

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

ELIZABETH SINES, SETH WISPELWEY,
MARISSA BLAIR, APRIL MUÑIZ,
MARCUS MARTIN, NATALIE ROMERO,
CHELSEA ALVARADO, JOHN DOE, and
THOMAS BAKER,

Plaintiffs,

v.

JASON KESSLER, et al.,

Defendants.

Civil Action No. 3:17-cv-00072-NKM

JURY TRIAL DEMANDED

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCOVERY
FROM DEFENDANT JEFF SCHOEP**

Plaintiffs respectfully submit this reply in support of their motion to compel discovery from Defendant Jeff Schoep (“Schoep”), ECF No. 689 (“Mot.” or “Motion”). After four months of refusing to produce his new cellphone containing responsive discovery to which Plaintiffs are entitled and forcing Plaintiffs to waste time, effort, and costs to file their motion to compel, *Schoep has now agreed* to produce his new cellphone for imaging, Opp. at 12, ECF No. 694 (“Opp.”), implicitly conceding that his prior position refusing to make the phone available was meritless. Schoep reconfirmed his about-face in an email to Plaintiffs’ counsel dated April 6, 2020. Ex. A (“We will also be providing Mr. Schoep’s new phone to the vendor for imaging and will provide his supplemental response for ‘Exhibit A To Stipulation and Order for the Imaging, Preservation, and Production of Documents’ accordingly.”).

While Schoep has finally capitulated to Plaintiffs’ request for his responsive documents over two months *after* the document production deadline set by the Court, *see* Order, Nov. 27,

2019, ECF No. 597, Schoep opposes Plaintiffs' request for fees and costs. Schoep contends that Federal Rule of Civil Procedure 37(a)(5)(A) precludes awarding Plaintiffs' their fees and costs because sanctions are not appropriate where "the opposing party's nondisclosure, response, or objection was substantially justified." Opp. at 14 (quoting Fed. R. Civ. P. 37(a)(5)(A)). But as Plaintiffs made clear in their opening motion, in refusing to produce his new cell phone, Schoep made only specious and legally incorrect arguments that had already been rejected by this Court and for four months steadfastly refused to engage with Plaintiff on the merits of their request.¹ Mot. at 7-9. Due to this unjustifiable intransigence, Plaintiffs were forced to move to compel. Had Schoep agreed to produce his cellphone in response to any of Plaintiffs' prior requests, Plaintiffs would not have had to file the instant Motion in the first place. Fees and costs are plainly justified.

Schoep also opposes Plaintiffs' requested relief that the Court order the Vendor to produce immediately to Plaintiffs, without opportunity for review by Schoep or his counsel, every document that hits on a previously agreed-upon search term. Opp. at 12-13. Schoep's opposition mischaracterizes the scope of Plaintiffs' requested relief. Plaintiffs do not seek "free access to Defendant Schoep's collected ESI regardless of relevance, privilege or confidentiality." *Id.* at 12. Plaintiffs seek only the documents that hit upon previously-agreed upon search terms, Mot. at 2, 9, which are presumptively relevant to the issues in this case. Plaintiffs have also promised to abide by the ethical rules governing the return of any documents that appear privileged—a procedure this Court has previously approved for productions of other Defendants' documents. *See* Order 2-3, Jan. 22, 2020, ECF No. 638. The Protective Order in the case also contains

¹ Through his attorney, Schoep asserted that his new cellphone could not have any responsive documents because it was obtained after *Unite the Right*, notwithstanding that the Court determined more than a year ago that "accounts created after August 2017 could hold responsive documents." *See* Mot. at 7-8 & n.3 (quoting Hr'g Tr. 20, Mar. 18, 2019, ECF No. 455).

confidentiality provisions that Schoep may use to designate documents as “confidential” or “highly confidential” thereby providing further protection to his productions. *See* Order for the Production of Documents and Exchange of Confidential Information, Jan. 3, 2018, ECF No. 167. Plaintiffs have been requesting the responsive discovery from Schoep’s phone for four months. The document production deadline set by the Court passed over two months ago, and the fact discovery deadline is approaching. Plaintiffs should not be required to wait any further for access to Schoep’s evidence while his counsel reviews documents that are already presumptively relevant and responsive.²

Plaintiffs reiterate their request for reasonable expenses and costs in bringing the Motion, including reasonable attorneys’ fees and costs, in addition to ordering the Vendor to produce immediately to Plaintiffs, without opportunity for review by Schoep or his counsel, every document that hits on a previously agreed-upon search term.³

Dated: April 8, 2020

Respectfully submitted,

/s/ Robert T. Cahill

Robert T. Cahill (VSB 38562)

COOLEY LLP

² Schoep has already delayed discovery by refusing to produce any documents for over a year, and his first production consisted of a mere 100 documents, many of which had no substance. *See* Mot. at 1-4. Given Schoep’s history of resistance and defiance of court orders and the impending fact discovery deadline, Plaintiffs submit that Schoep has forfeited any right to review any documents recovered from his new cell phone. Plaintiffs cannot afford and would be prejudiced by any further delay.

³ As noted in the Motion, Plaintiffs have already twice withdrawn requests for attorneys’ fees made in motions filed against Schoep and NSM, *see* Mot. at 2 n.1, both of whom are represented by ReBrook. This is now the *third time* that ReBrook has taken unjustified positions in discovery and forced Plaintiffs to seek redress from the Court, only to capitulate and effectively withdraw his opposition after Plaintiffs filed motions to compel. ReBrook’s conduct has not only caused significant delays in discovery, but also caused Plaintiffs to waste significant time, effort, and resources in engaging in unnecessary motion practice.

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2020, I filed the foregoing with the Clerk of Court through the CM/ECF system, which will send a notice of electronic filing to:

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I further hereby certify that on April 8, 2020, I also served the following non-ECF participants, via electronic mail, as follows:

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