.C. § 1927..... | 7 |
| E.D. Mich. L.R. 7.1..... | 2 |
| Fed. R. Civ. P. 11..... | 7 |
| Fed. R. Civ. P. 30(b)(2)(A)..... | 4 |
| Fed. R. Civ. P. 30(b)(6)..... | 1, 2, 3 |
| Fed. R. Civ. P. 37..... | 2 |

I. Plaintiffs Met and Conferred; Defendants Have Been Willfully and Knowingly Uncooperative: Plaintiffs' motion was filed after a year of diligently trying to gain compliance from Defendants. Ex. 1 – Email Timeline. Plaintiffs began seeking cooperation to schedule depositions from Defendants on March 15, 2023. Ex. 1 at 1. The supermajority of Plaintiffs' attempts was met with silence. Ex. 1 at 1-28. Defendants' first substantive response to Plaintiffs' repeated requests to schedule the deposition of their Fed. R. Civ. P. 30(b)(6) representative, took nine emails and over three-and-a-half months, but it was nothing more than gamesmanship. Ex. 1 at 1-6. At that time, Defendants had designated their Fed. R. Civ. P. 30(b)(6) witness as Jazz Parks, and after months of trying to gain Defendants' cooperation to schedule the deposition, Defendants provided Plaintiffs with only a window of a few hours of availability on one day. Ex. 1 at 7 (stating that Jazz Parks could be available for a half-day on July 25th). When Plaintiffs responded that they would need approximately seven hours for the deposition in accordance with the Federal Rules of Civil Procedure, Defendants again required Plaintiffs to contact them multiple times by email and phone. Ex. 1 at 6-28. Plaintiffs have contacted Defendants over twenty-five times by email regarding their request to depose Defendants' Fed. R. Civ. P. 30(b)(6) representative. Ex. 1 at 1-28. They have discussed the matter over the phone several times and met and conferred in person. Ex. 1 at 22-28. On February 29, 2024, after attempting to gain cooperation for months, Plaintiffs noticed the deposition. Plaintiffs

and Defendants met and conferred in person on the morning of February 29, 2023,¹ and met and conferred over the phone regarding this motion on March 7, 2024 at 12:30pm. Ex. 1 at 26-28.

The same pattern follows Defendants' lack of cooperation and failure to answer Plaintiffs' document requests. Ex. 1 at 5 and 9 (trying to confirm when Defendants might respond to Plaintiffs' document requests), at 12 (reminding Defendants to complete their late response by June 30, 2023), at 22 (discussing prior meet and confer and lack of production of any supplemental documents); at 28 (referring to counsels' March 7, 2024 meet and confer); *see also* ECF No. 42-2. Plaintiffs agreed to offer Defendants additional time to respond. When Defendants responded, their production was woefully deficient. *Id.* Plaintiffs met and conferred on their motion to compel. *Id.*, *see also* Ex. 1 at 5, 9, 12, 22, and 28. In response to Plaintiffs' motion, Defendants argue that they are "shocked" and "blindsided." ECF No. 44 at 1, 11. Defendants' puerile hyperbole is simple distraction that does not merit the engagement of Plaintiffs or the Court. Plaintiffs undoubtedly satisfied the concurrence requirements of Fed. R. Civ. P. 37, E.D. Mich. L.R. 7.1, and the Magistrate's Practice Guidelines.²

¹ *See* Dep. of J. Swift, *available at hyperlink: [SOREN NIELSEN_Swift Transcript & Exhibits](#)* (demonstrating that the deposition noticed for 10 am did not begin until 11:23am). The delay was due to an in person meet and confer of counsel. Plaintiffs met and conferred on this motion by email, in person, and over the phone.

² Defendants now argue that Plaintiffs should not be able to depose their Fed. R. Civ. P. 30(b)(6) representative. This argument has no merit. Defendants never communicated specific objections to Plaintiffs' Schedule A. When Plaintiffs asked for specific objections, Defendants represented that they would "get back" to Plaintiffs and

