IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

KAREN MCNEIL, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 1:18-cv-00033**
	)	**Judge Campbell/Frensley**
COMMUNITY PROBATION	)	
SERVICES, LLC, et al.,	)	
Defendants.	)	

ORDER

This class action lawsuit alleges constitutional and statutory violations caused by the use of private companies to provide probation services in Giles County, Tennessee. Docket No. 256 (Second Amended Complaint). Defendants Progressive Sentencing, Inc.; PSI-Probation II, LLC; PSI-Probation, LLC; Tennessee Correctional Services, LLC; Timothy Cook; Markeyta Bledsoe; and Harriet Thompson ("the PSI Defendants") have moved for summary judgment, arguing that the claims against them should be dismissed. Docket No. 300. Plaintiffs have filed a Response in Opposition. Docket No. 326.

This matter is now before the Court upon two Motions, both of which address the issue of outstanding Electronically Stored Information ("ESI") discovery. Plaintiffs have filed a "Motion to Compel PSI Defendants' Production of Electronically Stored Information Responsive to Plaintiffs' First Set of Requests to Produce Documents." Docket No. 319. The PSI Defendants have filed a Response, in which they adopt by reference the arguments made in their "memorandum of law in support of their first motion to stay email discovery pending a ruling on the PSI Defendants' motion for summary judgment." Docket No. 325, p. 1, *referencing* Docket No. 321. The PSI Defendants have filed a "Motion to Stay Email Discovery Pending a Ruling on

PSI Defendants' Motion for Summary Judgment." Docket No. 320. Plaintiffs have filed a Response in Opposition. Docket No. 323. For the reasons set forth below, Plaintiffs' Motion to compel is GRANTED, and the PSI Defendants' Motion to stay discovery is DENIED.

II. LAW AND ANALYSIS

A. Discovery Requests and Motions to Compel

Discovery in federal court is governed by the Federal Rules of Civil Procedure, which provide that a party may request production of documents or other tangible items as long as the information sought is within the scope of discovery. Fed. R. Civ. P. 34(a); *see also* Fed. R. Civ. P. 26(b)(1). In general, the scope of discovery extends to nonprivileged information that is relevant to any party's claim or defense, regardless of whether the information sought is admissible, that is "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). The Rules were amended, effective December 1, 2015, in part to address the alleged costs and abuses attendant to discovery. Under Rule 26, "[t]here is now a specific duty for the court and the parties to consider discovery in the light of its 'proportional[ity] to the needs of the case . . . .'" *Turner v. Chrysler Grp. LLC*, No. 3:14-1747, 2016 U.S. Dist. LEXIS 11133, at *2, (M.D. Tenn. Jan. 27, 2016), *quoting* Fed. R. Civ. P. 26(b)(1). The following factors are relevant to a consideration of whether the scope of discovery is proportional:

> (1) the importance of the issues at stake in the action,
> (2) the amount in controversy,
> (3) the parties' relative access to relevant information,
> (4) the parties' resources,
> (5) the importance of the discovery in resolving the issues, and
> (6) whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1) (numbering added). "Nevertheless, the scope of discovery is, of course, within the broad discretion of the trial court." *United States v. Carell*, No. 3:09-0445, 2011 U.S.

Dist. LEXIS 57435 at *5 (M.D. Tenn. May 26, 2011), *quoting Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998) (internal quotation marks omitted).

After making a good faith effort to resolve a dispute, a party may move for an order compelling discovery. Fed. R. Civ. P. 37(a)(1). The moving party "must demonstrate that the requests are relevant to the claims or defenses in the pending action." *Carell*, 2011 U.S. Dist. LEXIS 57435 at *5, *quoting Anderson v. Dillard's, Inc.*, 251 F.R.D. 307, 309-10 (W.D. Tenn. 2008) (internal quotation marks omitted). "If relevancy is shown, the party resisting discovery bears the burden of demonstrating why the request is unduly burdensome or otherwise not discoverable under the Federal Rules." *Id.* (internal quotation marks and citation omitted).

