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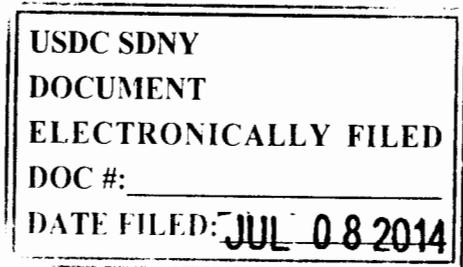
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July 7, 2014

VIA ECF

The Honorable Katherine B. Forrest
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007



Re: *JobDiva, Inc. v. Monster Worldwide, Inc.*, No. 13-cv-08229-KBF (S.D.N.Y.)

Dear Judge Forrest:

I write in response to Monster's July 3, 2014 letter regarding JobDiva's June 30, 2014 motion to compel.

Monster's opposition is based on the premise that JobDiva must prove that the majority of emails retrieved by the initial 15-custodian search using the parties' agreed-upon search terms is relevant to this litigation. But no such requirement exists. JobDiva is entitled to seek discovery that is "reasonably calculated to lead to the discovery of admissible evidence," Fed. R. Civ. P. 26(b)(1), and it is not required to justify relevant discovery requests with a statistical relevancy analysis of emails previously produced. But even applying Monster's standard, *nearly all* of the emails returned by the initial search are relevant to at least one issue in this litigation, including issues such as infringement, validity, and damages under the *Georgia-Pacific* factors. This confirms that the parties' original agreed-upon terms were properly tailored, and, consistent with Rule 26(b)(1), should be applied to the remainder of the custodians for which Monster has already collected emails.¹

Monster also argues that JobDiva is asking for production of too many emails, citing burden. But production of the requested emails is not unduly burdensome in a complex patent

¹ Monster argues that JobDiva's motion is "misleading" because certain of the documents cited came from Monster's production of a two-week sample of emails made on the eve of JobDiva's May 23, 2014 motion to compel. But JobDiva's motion explicitly states that certain of the cited emails come from that two-week sample.

case such as this one,² and the probative value of the requested emails outweighs any burden to Monster, as previously discussed. Moreover, the numbers that Monster cites in its opposition are unreliable. When JobDiva filed its original May 23 motion to compel, the corpus of emails consisted of 70,913 emails. (D.I. 63 at 1.) Monster now claims, however, that the number of documents impacted by JobDiva's current motion is 82,348. The only way to explain this discrepancy is that Monster appears to be inflating the numbers in its opposition by separately counting emails and attachments. But an email with an attachment is one document, not two documents. And, in any event, email attachments, such as Power Point presentations and marketing documents, should have been produced by Monster independently of email production.

Monster also identifies for the first time in its letter certain search terms that it believes should be modified. But with the close of fact discovery less than one month away, Monster should not be permitted to raise these issues when its previous negotiations with JobDiva have consisted of saying "no," rather than making any counter-proposal. Turning to Monster's specific arguments, Monster first argues that the search term "823"—the last three digits of one of the JobDiva patents-in-suit—is improper because certain of Monster's telephone numbers also contain the number "823." But this is not a valid reason to exclude this important search term, particularly given that all searches also require that the term "JobDiva" or "Job Diva" be present in the email. Similarly, Monster argues that the search term "copy" appears in the confidentiality footers in some employees' emails, but JobDiva is undeniably entitled to uncover evidence that Monster copied JobDiva's products or patents. And further, this term was not searched in isolation, but along with "JobDiva" or "Job Diva."

Monster's request for additional relief should also be rejected. Monster has provided no support for its new request that JobDiva bear half the costs of any future production as a result of this discovery dispute. Nor could it, because it is "presum[ed] [] that the responding party must bear the expense of complying with discovery requests." *Novick v. AXA Network, LLC*, 07 CIV. 7767 AKH KNF, 2013 WL 5338427, at *3–4 (S.D.N.Y. Sept. 24, 2013) (citing *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003)) (emphasis added). To overcome this presumption, the responding party must show that the data is kept in an *inaccessible format* as to render the production of such data to be unduly burdensome or expensive. *Novick*, 2013 WL 5338427, at * 4 (Holding that "for data that is kept in an accessible format, . . . the responding party should pay the costs of producing responsive data. A court should consider cost-shifting *only* when electronic data is relatively inaccessible, such as in backup tapes.") (emphasis added). Here, there is no dispute that the Monster emails in question are in an accessible format. Monster has therefore failed to overcome the presumption that the responding party bears the expense of complying with discovery requests.

² Monster states that it hired 10 attorneys to review 7,000 documents, but it is unclear what those attorneys were doing. There is no relevance review necessary because the search terms take the place of the relevance review. And any privilege review can be performed in the same manner using search terms, as that approach that has been endorsed in this District. *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405(CM)(JCF), 2012 WL 6732905, at *4 (S.D.N.Y. Dec. 27, 2012) (noting that "entry of a Rule 502(d) order will protect against waiver if [the respondent] opts to conduct a more economical [privilege] analysis").

Finally, Monster's request that any subsequent search be limited to 10 custodians and 20 search terms has no basis in the law and should be rejected.³ In complex litigations such as this one, courts in this District have allowed the use of tens of thousands search terms, contrary to the narrow restriction Monster asks the Court to impose. *See Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99, 103-06 (S.D.N.Y. 2013) (expanding ESI discovery that comprised 80,000 search terms and 875,000 documents); *In re Morgan Stanley Mortgage Pass-Through Certificates Litig.*, 09-CV-02137 LTS SN, 2013 WL 5745938 (S.D.N.Y. Oct. 23, 2013) (Granting plaintiff's request to add additional custodians even though the court "was dubious that these custodians will produce relevant documents not otherwise subject to the search protocol," wherein the search protocol involved more than 30,000 search term combinations with a list spanning over 1,600 pages.) In light of JobDiva's identification of a large number of relevant emails as well as this District's liberal scope of permissive ESI discovery, Monster's request is unduly narrow, and should be rejected.⁴

For the reasons stated above, JobDiva respectfully requests that the Court grant JobDiva's motion to compel, and reject the relief sought by Monster.

Sincerely,

/s/ Todd Friedman

Todd M. Friedman

cc: Counsel of record

- Ordered: motion denied at this time.
1. First, replies on discovery motion aren't typically allowed (so, no more replies).
 2. There is no way the court would ever order 5000+ custodians be searched (on this record).
 3. The parties should meet and confer on whether there is a narrow list of custodians (10 seems right) about whom they can agree -- if not, JobDiva needs to provide the court with specific detail as to who else it needs and why.

³ Monster is incorrect that the parties did not meet and confer. Monster's letter recounts, in a lengthy paragraph, a list of communications between JobDiva and Monster regarding this issue. (D.I. 84 at 2.) Those communications were one-sided, as Monster failed to offer any counter-proposals. Instead, Monster took the position that JobDiva should negotiate against itself until it made an offer that Monster was willing to accept, while Monster continued to reject JobDiva's proposals and run out the clock on fact discovery.

⁴ Through two rounds of briefing, Monster has only come forth with an argument based upon *Kay Beer Distributing, Inc. v. Energy Brands, Inc.*, No. 07-C-2009, 2009 WL 1649S92 (E.D. Wisc. June 10, 2009). But as explained in connection with JobDiva's May 23 motion, *Kay Beer* does not support Monster. (See D.I. 53 at 2.)

K.B. Friedman

7/8/14

W.D.J.