UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SHAWN THOMAS,

Plaintiff,

v.

THE CITY OF NEW YORK, COMMISSIONER DANIEL A. NIGRO, WILLIAM SEELIG, STEPHEN GERAGHTY, DONALD HAYDE, JOHN SPILLANE, JOHN ESPOSITO, JOSEPH CUNNINGHAM, JOSEPH DOWNEY, JAMES ELLISON, THOMAS GARDNER, EDWARD COWAN, WILLIAM BEDELL and JOHN and JANE DOE (said names being fictitious, the persons intended being those who aided and abetted the unlawful conduct of the named Defendants),

Defendants.

ORDER
19-CV-4791-NGG-SJB

BULSARA, United States Magistrate Judge:

Plaintiff has filed a motion to compel certain electronic discovery from Defendants. (Mot. to Compel dated Aug. 20, 2020 ("Mot."), Dkt. No. 43). For the reasons explained below, the motion to compel is granted.

Plaintiff seeks (in "Phase 2 ESI" discovery) documents (including text messages, GroupMe messages, and emails) from five custodians, all defendants: Captain Gardner, Lieutenant Cowan, Lieutenant Bedall, Chief of Special Operations Esposito, and FDNY Commissioner Nigro. Defendants agreed to collect ESI from Nigro according to agreed-upon search terms and time frames and have collected emails from Gardner and text messages from Cowan. (Opp. to Mot. dated Aug. 20, 2020 ("Opp."), Dkt. No. 44, at 2). They oppose any additional production request, including any collection from Esposito or Bedall, further collection from the other custodians, and any collection of GroupMe messages. (*Id.* at 2, 5–6).

Neither party addresses the standards or burdens for ESI production correctly; some review is required. Under Rule 26, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). If relevant and proportional, then the party that objects to the discovery must establish that the request should be denied. *See N. Shore-Long Island Jewish Health Sys., Inc. v. MultiPlan, Inc.*, 325 F.R.D. 36, 48 (E.D.N.Y. 2018) ("Once the requesting party has made a *prima facie* showing of relevance, 'it is up to the responding party to justify curtailing discovery.'" (quoting *Fireman's Fund Ins. Co. v. Great Am. Ins. Co.*, 284 F.R.D. 132, 134 (S.D.N.Y. 2012))); *see also Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp.*, No. 14-CV-4717, 2016 WL 2858815, at *3 (E.D.N.Y. May 16, 2016) ("[T]he party resisting discovery has the burden of showing undue burden or expense." (quoting *State Farm Mut. Auto. Ins. Co. v. Fayda*, No. 14-CV-9792, 2015 WL 7871037, at *2 (S.D.N.Y. Dec. 3, 2015))). With respect to ESI, to avoid production in response to a "motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(B).

Defendants have failed to rebut Plaintiff's showing that the discovery sought is relevant and proportional, or that the discovery is not reasonably accessible because of undue burden or cost. According to Defendants, having collected emails from Gardner, text messages from Cowan, and ESI from Nigro; and conducted certain unidentified interviews, collecting additional ESI from Gardner, Bedall, and Esposito would "yield no unique or non-duplicative information." (Opp. at 2). There are several flaws in Defendants' analysis of their discovery obligations.

As for Gardner, Cowan, and Bedall, they are all defendants in the case—and alleged to have conspired to retaliate against Plaintiff. As such, there is no plausible argument that the information sought from their files is irrelevant under Rule 26(b). In other words, there is some reason to believe that they would have relevant and discoverable information in their possession. To exclude any defendant from electronic information collection entirely would be the unusual course, and all defendants have offered to support that position is their view that the information to be obtained would be duplicative or redundant. Defendants have not suggested that Cowan, Gardner, or Bedall are not involved, but contend instead that the information sought is the same information that will or has already been produced. Yet, Defendants offer not a modicum of proof for this position (such as email exhibits showing that all parties were copied on the relevant emails) or plausible explanation (such as a factual proffer that, given their roles as supervisors, these defendants always emailed with each other about all employees). "The mere fact that many documents have already been produced is not sufficient to establish that there are no other relevant materials to be found." *Family Wireless #1, LLC v. Auto. Techs., Inc.*, No. 15-CV-1310, 2016 U.S. Dist. LEXIS 65885, at *7 (D. Conn. May 19, 2016); *Bagley v. Yale Univ.*, 307 F.R.D. 59, 66 (D. Conn. 2015) ("The sense of irritated resignation conveyed by the familiar aphorism—'it's like looking for a needle in a haystack'—does not exclude the possibility that there may actually be a needle (or two or three) somewhere in the haystack, and sharp needles at that. Plaintiff is presumptively entitled to search for them."). In any event, for Defendants to prevail on limiting discovery because of duplication, they must show that such the resulting information is "unreasonably cumulative or duplicative." Rule 26(b)(1)(C)(i). The mere existence of overlap and some duplication is insufficient to preclude the discovery