B. <u>The Discovery Matters at Issue</u>

1. <u>Relevance</u>

Plaintiffs request the production of:

> (1) all ESI resulting from (a) the narrowed ESI search proposed by Plaintiffs on June 19, 2019, and (b) the search of Ms. Downing's personal email account requested by Plaintiffs on September 18, 2019 . . . and (2) the Missing Documents identified by Plaintiffs on March 25, 2019 . . . .[1], [2]

Docket No. 319, p. 7 (citations omitted). Plaintiffs contend that the ESI at issue is responsive to

[1] Plaintiffs state that Erika Downing is a PSI Regional Manager and ESI custodian, and that they asked the PSI Defendants to search her personal email account for responsive documents "in light of documents produced indicating that she used her personal email account to communicate about topics responsive to Plaintiffs' Requests." Docket No. 319, p. 4-5. The PSI Defendants do not dispute these assertions. *See* Docket No. 321.

[2] "The Missing Documents" refers to "51 documents referenced in PSI Defendants' production that [have] not been produced . . . ." Docket No. 319, p. 3. Plaintiffs assert that the "PSI Defendants do not dispute that they should produce the Missing Documents," and the PSI Defendants have not contested this assertion. *Id.* at 7; *see* Docket No. 321. This Order therefore focuses on the Parties' arguments regarding the ESI requested; however, because Plaintiffs contend that "[the PSI Defendants'] six-month delay in producing the Missing Documents . . . necessitates an order compelling production," the Court will rule on the issue of the production of the Missing Documents.

Plaintiffs' most recently narrowed proposed search terms, and that the PSI Defendants have represented that they have already used these terms to search for documents. Docket No. 319, p. 4. They further contend that the ESI is relevant because "PSI Defendants' policies and customary practices are critical to Plaintiffs' constitutional claims because Plaintiffs bring those claims pursuant to *Monell v. Department of Social Services* . . . which requires proof that formal policies and/or informal customs caused Plaintiffs' injuries." *Id.* at 7, *citing Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978).

Plaintiffs have brought multiple claims pursuant to 42 U.S.C. § 1983 and *Monell*. Docket No. 256 (Second Amended Complaint), p. 100-119. In *Monell*, the Supreme Court held that "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U.S. at 694. In the context of a sex discrimination claim under the Equal Protection Clause, the Court of Appeals for the Sixth Circuit recently noted that "[t]o make out their Equal Protection claim, Plaintiffs must show that it was Defendant's policy to provide less protection to victims of sexual assault than those of other violent crimes . . . ." *Doe v. City of Memphis*, 928 F.3d 481, 493 (6th Cir. 2019). In *Doe*, the defendant had filed a motion for summary judgment and appeared (to the court) to be attempting to delay producing discovery until a ruling issued on its summary judgment motion. *Id.* at 496. The Court did not approve of this approach:

> Defendant's delay in producing discovery suggests that it could have been hoping to obtain summary judgment before having to comply in full with Plaintiffs' discovery requests. Defendant's repeated assurances that it would comply by May 2016 before it moved for summary judgment in January 2016 further suggests the possibility of a strategic delay motivated by a desire to deprive Plaintiffs of a full opportunity for discovery.

Id.

Here, the PSI Defendants are clear that they hope to avoid producing further discovery until after their Motion for Summary Judgment has been ruled upon. Docket No. 320; Docket No. 321, p. 8. They argue that the ESI at issue is not relevant to their pending Motion for Summary Judgment. Docket No. 321, p. 2, 7-9. But that is not the standard for determining the relevance of discovery materials. Rather, the moving party "must demonstrate that the requests are relevant to the claims or defenses in the pending action." *Carell*, 2011 U.S. Dist. LEXIS 57435 at *5. Citing *Monell* and *Doe*, Plaintiffs have demonstrated their need for discovery regarding the PSI Defendants' policies and procedures, and have explained why the PSI Defendant's original search terms are unlikely to capture such evidence. Docket No. 319, p. 7-8. Plaintiffs contend that the original search essentially used only two terms: "drug" and "fee." *Id.* at 8. The PSI Defendants do not dispute this. *See* Docket No. 231. It seems clear that such a search would be unlikely to return all documents responsive to discovery requests related to the relevant policies and procedures. The Court therefore finds that Plaintiffs have demonstrated that the requested ESI is relevant to some of their claims.

