

No. 82397-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DOUG AND BETH O'NEILL,

Appellants,

vs.

CITY OF SHORELINE AND DEPUTY MAYOR MAGGIE FIMIA,

Respondents.

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AMICUS BRIEF OF WASHINGTON STATE ASSOCIATION OF
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TABLE OF CONTENTS

Page(s)

I. IDENTIFICATION AND INTEREST OF AMICUS CURIAE1

II. ISSUES DISCUSSED BY AMICUS2

III. STATEMENT OF THE CASE2

IV. ARGUMENT.....3

 A. In the absence of a showing that it relates to the
 conduct of government, metadata is not a public
 record.3

 B. A mandate to collect and produce all metadata
 associated with identical copies of an email results in
 absurdities and cannot be the legislative intent of the
 PRA.....5

 C. The Arizona Supreme Court’s decision in *Lake v. City
 of Phoenix* does not address the central issue in this
 case.9

 D. This Court can reverse Division I’s decision in this
 case regardless of whether it grants review in *Mechling
 v. City of Monroe*.10

V. CONCLUSION.....11

TABLE OF AUTHORITIES

Page(s)

CASES

Aguilar v. Immigration & Customs Enforcement Div.,
255 F.R.D. 350, (S.D.N.Y. 2008) 6

Dragonslayer, Inc. v. Wash. State Gambling Comm'n,
139 Wn. App. 433, 161 P.3d 428 (2007)..... 4

Ky. Speedway, LLC v. Nat'l Assoc. of Stock Car Auto Racing,
No. Civ. 05-138, 2006 WL 5097354, *2 (E.D. Ky. Dec. 18, 2006)..... 6

Lake v. City of Phoenix, 218 P.3d 1004 (Ariz. 2009)..... 9

Mechling v. City of Monroe, 152 Wn. App. 830, ___ P.3d ___ (2009).... 11

Mich. First Credit Union v. Cumis Ins. Soc'y, Inc.,
No. Civ. 05-74423, 2007 WL 4098213,
*2 (E.D. Mich. Nov. 16, 2007) 6

O'Neill v. City of Shoreline,
145 Wn.App. 913, 187 P.3d 822 (2008)..... 3, 7, 8, 10

Tacoma Public Library v. Woessner,
90 Wn. App. 205, 223, 951 P.2d 357 (1998)..... 3

Williams v. Sprint/United Management Co.,
230 F.R.D. 640, (D. Kan. 2005) 8

Wyeth v. Impax Labs., Inc., 248 F.R.D. 169, (D. Del. 2006)..... 6

STATUTES

RCW 42.56 3

RCW 42.17.251 3

RCW 42.56.010(2)..... 3

RCW 42.56.030 3

RCW 42.56.100 8

OTHER AUTHORITIES

*Thomas Y. Allman, The "Two-Tiered" Approach to E-Discovery:
Has Rule 26(B)(2)(B) Fulfilled Its Promise?,
14 Rich. J. L. & Tech. 7, 4 (2008)..... 6*

I. IDENTIFICATION AND INTEREST OF AMICUS CURIAE

Amicus Washington State Association of Municipal Attorneys (“WSAMA”) is a not-for-profit corporation made up of attorneys who advise and represent most cities and towns in the State of Washington. WSAMA submits this brief in support of Petitioners the City of Shoreline and Maggie Fimia.

Washington has 281 cities and towns, ranging from Seattle with more than a half million residents to towns with populations of less than 100. Every city and town in Washington is subject to the requirements of the Public Records Act (“PRA”), and many thousands of public disclosure requests are received by these cities and towns annually. For example, the City of Seattle alone received approximately 6,000 public disclosure requests in 2008. City and town employees devote hundreds of hours and significant resources to searching for and producing both paper and electronic records. As such, Washington cities and towns have a strong interest in understanding their obligations under the PRA and ensuring the efficient utilization of public funds and agency resources in responding to public disclosure requests.

Division I’s broad statements regarding an agency’s obligations to produce “metadata” associated with email will severely tax government resources without materially advancing the cause of open government.

