

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

NICOLE P. ERAMO)	
Plaintiff,)	Civil Action No. 3:15cv23
)	
v.)	<u>MEMORANDUM OPINION & ORDER</u>
)	
ROLLING STONE LLC, <i>et al.</i> ,)	By: Joel C. Hoppe
Defendants.)	United States Magistrate Judge

The Plaintiff, Nicole P. Eramo, brought defamation claims against Defendants Rolling Stone LLC, Wenner Media LLC, and Sabrina Rubin Erdely, arising out of a November, 2014, article published in *Rolling Stone* magazine. As part of this action, the Plaintiff served a Rule 45 subpoena on third-party Respondent “Jackie.” This matter is before the Court on Plaintiff’s motion for an order to show cause and to compel (“Motion”), ECF No. 63, specifically to compel Jackie’s compliance with Demand No. 15 of the subpoena and a Court Order issued January 25, 2016, by Chief Judge Glen E. Conrad. On June 20, 2016, the Court held a hearing on the Motion.

I. Discussion

On July 27, 2015, Eramo served Jackie with a Rule 45 subpoena, seeking production of documents relating to circumstances underlying the *Rolling Stone* article. Jackie refused production. After counsel attempted to resolve the issue through letters and telephone conferences, Eramo filed a motion to compel. Chief Judge Conrad entered an Order granting in part and denying in part the motion to compel. Order, *Eramo v. Rolling Stone LLC*, No. 3:15mc11 (W.D. Va. Jan. 25, 2016), ECF No. 35.

On February 16, 2016, Jackie produced documents responsive to the subpoena and the Court’s Order. The issue presented in the Motion here relates to Demand No. 15 of the subpoena, which orders Jackie to produce certain specific communications by or referencing “Haven

Monahan.” After Jackie did not produce any documents responsive to that demand, the Plaintiff sent a letter to Jackie’s counsel seeking production or a detailed explanation of why they were not produced. Jackie’s counsel asserted that they had produced all the documents in Jackie’s possession in compliance with the subpoena and Order. After counsel exchanged several more letters and emails, but notably held no telephone conference, Eramo filed the instant Motion.

Eramo makes three requests in her Motion: (1) to compel Jackie to produce the documents relevant to Demand No. 15 of the subpoena; (2) alternatively, if the documents cannot be produced, to provide a detailed explanation of why; and (3) to award Plaintiff’s costs and fees associated with this Motion.

In her opposition to the Motion, Jackie repeatedly and unequivocally asserts that she does not possess the documents responsive to Demand No. 15. Furthermore, she argues that she is under no obligation to do more, such as certify or otherwise explain her inability to produce any such documents. Eramo argues that she has made a convincing threshold showing through several exhibits that Jackie, at least at one time, possessed responsive documents that she has not produced. Because of this showing, they argue that a simple claim of an inability to produce these documents is inadequate and requires an explanation of the disposition of the documents.

In a case cited by Eramo, the district court in *Meeks v. Parsons*, No. 1:03-cv-6700, 2009 U.S. Dist. LEXIS 90283, (E.D. Cal. Sept. 18, 2009), framed the legal analysis well:

“The fact that a party may disbelieve or disagree with a response to a discovery request . . . is not a recognized ground for compelling discovery, absent some indication beyond mere suspicion that the response is incomplete or incorrect.” But if there is reason to believe that the response is incomplete or incorrect, the court may require a certification that the respondent “ha[s] conducted a search for the information reasonably available to them through their agents, attorneys, or others subject to their control and has[] determined that the information requested either does not exist or that is has been produced.” “Ordinarily, a sworn statement that a party has no more documents in its

possession, custody or control is sufficient to satisfy the party's obligation to respond to a request for production of documents.”

Id. at *8–9 (quoting *Gray v. Faulkner*, 148 F.R.D. 220, 223–24 (N.D. Ind. Apr. 14, 1992)).

Meeks continues:

“[I]f the documents sought are known to have been in the party's possession, custody, or control, it would not suffice for that party to simply disavow their existence without adequately explaining the disposition of the documents. Without such an explanation, the requesting party would be unable to ‘determine whether to search elsewhere, or whether the only existing copies were destroyed, thus making further search futile.’”

Meeks, U.S. Dist. LEXIS 90283, at *9 (quoting *Superfilm of Amer., Inc. v. UCB Films, Inc.*, 219 F.R.D. 649, 651 (D. Kan. 2004) (quoting *Lone Star Steakhouse & Saloon, Inc. v. Liberty Mut. Ins. Group*, 2003 U.S. Dist. LEXIS 12160, 2003 WL 21659662, at *2–3 (D. Kan. June 4, 2003))).

Eramo has presented evidence purporting to show that Jackie at some point had possession, custody, or control over documents responsive to Demand 15. That evidence does not, however, show that Jackie's response to Demand No. 15 was inadequate. In written filings with the Court, Jackie's counsel has twice represented that Jackie does not have possession, custody, or control over the requested documents. Counsel reaffirmed this representation at a hearing on this matter, advising the Court that they had conducted a forensic examination of Jackie's computer and mobile phone and examined all known online accounts accessible by Jackie that may contain responsive documents. This response by an officer of the Court is sufficient. A different result may be warranted in a case such as *Meeks* where the Rule 45 subpoena was directed to a third-party corporation that had an established document retention and retrieval policy. In that circumstance, some additional explanation may be necessary to aid the requesting party's search into other areas that might contain the missing documents. *Meeks*, 2009 U.S. Dist. LEXIS 90283, at *12–14. Here, the steps taken by Jackie's counsel were

relatively straight forward and appear to have exhausted all known areas of inquiry for responsive communications currently in Jackie's possession. Accordingly, Plaintiff's evidence that Jackie may have once possessed documents responsive to Demand No. 15 does not lead the Court to conclude that further explanation from Jackie or her counsel will lead to the discovery of additional unproduced documents. Thus, any further explanation of the Respondent's search process is unnecessary and not calculated to lead to a stone unturned.

II. Conclusion & Order

For the foregoing reasons and those stated during the hearing, the Court hereby DENIES Plaintiff's Motion. ECF No. 63. The Court further finds that Plaintiff's and Respondent's positions were not unjustified. Accordingly, all requests for sanctions or awarding of fees and costs are hereby DENIED.

It is so ORDERED.

ENTERED: June 21, 2016

A handwritten signature in black ink that reads "Joel C. Hoppe". The signature is written in a cursive, slightly slanted style.

Joel C. Hoppe
United States Magistrate Judge