2. <u>Undue Burden</u>

Because Plaintiffs have established that the requested ESI is relevant, the burden shifts to the PSI Defendants to demonstrate that the requests are unduly burdensome or that the materials are otherwise not discoverable under the Federal Rules. *Carell*, 2011 U.S. Dist. LEXIS 57435 at *5. To that end, the PSI Defendants argue that this litigation has already been very expensive, and that the expense is a great burden on PSI, a small company. Docket No. 321, p. 1-7. The PSI Defendants describe several negative events that they claim are direct consequences of this litigation, including the loss of contracts, closing offices, and employees who have left their jobs.

Id. at 5-7. What the PSI Defendants have not done is tie any of these events, or potential future consequences, to the specific discovery being requested.[3] Instead, all of the PSI Defendant's concerns are related to the general negative effects of being involved in litigation. In terms of the particular burden of *this* discovery, the PSI Defendants argue that:

> Finally, the email production process would be a tremendous expense to the company that should not be taken lightly. Even when applying the proposed search terms, there are approximately 60,000 emails and attachments that defense counsel will have to review for privilege and relevance. In the context of the above burdens PSI Defendants face, this production, which ultimately may never be needed, is crushing.

Id. at 7.

The number of emails and attachments, by itself, is not sufficient information to demonstrate undue burden. Because the PSI Defendants have not provided any specific information about the time or money needed to produce the requested ESI, it is difficult to assess how much of a burden production would be; however, several factors weigh against finding that it would be unduly burdensome. First, the PSI Defendants appear to have already searched for and collected the ESI. *See* Docket No. 321, p. 7 (alluding to 60,000 emails and attachments found when applying the proposed search terms). Second, while they claim that they will have to review all (approximately) 60,000 emails and attachments for relevance and privilege, it is not clear why this would be the case. These are emails that were selected by "applying the proposed search terms." *Id.* They are presumptively responsive and relevant – that is the purpose of search terms. The PSI Defendants do not argue against using the proposed search terms, and as discussed above,

[3] The Court has also reviewed the Declaration of Tim Cook, the owner of Progressive Sentencing, Inc. and several predecessor entities. Docket No. 321-2. The Court finds that Mr. Cook's Declaration is devoid of any information regarding the specific burden that would be posed by production of the requested ESI.

they do not contend that the resulting ESI is not relevant to any Party's claim or defense. Therefore, a relevance review is unnecessary. Regarding privilege, the emails could similarly be culled by using search terms such as the email addresses of the PSI Defendant's attorneys, and perhaps their names or a few other targeted terms. This should be a relatively brief and inexpensive process that involves minimal extra attorney-hours. Additionally, Plaintiffs have indicated that they are willing to enter into a claw-back or quick-peek agreement, further reducing concerns regarding the accidental production of potentially-privileged materials. *See* Docket No. 323, p. 5. Because the PSI Defendants do not offer any information about the specific burden of producing this ESI, and its production appears to be a relatively simple and inexpensive matter, the Court finds that the PSI Defendants have not demonstrated that producing the ESI would be an undue burden.