WSAMA therefore respectfully urges this Court to reverse Division I and reinstate the trial court's decision finding no violation of the PRA. Further, whatever this Court's holding in this specific case, this Court should provide clear guidance to public agencies regarding what portions of metadata may be related to the conduct of government and whether differences in certain types of irrelevant metadata transform two copies of one document into two separate documents.

II. ISSUES DISCUSSED BY AMICUS

WSAMA requests that this Court address the following issues: (1) Whether all metadata is an integral part of a public record, even in the absence of a showing that the metadata relates to the conduct of government; and (2) whether minor inconsistencies in the metadata contained in two separate copies of the same electronic document constitute a material difference such that production of one of the copies of the document does not satisfy the requirements of the PRA.

III. STATEMENT OF THE CASE

WSAMA adopts the statement of the case contained in the Supplemental Briefs of Petitioners Shoreline and Maggie Fimia.

IV. ARGUMENT

A. In the absence of a showing that it relates to the conduct of government, metadata is not a public record.

The overriding public policy of the Public Records Act, Chapter 42.56 RCW (“PRA”) is to keep the public informed so that it may monitor the government’s functioning. *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 223, 951 P.2d 357 (1998) (citing former RCW 42.17.251 recodified at RCW 42.56.030). To further that policy, the PRA requires public agencies to produce public records upon request, unless a specific exemption applies. RCW 42.56.080. The PRA defines a public record as “...any writing containing information *relating to the conduct of government or the performance of any governmental or proprietary function...*” RCW 42.56.010(2) (emphasis added).

The primary issue in this case, and the purpose of the requester’s specific request for “metadata,” is to determine who received and sent a particular email, and thus who may have had knowledge of alleged governmental improprieties. In fact, the identity of the senders and recipients of an email is the only metadata that Division I specifically determined is “related to the conduct of government.” *O’Neill v. City of Shoreline*, 145 Wn. App. 913, 925, 187 P.3d 822 (2008). This information was contained in the printed email provided to O’Neill; metadata would have simply replicated this information.

However, in its analysis of the complex issue of metadata contained in electronic records, Division I simply stated that a requester is entitled to “metadata” associated with an email upon request. *Id.* at 935. Division I also concluded that separate copies of the same email transmission received by different recipients each have unique metadata that constitutes a separate public record. *Id.* This conclusion is misguided—while separate copies of the same email have slight differences in metadata, those differences do not make the two copies into two distinct public records. Indeed, Division I did not find that any portions of metadata distinct between the copies are in any way related to the conduct of government, as the law requires. *See Dragonslayer, Inc. v. Wash. State Gambling Comm’n*, 139 Wn. App. 433, 161 P.3d 428 (2007) (holding that there must be a specific factual finding as to how a record is related to the conduct of government rather than mere conclusory statements).

Metadata comes in different forms. Some types of metadata—such as fields showing the senders, recipients, date, and subject of an email—are plainly related to the conduct of government in most instances. But other types of metadata—such as “path” information showing how a message travelled through the internet to reach its recipient—are not

related to the conduct of government.¹ Division I's decision fails to distinguish between the two.

B. A mandate to collect and produce all metadata associated with identical copies of an email results in absurdities and cannot be the legislative intent of the PRA.

There is no dispute that some portion of metadata associated with an email may relate to the conduct of government. Indeed, the City of Shoreline produced such metadata associated with the email to the requester. WSAMA's concern is that Division I, when presented with the complex issue of metadata, concluded that the failure to produce multiple versions of portions of metadata that are not related to the conduct of government could subject a public agency to the full spectrum of attorney's fees and penalties under the PRA.

In the context of electronic discovery, which is instructive in addressing the PRA's application to different types of metadata, federal courts typically do not compel discovery of electronically stored information from inaccessible locations when substantially similar information may be available from more accessible sources. *See Thomas Y. Allman, The "Two-Tiered" Approach to E-Discovery:*

¹ For example, if email is sent to two different recipients, there would be three copies of the email: The sender's copy and each recipient's copy. Each copy would be functionally identical, with only minor, irrelevant differences in the "path" metadata.