II. This Court Should Grant Plaintiffs' Motion to Compel Discovery:

Defendants admit to some of their deficiencies. Defendants admit that they possess additional documents that they will not provide without a protective order. ECF No. 44 at 4-5.³ They admit that they “inadvertently” did not produce a privilege log. *Id.* at

then never did. Plaintiffs do not fault the author of the response brief for her misrepresentation, as she did not participate in the March 7, 2024 meet and confer. Plaintiffs do note, however, that the very case cited by Defendants for why Plaintiffs' motion should not be granted *establishes that it should*. In *Edwards v. Scripps Media, Inc.*, the court ordered the defendants to designate a Fed. R. Civ. P. 30(b)(6) witness to testify regarding policies relevant to the claims and defenses of the parties. 331 F.R.D. 116-23 (E.D. Mich. 2019). The court ruled that “the prior testimony from the individual fact witnesses does not relieve [a] defendant from its obligation to designate a witness under Rule 30(b)(6).” *Id.* at 122. The chart provided by Defendants fails to provide any substitute for the Defendants' corporate representative. Defendants never address the fact that Defendants have withheld key evidence, such as their new student announcement policy known to Defendants since September 2023, to which none of the defense witnesses have testified (because Defendants knowingly withheld this discovery until *two weeks after the close of discovery*). Ex. 2. Defendants fail to acknowledge that the deposition of a Fed. R. Civ. P. 30(b)(6) witness is even more critical where, as here, Defendants have been uncooperative with the discovery process and have failed to comply with requests. *Id.* at 123-25. In their response, Defendants admit that they have not timely responded to Plaintiffs' discovery requests and are still now, after the close of discovery, just getting around to answering Plaintiffs' May 11, 2023 document request. ECF No. 44 at 19-20. Further, Defendants' retention policies and procedures are important where, as here, there are issues of spoliation. *Id.* at 125. McElmeel testified that the 36-second video provided to Plaintiffs of the walk-out is not all of the video evidence and that preservation policies were beyond his paygrade. ECF NO. 42-7, Dep. of C. McElmeel at 153, lns. 1-23.

³ If Defendants were seeking a protective order, it was incumbent upon them to motion for one before the deadline of Plaintiffs' document request. *William Beaumont Hosp. v. Medtronic, Inc.*, No. 09-CV-11941, 2010 WL 2534207, at *4 (E.D. Mich. June 18, 2010). They never did. “At the very latest,” Defendants should have motioned for a protective “by the deadline for responding to a motion to compel.” *Vickers v. Mt. Morris Twp. Police Dep't*, No. 19-12250, 2022 WL 1404664, at *1–2 (E.D. Mich. May 4, 2022). They never did. Defendants' “[f]ailure to move . . . precludes later objection.” *Medtronic, Inc.*, 2010 WL 2534207, at *4. Defendants' desire to have a protective

6.⁴ Defendants admit (although using fatally narrow search terms and parameters to respond to Plaintiffs’ document request) that they *only now* are “reviewing results” of a document search. *Id.* at 14. Defendants admit that they failed to provide large portions of the text message string (the only one Defendants have provided) until two weeks after Plaintiffs filed their motion to compel. *Id.* at 19-20. Since July 19, 2023, Plaintiffs have been asking for Defendants to supplement the missing portions of the text string. ECF No. 42-2. ***Defendants claimed for over nine months, and during the three depositions that Plaintiffs have been allowed to take, that these texts could not be produced because they were protected under the attorney-client privilege.*** And yet, when a more complete version of the text was finally produced ***after the close of discovery and two weeks after the filing of this motion***, the texts clearly do not implicate the attorney-client privilege. Instead, the text string is a smoking gun. The former-Superintendent of the Ann Arbor Public Schools portends that ***“A2 WILL shut him down”***—referring to one of the Plaintiffs who was a 17-year-old minor at the time.

order, yet never motioning for one, does nothing to negate their obligation to comply with discovery. The Court should order Defendants to provide the documents they admit to not disclosing due to their failure to motion for a protective order.

⁴ Defendants admit that they never provided a privilege log until after the close of discovery and in response to Plaintiffs’ motion to compel. Pursuant to Fed. R. Civ. P. 30(b)(2)(A), Defendants’ privilege log is tardy by approximately ten months. Further, Defendants have demonstrated a history of withholding documents and failing to make timely disclosures. Defendants have waived any privilege. *West v. Lake State Ry. Co.*, 321 F.R.D. 566, 568–70 (E.D. Mich. 2017).

Ex. 2 at AAPS 292 (emphasis added).⁵ The text string also reveals that the Pro-Prop 3 Walk-out was organized by the student club, the GRSA, which is a fact central to the case. Ex. 2 at AAPS 289. The text reveals pictures and videos that Plaintiffs requested in their document request; the video still has never been provided. *Id.* at 287-88; ECF No. 42-1 at #17, #35, #38.⁶ A document provided after discovery also reveals that Defendants changed their announcement policy (one of the central issues in this case) to a version even more problematic to Plaintiffs' First Amendment rights in September of 2023, yet have just now provided this even more egregious policy to Plaintiffs *two weeks after the close of discovery*. Ex. 2 at AAPS 293 (stating that student clubs must first have an announcement vetted and approved by a staff sponsor before it can be submitted). This new policy, *withheld by Defendants for the last eight months*, was implemented after learning of Plaintiffs' hardship in obtaining a staff sponsor for the Skyline Republican Club due to political opposition from the administration and staff and the concern of potential retaliation for sponsoring or supporting the club. Knowing

⁵ Defendants failed to provide any other texts, even from J. Parks and J. Swift who were on this text string but never produced it from their phones, demonstrating Defendants failed to preserve messages after duty bound to do so. ECF No. 42-9.

