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21 UNITED STATES DISTRICT COURT
22 NORTHERN DISTRICT OF CALIFORNIA

23 JERI CONNOR,
24 Plaintiff,

25 v.

26 QUORA, INC.,
27 Defendant.

Case No.: 5:18-cv-07597-BLF-NC

Hon. Beth Labson Freeman; Hon. Nathanael Cousins

DEFENDANT QUORA, INC.'S MOTION FOR RELIEF FROM NONDISPOSITIVE PRETRIAL ORDER OF MAGISTRATE JUDGE DENYING MOTION TO COMPEL FORENSIC INSPECTION OF PLAINTIFF'S DEVICES

INTRODUCTION

Pursuant to Fed. R. Civ. P. 72(a), 28 U.S.C. § 636(b)(1)(A), and L.R. 72-2, Defendant Quora, Inc. moves for relief from the Magistrate Judge’s nondispositive pretrial order denying its motion to compel a forensic examination of plaintiff Jeri Connor’s devices used to access Quora. ECF No. 236 (“Order”).

BACKGROUND AND PROCEDURAL HISTORY

As detailed in the Joint Statement to the Magistrate Judge, Quora moved to compel a third-party forensic inspection of plaintiff’s devices to identify spyware, trojans, or other surreptitious malware that may have unwittingly allowed a theft of her personal information from her *own* devices, which would be directly relevant to causation in negligence (her sole remaining claim), comparative negligence, and class certification. ECF No. 235 at 1-3 (“Jt. St.”). Quora explained the pointed relevance of this discovery, including, *e.g.*, how it is probative of plaintiff’s subjective “straw that broke the camel’s back” theory of causation because a failure to meaningfully protect sensitive information residing on her own devices shows a general indifference to data security that calls into question “the authenticity of [her] claimed reasons for more carefully monitoring her credit,” which the Court specifically identified as a fact issue that precluded summary judgment for Quora. *Id.* at 2; ECF 210 at 19 (Summ. J. Order).

Quora cited specific authority for its requested discovery, including the Magistrate Judge’s own order in the Anthem data breach case compelling the same type of inspection—*i.e.*, to examine “whether the plaintiffs’ computer systems contain malware, viruses, or other electronic indicators suggesting that their personally identifiable information . . . was compromised before the cyberattack on Anthem”—because it was “relevant to causation” and “proportional to the needs of the case.”¹ Jt. St. at 1 (citing *In re Anthem, Inc. Data Breach Litig.*, No. 5:15-md-02617 LHK-NC, 2016 WL 11730951, at *1 (N.D. Cal. Oct. 31, 2016) (“*Anthem*”). Quora “recognize[d] the privacy concerns” attendant to forensic inspection and (despite plaintiff’s outright refusal to even confer on possible inspection protocols) expressly proposed to adopt the same protocol approved in *Anthem*, as summarized below and set forth in Quora’s

¹ Quora also noted that plaintiffs in the Yahoo case agreed to allow such an inspection. Jt. St. at 1 (citing *In re Yahoo Inc. Customer Data Security Breach Litig.*, No. 16-MD-02752-LHK, ECF No. 299 at 30-32).

1 Proposed Order.² Jt. St. at 3; *Anthem*, at *1-2.

2 In her opposition to Quora’s motion, plaintiff raised only threshold arguments that the discovery
3 sought was irrelevant, cumulative, untimely, and overly intrusive. Jt. St. at 3-5; Order at 1. Plaintiff did
4 *not* object to or even address the specifics of the *Anthem* protocol that Quora proposed, nor did she argue
5 that any aspects of the protocol were somehow inadequate to address privacy or other concerns. Jt. St. at
6 3-5. Instead, plaintiff maintained that any forensic examination, irrespective of protocol, would be
7 inappropriate. *Id.* at 3.

8 **ORDER OBJECTED TO AND APPEALED FROM**

9 In a terse order less than one page, the Magistrate Judge denied Quora’s motion to compel on the
10 ground that Quora’s “discovery brief is short on details as to what it is proposing,” Order at 2. The Order
11 notably did *not* find the discovery irrelevant, instead faulting Quora for not addressing a series of specific
12 questions—“What does [Quora] want to search for?”; “Using what methods?”; “Who would do the
13 search?”; “Where?”; “Who would pay for it?”; and “What access and control will plaintiff have over the
14 search?” *Id.* The Magistrate Judge concluded that without these answers to “limit the burden and
15 expense” of the discovery, it could turn into “a fishing expedition that is not proportional to the needs of
16 the case.” *Id.* In essence, the Magistrate Judge denied Quora’s motion for failing to include a detailed
17 inspection protocol within Quora’s allotted 2 ½ pages. Quora objects to the Order’s findings as clearly
18 erroneous and to the lack of reasoning in the Order as contrary to law.

19 **STANDARD OF REVIEW**

20 A magistrate judge’s nondispositive pretrial order may be modified or set aside if it is “clearly
21 erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); 28 U.S.C. 636(b)(1)(A). “[T]he magistrate’s
22 factual determinations are reviewed for clear error”; “legal conclusions are reviewed de novo to
23 determine whether they are contrary to law.” *Perry v. Schwarzenegger*, 268 F.R.D. 344, 348 (N.D. Cal.
24 2010). “The implicit abuse of discretion standard does not apply to portions of a magistrate judge’s

25
26 ² Due to the Magistrate Judge’s 2 ½ page limitation, Quora could not recite the entirety of the detailed
27 *Anthem* protocol in the Joint Statement. Nonetheless, Plaintiff acknowledged in her opposition that Quora
28 “volunteer[ed] to adopt” the *Anthem* protocol. Jt. St. at 5.