3. <u>Otherwise Not Discoverable</u>

Aside from the general expense of the litigation, the PSI Defendants assert several other arguments as to why they should not have to produce the requested ESI. *See* Docket No. 321. These arguments are primarily related to their pending Motion for Summary Judgment. They argue that it would be more efficient to wait for the Motion for Summary Judgment to be ruled upon, because the ruling may narrow or even eliminate the need for the ESI production. *Id.* at 7. Further, they essentially argue that this discovery matter is already before the District Judge: "[t]o the extent plaintiff's [*sic*] claim any email is essential in responding to the [summary judgment] motion, Judge Campbell has already ordered that plaintiffs should say so in their response to the motion for summary judgment." *Id.* at 8. As discussed above, the standard for whether material is relevant for discovery purposes is not whether it is relevant to a particular motion, but whether it is relevant to any Party's claim or defense. Thus, it is possible for this ESI to be irrelevant to

the PSI Defendants' Motion for Summary Judgment (although the Court is not making such a finding), yet still relevant and discoverable in this case. Here, as previously discussed, the Court is persuaded that the ESI is relevant to Plaintiffs' claims brought pursuant to 42 U.S.C. § 42 and *Monell*. Further, Judge Campbell has made clear that:

> All discovery disputes are to be brought before the Magistrate Judge. This Order should not serve as a basis for any failure to comply with discovery obligations.

Docket No. 316, p. 3. Therefore, the case should continue to move toward preparation for trial, which includes continuing the production of relevant discovery. The PSI Defendants' arguments on this point do not persuade the Court that the requested ESI is not otherwise discoverable under the Rules.

The PSI Defendants' other arguments do not deal with whether the material is discoverable, but instead address other factors. The PSI Defendants contend that staying email discovery will not cause any delays in the litigation, because "this case cannot proceed to trial without the depositions of these Defendants, which are stayed pending the CPS Defendants' appeal to the Sixth Circuit." Docket No. 321, p. 8. Yet, Plaintiffs argue that they need the ESI in order to defend against the Motion for Summary Judgment. Docket No. 323, p. 7. Additionally, continuing production of ESI discovery increases the chances that all Parties will be prepared to proceed with depositions when the CPS discovery stay is lifted, which will increase efficiency and reduce time lost from the case schedule.

The PSI Defendants also contend that there is no risk that any data will be lost if ESI production is halted. Docket No. 321, p. 9-10. Yet, Plaintiffs assert that:

> (1) four relevant ESI custodians' email accounts have already been deleted, one of which was deleted after this lawsuit was filed; . . . and (2) PSI's counsel only purported to issue any written notice to his clients about their duty to preserve evidence this month – 18

> months after this lawsuit was filed and only after Plaintiffs' counsel asked about it in discovery and subsequent Rule 37 communications – and still, to date, PSI Defendants have failed to produce any such written notice to Plaintiffs (or a privilege log reflecting the existence of such written notice) in response to Plaintiffs' discovery requests.

Docket No. 323, p. 9 (citations omitted). Despite the PSI Defendants' assertions that "the entire email accounts of all possibly relevant PSI employees have been preserved and backed-up" (Docket No. 321, p. 10), an even more certain method of ensuring that no data is lost is to produce the ESI now. Even if the PSI Defendants could guarantee data preservation, this would not be an argument against producing relevant discovery materials where production is not unduly burdensome and the materials are otherwise discoverable under the Rules.

Finally, the Court has considered this dispute in light of the proportionality factors set forth in Rule 26. *See* Fed. R. Civ. P. 26(b)(1). The Court finds that utilizing all that can be discerned from the information set forth by the Parties (and the marked lack of specific information presented by the PSI Defendants, whose responsibility it is to demonstrate undue burden), the likely benefit of the requested discovery material outweighs its burden or expense.

III. CONCLUSION

For the reasons discussed above, "Plaintiffs' Motion to Compel PSI Defendants' Production of Electronically Stored Information Responsive to Plaintiffs' First Set of Interrogatories" (Docket No. 319) is GRANTED, and the PSI Defendants' "Motion to Stay Email Discovery Pending a Ruling on PSI Defendants' Motion for Summary Judgment" (Docket No. 320) is DENIED. The PSI Defendants must produce all ESI resulting from the narrowed ESI search proposed by Plaintiffs on June 19, 2019 and the search of Ms. Downing's personal email account. The must also produce the "Missing Documents" identified by Plaintiffs on March 25, 2019.

IT IS SO ORDERED.

JEFFERY S. FRENSLEY
United States Magistrate Judge