⁶ Defendants' failure to provide these videos is consistent with their refusal to provide only a 34-second, edited clip of their walk-out demonstration. During his deposition, McElmeel admitted that the one video clip of the walk-out that Defendants provided was incomplete. ECF NO. 42-7, Dep. of C. McElmeel at 153, lns. 1-8 ("Q. This video, this isn't the entire demonstration, right, this clip? A. It does not appear to be. Q. It's just 34 seconds? A. Correct. Q. So there would be additional video outside of this 34 seconds? A. Yes."). The video, now apparent from the withheld as privileged text string, has never been provided. McElmeel testified that there are around 140 cameras at Skyline High School; he has no idea if they were preserved. *Id.* at 153, lns. 1-23.

this, Defendants changed the policy, adding a layer of difficulty for Plaintiffs—and then intentionally failed to provide the policy change to Plaintiffs. Defendants’ guileful use of the “attorney-client privilege” to withhold, not just relevant but, key evidence shows the critical need for a third-party forensic examination. Defendants have proven their untrustworthiness to handle the remaining document searches and production. Defendants’ proposed, limited search terms fail to account for even the plain wording of Plaintiffs’ document requests or the people on Defendants’ witness list.

Plaintiffs’ document requests include, *inter alia*, documents surrounding requests from students clubs, communications using the computers, computers systems, and communication systems in Defendants’ possession or control, communications pertaining to political activity or political candidates, documents pertaining to Defendants’ Michigan’s Campaign Finance Act defense, documents from Defendants’ school newspapers, documents from Defendants’ property and communication systems, such as emails and text messages regarding the GVRSA’s student club’s activities in favor of Proposal 3, such as communications from and between students, faculty, and administration and with, to, or from the email address “OBPOZENEL@GMAIL.COM,” documents regarding the announcements quoted in Plaintiffs’ complaint, documents regarding the Skyline Republican Club’s past announcement submissions, communications on Defendants’ phones, etc.—*all of which fall outside of Defendants’ asserted search parameters*. Defendants defend that Plaintiffs’ announcement could not be read because using Defendants’ property

implicated Michigan’s Campaign Finance Act. *Nielsen v. Ann Arbor Pub. Sch.*, 2022 WL 16744371 (E.D. Mich. Nov. 7, 2022). So, the use of Defendants’ laptops, email, and communication systems is highly relevant.

A third-party forensic examination is necessary to obtain this discovery given Defendants’ months long history of withholding highly relevant, non-privileged documents and their “refusal to turn over all the information in [their] possession.”⁷ Justice requires it.⁸

CONCLUSION

For the foregoing reasons and those argued in Plaintiffs’ motion and memorandum in support, Plaintiffs respectfully request that this Honorable Court compel Defendants to produce full and complete responses to Plaintiffs’ First Request for Document, order that the search for these documents be performed by a third-party forensic auditor and at the Defendants’ expense, and order Defendants to comply with Fed. R. Civ. P. 30(b)(6).

Dated: April 4, 2024

Respectfully submitted,
THOMAS MORE LAW CENTER

/s/ Richard Thompson
Richard Thompson (P21410)

⁷ *Stryker Corp. v. Ridgeway*, 2016 WL 7626229, at *1–3 (W.D. Mich. Mar. 9, 2016); *Gertcher v. Therrian*, 2022 WL 21296151, at *4 (W.D. Mich. Mar. 23, 2022). Plaintiffs agree to implement a forensic inspection protocol that carefully protects any confidential information.

⁸ Defendants’ request for Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 sanctions and attorneys’ fees is frivolous and not properly before the Court. Plaintiff have not acted with bad faith or improper motive but seek relief from abusive discovery tactics.

24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
734.827.2001 phone
734.930.7160 fax
rthompson@thomasmore.org
emersino@thomasmore.org

CERTIFICATE OF SERVICE

RICHARD THOMPSON states that on April 4, 2024, he did serve a copy of **this reply brief** via the United States District Court electronic transmission.

/s/RICHARD THOMPSON
Richard Thompson (P21410)
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
(734) 827-2001
rthompson@thomasmore.org
Attorney for Plaintiffs