sought. *E.g.*, *Kenyon v. Simon & Schuster, Inc.*, No. 16-MISC-327, 2016 U.S. Dist. LEXIS 140917, at *17–18 (S.D.N.Y. Oct. 11, 2016) ("The Court is not persuaded that simply because a subset of documents—i.e., communications with Clare—may also be available from Clare, Kenyon's requests are unreasonably duplicative or cumulative. S&S . . . likely has the lion's share of documents responsive to Kenyon's requests. Rule 26(b)(2)(C)(i) does not require requests to be circumscribed pens sharing no common ground. It requires only that the overlap not be 'unreasonable.'"). Furthermore, even if duplicative, obtaining the information about custodian of a text message or email yields pertinent information. That is, even if an email was produced from one witness's custodial inbox, producing the same email from another witness's inbox establishes that the second witness received the email (and helps counter any suggestion that he or she lacked knowledge of or did not receive the email in question).

Nor have Defendants established that ESI is inaccessible. *See* Fed. R. Civ. P. 26(b)(1)(B). That is,

> [t]he producing party is relieved of the initial obligation to produce information from these sources only if they are properly identified as "inaccessible." This does not mean that the responding party must describe with great specificity what information is available from these sources; providing that specificity might sometimes entail undertaking the burdensome efforts that the rule seeks to defer or avoid. But the identification must provide details on the burdens and costs that would result from providing the discovery, and on the likelihood of finding responsive information on the identified sources.

8 Arthur R. Wright & Charles Alan Miller et al., *Federal Practice & Procedure* § 2008.2 (3d ed. 2020). Defendants' papers are devoid of any specific analysis of the burden of the ESI production being sought by Plaintiff. And some of the arguments suggests the burden is minimal at best—for instance, Defendants contend that "Cowan and Bedell rarely used email," (Opp. at 2), which if true, suggests little additional time and expense

would be incurred in producing their ESI. Since Defendants give no indication of the volume of responsive ESI, the Court cannot conclude that the efforts in reviewing the ESI of the additional custodians would be so burdensome so as to be "inaccessible." *E.g.*, *Black Love Resists in the Rust ex rel. Soto v. City of Buffalo*, 334 F.R.D. 23, 29 (W.D.N.Y. 2019) ("Although Defendants assert that it would be unduly burdensome for them to produce ESI because Plaintiffs' proposed search terms are incompatible with Defendants' email systems, they have not quantified that burden in terms of the number of documents subject to collection and review or 'the amount of time and manpower that would be reasonably required to comply' with the requests." (quoting *Gross v. Lunduski*, 304 F.R.D. 136, 152 (W.D.N.Y. 2014))); *Garcia Ramirez v. U.S. Immigr. & Customs Enf't*, 331 F.R.D. 194, 198 (D.D.C. 2019) ("Defendants have not articulated anything more than general statements that allowing discovery from the additional custodians would cause an undue burden. Defendants do not provide any evidence or specific factual allegations to support their assertion that discovery from the additional custodians would unduly add to the cost or time needed to process the necessary documents.").

It appears—though the parties' papers are unclear on this point—that Defendants have agreed to obtain a subset of ESI from particular defendants and cobbled together the information. (Opp. at 2 ("Defendants have agreed to collect emails from Commissioner Nigro . . . . Defendants have also agreed to collect emails from Captain Gardner and text messages from Lieutenant Cowan.")).[1] This kind of splicing—

[1] This is why Defendants' arguments about speculative custodians is hollow. Plaintiff seeks documents from named Defendants; Defendants effectively concede these individuals have documents, but the documents are not unique. None of the cases cited by Defendants are remotely similar to the facts presented here.

collecting emails from one defendant, text messages from another—with the hope that the amalgam of information is the universe of relevant discovery is an inappropriate collection and production methodology. It assumes that one person's documents are complete and nothing has been deleted or expunged, that reviewing duplicate information is unduly burdensome or disproportionate, and that custodian information is irrelevant.

Each assumption is flawed. Defendants have offered nothing to support their first assumption—that Nigro's emails are the complete set of emails and Cowan's text messages are the complete set texts between any of the defendants or concerning the Plaintiff's claims—other than "custodial interviews." Interviews of witnesses about the content of their electronic communications is likely to provide, at best, an incomplete picture of the content of relevant and discoverable ESI. It is one thing to ask a witness how he or she communicated—through email or text—or about their deletion practices. But it is quite another thing to rely on a witness's recollection about whether her emails represent the entire set of communications on a particular set of issues. Asking a witness to recreate and recount the content of electronic communications and describe the extent of communications on a particular issue from memory is unlikely to provide an accurate accounting. It is also problematic to accept, without verifying, that the witness being asked to collect documents is involved in all the relevant conversations, as Defendants do. (Opp. at 2 ("Cowan and Bedell rarely used email, and any relevant emails concerning any of the "retaliation" allegations . . . would always include Gardner, as the direct supervisor in Squad 8."). At this point, Plaintiff is not required to accept Defendants' characterization of the evidence. And as explained earlier, the other

assumptions of Defendants—about the burden of duplicative emails and the irrelevance of custodial information—are either unsupported or without merit.