Has Rule 26(B)(2)(B) Fulfilled Its Promise?, 14 Rich. J. L. & Tech. 7, 4 (2008). Multiple federal courts have commented that most metadata lacks evidentiary value because it is not relevant. See, e.g., *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, 354 (S.D.N.Y. 2008) (addressing both metadata contained within an electronic document and metadata created by information management systems); *Mich. First Credit Union v. Cumis Ins. Soc'y, Inc.*, No. Civ. 05-74423, 2007 WL 4098213, *2 (E.D. Mich. Nov. 16, 2007) (finding that the relevant metadata, such as date and time of creation, appeared in a PDF copy); *Ky. Speedway, LLC v. Nat'l Assoc. of Stock Car Auto Racing*, No. Civ. 05-138, 2006 WL 5097354, *2 (E.D. Ky. Dec. 18, 2006) ("In most cases and for most documents, metadata does not provide relevant information"); *Wyeth v. Impax Labs., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006) ("Most metadata is of limited evidentiary value, and reviewing it can waste litigation resources").

Relevancy controls production in civil discovery. Whether immaterial differences between two documents are probative of the conduct of government is a comparable limitation on production in the public records context. As described in Shoreline's Supplemental Brief, the only portions of metadata that typically differ between two copies of an identical email received by separate recipients is "path" information,

which is for all intents and purposes randomly generated and essentially meaningless.² See Shoreline's Supp. Br. at 6. But under Division I's reasoning in this case, public agencies may be compelled to individually collect multiple copies of an identical email from various locations for the sole purpose of producing that type of irrelevant metadata not related to the conduct of government.

Taken to its logical conclusion, this portion of Division I's holding could require government agencies to produce thousands of copies of what is for all intents and purposes one public record. For example, the City of Seattle sometimes sends identical emails to its eleven thousand employees on a wide range of personnel issues such as the features of the City's Employee Assistance Program. If a PRA requester asked for "the City-wide Employee Assistance Program email including any metadata," under the *O'Neill* decision the City might be obligated to locate and produce *eleven thousand* individual emails—the sent email in addition to each copy of the email received by every city employee—because each of those

² Metadata revealing "bcc" (blind carbon copy) recipients will only appear in the email sender's version of the metadata. Here, no "bcc" information would have appeared in the email at issue because the pertinent email is a received email, not a sent email. See Shoreline's Supp. Br., at 5 n.8. Thus, even if the City had access to the exact metadata contained within the one email at issue in this case, it would not reveal any additional "bcc" recipients.

eleven thousand copies of the same email contains minute, immaterial distinctions in metadata.³

Additional complications arise from the fact that simply accessing an electronic document may automatically alter the metadata. *See Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 646-47 (D. Kan. 2005) (noting that metadata for electronic documents may include the date of last access and that some metadata may be created automatically by a computer). But even to determine whether an electronic document is responsive to a particular request, an agency must open and review the document. Under the *O'Neill* decision, an agency may not be able to conduct a review of electronic documents without fear of modifying metadata, thereby altering public records, and creating an entirely new public record in the process.

There is nothing in the PRA that mandates access to an original version of a document, as opposed to a virtually identical copy. What

³ Of course, any assertion that all secondary copies of a document must be retained directly conflicts with the retention guidelines issued by the Washington Secretary of State. Those guidelines indicate that essentially all secondary copies of public records should be "destroyed when obsolete." *See* Office of Secretary of State – Local Government Common Records Retention Schedule (2010). Logically, the retention guidelines do not require retaining all eleven thousand copies of an identical email. But under the *O'Neill* decision, if an agency received a public disclosure request when the copies did exist, the Public Records Act may require that an agency retain possession of all eleven thousand copies until the request was resolved due to minor differences in the path information. RCW 42.56.100.

Division I mandates for public agencies in responding to requests is contrary to any prior understanding of the requirements of the PRA, and cannot be the original legislative intent of the Act.

When originally enacted in 1972, the PRA contained a definition of public record essentially identical to that which exists in the PRA today. Before the digital age, no interpretation of that language ever concluded that a public agency must produce, for example, a copy of a document with the exact color of ink as that used in the original. No interpretation of that language resulted in agency liability if the copying process inadvertently obscured a page number on the copy produced. While the color of ink and page numbers may be considered part of a document, differences in that type of information in the copies produced are immaterial to the conduct of government and do not transform one public record into many.