1 discovery order not concerned with relevance.” *EEOC v. Peters’ Bakery*, 301 F.R.D. 482, 485 (N.D. Cal.
2 Sept. 17, 2014) (Freeman, J.). “A decision may be contrary to law if it fails to apply or misapplies
3 relevant statutes, case law, or rules of procedure.” *Rojas v. Bosch Solar Energy Corp.*, No. 18-cv-05841-
4 BLF, 2020 WL 6557547, at *2 (N.D. Cal. July 20, 2020) (Freeman, J.).

5 ARGUMENT

6 The Order was clearly erroneous because Quora plainly addressed all the “details” the Magistrate
7 Judge believed important to “limit the burden and expense” of the discovery, and those particulars were
8 consistent with, and supported by, the most apt authority in the record—indeed, the *only* authority in any
9 jurisdiction—on forensic examinations of plaintiff’s devices in the context of data breach cases. To wit:

10 • “What does [Quora] want to search for?” *Id.* Quora explained in the second sentence of
11 the Joint Statement that it sought to forensically examine plaintiff’s devices for “[t]he presence of
12 spyware, trojans, or other surreptitious malware that may unwittingly allowed a theft of her personal
13 information” from her own devices, matching the level of detail accepted by the Magistrate Judge for the
14 inspection in *Anthem*. Jt. St. at 1; *Anthem*, at *1 (a “forensic scan of device data for the limited purpose of
15 identifying malware or malicious files” and a “root cause analysis of select malware when identified”).

16 • “Using what methods?” Order at 2. Methods “like those adopted in the *Anthem* case.” Jt.
17 St. at 3 (citing *Anthem* as “providing parameters for inspection”). Assuming the Magistrate Judge had
18 agreed with Quora’s proposal to adopt the same protocol as in *Anthem*, a third-party forensic examiner
19 would create images of plaintiff’s devices, conduct an initial scan for the presence of malware or other
20 indicators of compromise, and conduct a further root cause analysis, if necessary, before providing a
21 summary to both parties. *Anthem*, at *1-2.

22 • “Who would do the search?” Order at 2. “[A] third-party forensic examiner,” as Quora
23 explained in the Joint Statement. Jt. St. at 3. Just like in *Anthem*, which Quora cited for this point, the
24 forensic examiner would comply with National Institute of Standards and Technology (NIST) standards
25 for acquiring, preserving, and forensically reviewing plaintiff’s devices, and plaintiff would choose the
26 examiner from a roster offered by Quora (which obviated identifying a specific person at the time of
27 Quora’s motion). *See id.*; *Anthem*, at *1.

28 • “Where?” Order at 2. Like the *Anthem* protocol, which Quora proposed to follow, plaintiff

1 would choose where the forensic imaging of her devices would take place. Jt. St. at 3; *Anthem*, at *1.

2 • “Who would pay for it?” Order at 2. Quora would pay the costs of the forensic examiner,
3 as in *Anthem*, which Quora proposed to follow. Jt. St. at 3; *Anthem*, at *1.

4 • “What access and control will plaintiff have over the search?” Order at 2. Under the
5 *Anthem* protocol Quora volunteered to adopt, the examiner would control all forensic images, and neither
6 party would control the search itself. Jt. St. at 3; *Anthem*, at *1-2.

7 In other words, all the “details” Quora was faulted for not addressing were in fact addressed, and
8 matched the protocol used in *Anthem*—because Quora expressly proposed to adopt that protocol here.
9 Plaintiff did not even contest the adequacy of Quora’s proposed protocol. Jt. St. at 3-5. To fault Quora for
10 putatively insufficient responses to specific issues plaintiff did not even raise (indeed, details about a
11 possible protocol that plaintiff refused to even confer on) is not just clearly erroneous but manifestly
12 unfair, especially given the strict page constraints imposed by the Magistrate Judge for discovery
13 disputes. The finding that Quora’s motion was “short on details” was thus clearly erroneous.

14 The Order’s finding that, absent answers to the above inquiries, a forensic inspection could in
15 theory turn into “a fishing expedition that is not proportional to the needs of the case” is clearly erroneous
16 given that Quora proposed a detailed protocol based on that approved in *Anthem*. Order at 2; Jt. St. at 3.
17 Moreover, Quora’s request is far narrower than what was permitted in *Anthem*—and thus well-supported
18 by the only apposite authority on forensic examination of plaintiffs’ devices in this context. The *Anthem*
19 defendants requested inspection of nearly 100 named plaintiffs’ devices, which the Magistrate Judge
20 narrowed to 30, whereas Quora here requests forensic examination of just one person’s devices—
21 plaintiff. See *In re Anthem*, 162 F. Supp. 3d 953, 970 (N.D. Cal. 2016) (98 named plaintiffs); compare
22 *id.*, 5:15-md-02617-LHK-NC, ECF No. 549 (Joint Discovery Brief) at 1, with 2016 WL 11730951, at *1.

23 To the extent the Order implicitly relied on a finding of disproportionality, which is not clear, it
24 provided no reasoning, prejudicing Quora’s ability to seek review. Rule 72(a) “calls for a written order of
25 the magistrate’s disposition to preserve the record and facilitate review.” *Rojas*, 2020 WL 6557547, at *3.
26 An order devoid of reasoning is contrary to law. *Id.* (“[S]ome reasoned decision clearly is required.”). For
27 example, Quora cannot assess whether the Magistrate Judge properly placed the burden on “the party
28 resisting relevant, non-privileged discovery” (plaintiff), see *21X Capital Ltd. v. Werra*, No. C06-04135

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