With respect to Esposito, that there are "no direct allegations against him in the Amended Complaint" does not immunize his ESI from collection. Again, Defendants do not take the position that Esposito does not have information, but that his information is duplicative. For the reasons explained above, the argument is as flawed as it is with respect to the other defendants.

Defendants remaining arguments are without merit. They contend that in the first instance it is entitled to choose which custodians to search. (Opp. at 3 "([D]efendants are best situated to determine how to search and produce their own ESI.")). Such an approach is in tension with Rule 26—which requires production of ESI unless "the party resisting discovery shown that the information in question is not *reasonably* accessible." *Stinson v. City of New York*, No. 10-CV-4228, 2015 WL 4610422, at *4 (S.D.N.Y. July 23, 2015); *see supra* at 2. But even if such presumptions are appropriate, they are rebuttable and the choice is accorded no weight when "manifestly unreasonable or the requesting party demonstrates that the resulting production is deficient." *Mortg. Resol. Servicing v. JPMorgan Chase Bank, N.A.*, No. 15-CV-293, 2017 U.S. Dist. LEXIS 78217, at *7 (S.D.N.Y. May 18, 2017). Unlike the cases Defendants cite, where individuals are deemed unlikely to have relevant information, here Defendants are seeking to avoid discovery of materials belonging to named defendants; concede that many of the custodians have information, but assert that the ESI must be redundant or non-unique; and have failed to demonstrate exceptional costs in reviewing allegedly redundant ESI. *E.g.*, *id.* at *9–10 ("The cost of producing it would be substantial. Phil Verdelho, the Executive Director for Electronic

Discovery Platform Services for Chase, has presented a detailed (and uncontradicted) analysis, showing that the cost of restoring the additional custodians' email mailboxes and deduplicating, culling, and reviewing the data would likely exceed $400,000.00.").

Defendants then say that in other districts Plaintiffs would not be permitted to discovery from other custodians—*i.e.*, there is an automatic limit. But this is not the Southern District of New York, and discovery in each case is to be tailored to the allegations and facts at issue—analogizing to cases where the total number of custodians was fewer than those searched here is a meaningless exercise. The issue here is whether the discovery is relevant and proportional, not whether (unlike interrogatories, which are limited to 25) Plaintiff's request exceeds a bright-line cap.

Two final issues remain. Plaintiff seeks to obtain text messages from some of the aforementioned individuals; Defendants have "proposed a text message collection from . . . Cowan, who was part of all of the text messages of all three [Gardner, Bedell, and Cowan]." Again, this proffer—not sustained by any affidavit or exhibit—is based on the same flawed assumption that suggests that certain custodians should be excluded from ESI collection. Defendants attempt to avoid text message collection from these individuals because they have said there are no other text messages is unpersuasive, particularly when there has been no showing that there is a disproportionate burden from the additional collection and production.

Plaintiff also seeks GroupMe chats between various parties. Defendants' position—"custodial interviews reveal there was nothing relevant to this lawsuit discussed on the chat"—is a form of self-collection which is strongly disfavored. *Herman v. City of New York*, 334 F.R.D. 377, 386 (E.D.N.Y. 2020) ("It is not appropriate to take a client's self-collection of documents, assume it is complete, and

not take steps to determine whether significant gaps exist."). That is, Defendants' counsel is relying on their clients' statements that these chats do not contain pertinent or relevant information. It is unclear why Defendants' counsel chose not to review the chats. If the contention is the chats were not preserved and there is nothing to review, then Defendants should provide a statement to that effect.

> If there is no ESI from a given supervisor . . . , the City need not produce anything—after all, "a party cannot be compelled to produce that which he does not have." That basic principle does not, however, relieve the City of its obligation to conduct a good faith search and produce what relevant ESI it does have.

Stinson, 2015 WL 4610422, at *6 (quoting *Gropper v. David Ellis Real Estate, L.P.*, No. 13-CV-2068, 2014 WL 642970, at *1 (S.D.N.Y. Feb. 14, 2014)). Instead, Defendants claim that Plaintiff deleted his copy of the chats and that is an admission of non-relevance. But Defendants have a perseveration and production obligation irrespective of whether Plaintiff complied with any obligation he had.

As such, the Court grants Plaintiff's motion to compel. Thus, Defendants Esposito, Gardener, Bedell, Cowan, and Nigro are custodians whose ESI must be searched and produced, including emails and text messages; and Defendants are required to search and produce Squad 8 GroupMe chat messages.

SO ORDERED.

/s/ Sanket J. Bulsara September 16, 2020
SANKET J. BULSARA
United States Magistrate Judge

Brooklyn, New York