C. The Arizona Supreme Court's decision in *Lake v. City of Phoenix* does not address the central issue in this case.

The only other reported case involving metadata in the context of public records law has nothing to do with identical copies of electronic documents and immaterial differences in the metadata contained within those copies. The issue in *Lake v. City of Phoenix*, 218 P.3d 1004 (Ariz. 2009), was the city's outright denial of a request to provide the metadata

associated with an electronic version of notes made by a city employee. *See Id.* at 1005. The Arizona Supreme Court concluded that metadata in an electronic document constitutes part of the document itself, and must be produced upon request. *Id.* at 1007.

Here, there is no dispute that some portions of metadata relate to the conduct of government and, absent an exemption, must be produced in response to a PRA request. Indeed, Shoreline provided *O'Neill* with a copy of all portions of the metadata that relate to the conduct of government. As such, the holding of the Arizona Supreme Court has no relevance to the central issue in this case—whether a minute and irrelevant difference between the metadata in two copies of an electronic record makes the copies into two *distinct* records.⁴

D. This Court can reverse Division I's decision in this case regardless of whether it grants review in *Mechling v. City of Monroe*.

In *Mechling v. Monroe*, the City of Monroe produced email in response to a public disclosure request with portions of the email redacted,

⁴ Significantly, the Arizona Supreme Court provided at least some guidance related to the types of metadata subject to disclosure under Arizona public records law when it specified that the ruling did not apply to external or “system metadata,” which may contain information about the document but is not inherent in the document. *Id.* at fn. 5. Division I's holding completely lacks any similar guidance, other than conclusory statements that “metadata” is a public record.

based on Monroe's assertion that the redacted text did not meet the definition of public record under the PRA. *Mechling v. City of Monroe*, 152 Wn. App. 830, ___ P.3d ___ (2009). *Mechling* held that the PRA did not authorize the redaction of that content because "does not meet the definition of a public record" is not a statutory exemption to disclosure under the PRA. *Id.* at ¶ 54.

Division I's conclusion and reasoning in that case is entirely unrelated to the central issue in this case. Here, Shoreline produced all metadata content identified by Division I as related to the conduct of government; there was no redaction. Under *Mechling*, a government agency could not "redact" portions of metadata that are not related to the conduct of government, but *Mechling's* rule regarding redaction need not and should not be extended to make differences in irrelevant portions of a document's metadata transform two copies of one document into two separate documents.

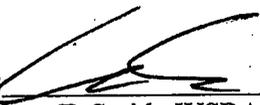
V. CONCLUSION

Amicus WSAMA respectfully urges the Court to reinstate the decision of the trial court. Alternatively, if the Court remands for a factual hearing, it should provide clear guidance to the trial court and public agencies regarding what portions of metadata are related to the conduct of

government and affirm that production of one copy of metadata with that information meets the requirements of the PRA.

DATED this 12th day of February, 2010.

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By: 

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Not Reported in F.Supp.2d, 2007 WL 4098213 (E.D.Mich.)
(Cite as: 2007 WL 4098213 (E.D.Mich.))

▷ Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
MICHIGAN FIRST CREDIT UNION, Plaintiff,
v.
CUMIS INSURANCE SOCIETY, INC., Defendant.
Civil Case No. 05-74423.

Nov. 16, 2007.

Charles J. Holzman, Patricia Corkery, Holzman, Ritter, Southfield, MI, Don W. Blevins, Mark L. McAlpine, Ryan W. Jezdimir, McAlpine & Assoc., Auburn Hills, MI, Alan C. Harnisch, George S. Fish, Strobl and Sharp, Bloomfield Hills, MI, for Plaintiff.

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OPINION AND ORDER DENYING SANCTIONS

R. STEVEN WHALEN, United States Magistrate Judge.

*1 Before the Court is Plaintiff's Motion for Sanctions for Failure to Comply with Court Order to Produce Electronically Stored Information [Docket # 166]. For the reasons set forth below, the motion is DENIED.

I. FACTS

On May 4, 2007, this Court entered an order granting Plaintiff's motion to compel discovery, and directing Defendant to supplement its responses to Plaintiff's third set of production requests, specifically with regard to electronically stored documents (Request # 14). At the hearing on May 2, 2007, the Court stated:

"The defendant will also supplement any previously answered requests, including supplementing with any electronically stored documents, including E-mails or any other electronically stored documents that would be responsive, and that the-

responses and the supplementation to the third set of requests will be done within twenty-one days of today's date, and I will issue an order incorporating those parameters that I've made on the record."

These comments were incorporated in the written order filed on May 4, 2007 ("For the reasons and under the terms stated on the record on May 2, 2007 ...").

Defendant filed an objection to this Order. The District Judge overruled Defendant's Objection by written order dated July 9, 2007. However, Defendant states that it "complied with the Court's May 4, 2007 Order on June 20, 2007 and made a supplemental document production (including voluminous electronic records) and served supplemental responses, before Judge Steeh ruled on Cumis' objections." *Joint List of Unresolved Issues*, p. 3.

The issue in the present motion is whether Defendant is in violation of this Court's May 4th order because its supplemental disclosures, many of which were produced on CD-ROMs in readable PDF form, do not include "metadata," nor have they been provided in "native format." In its initial timely objections to Plaintiff's third set of production requests, Defendant objected to the request that it produce records "as they are maintained in the ordinary course of business in their 'native format,' along with the intact metadata." Specifically, Defendant objected to the request as "unduly burdensome" and "impos[ing] obligations on Cumis beyond those permissible under the Federal Rules of Civil Procedure."

At the oral argument on this motion on August 14, 2007, the Court stated that its previous discovery order did not address the question of "metadata," and directed the parties to brief that issue.^{FN1}

^{FN1}. Judge Steeh's July 9, 2007 order rejected Defendant's argument that before supplementing discovery, Plaintiff "should be required to initially show a deficient response." However, although this order affirmed my order directing supplementation with electronically stored documents now

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(Cite as: 2007 WL 4098213 (E.D.Mich.))

falling within the revised Fed.R.Civ.P. 34, neither order specifically addressed the question of whether the production of "metadata" was required.

II. ANALYSIS

Metadata has been defined as "information about a particular data set which describes how, when, and by whom it was collected, created, accessed, or modified and how it was formatted." *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 646 (D.Kan.2005) (quoting Appendix F to *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information & Records in the Electronic Age*). Attached to Defendant's supplemental brief in opposition [Docket # 191] is the affidavit of Deborah Niemisto, Cumis's Senior Manager in Information Security Assurance, who defines metadata as "'data about data,' and can be found in various 'fields' when looking at the properties of a particular electronic document. The selection and arrangement of these 'fields' are generally made by the creator of the application."

*2 Although Rule 34 speaks of "data compilations," it does not explicitly reference or require the production of metadata. The Rule does indicate that a request for electronic discovery may specify the form of production, and that if a particular form is not specified, information must be produced "either in a form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable." Rule 34(b)(ii).

In this case, Plaintiff requested that "[a]ll electronically stored documents shall be produced as they are maintained in the ordinary course of business in their 'native format,' along with the intact metadata." As indicated above, Defendant objected to this request, and the Court has not, up to this point, addressed the discoverability of metadata.

In *Wyeth v. Impax Laboratories, Inc.*, 2006 WL 3091331, *2 (D.Del.2006) (unpublished), the court stated that "[m]ost metadata is of limited evidentiary value, and reviewing it can waste litigation resources." (Citing *Williams v. Sprint, supra*, 230 F.R.D. at 651). Likewise, the Eastern District of Kentucky stated in *Kentucky Speedway, LLC v. NASCAR, Inc.*, 2006 U.S. Dist. LEXIS 92028, *24, 2006 WL 5079480 (E.D.Ky.2006), "In most cases and for most documents, metadata does not provide relevant informa-

tion." In *Williams v. Sprint*, 230 F.R.D. at 651, the court noted that "[e]merging standards of electronic discovery appear to articulate a general presumption against the production of metadata[.]"

In this case, Plaintiff has expressed a concern that, particularly with regard to emails, the metadata might contain relevant information about who composed or received the message that might not appear in the PDF or hard copy. However, the affidavit of Deborah Niemisto answers that concern, and also shows that ordering Defendant to produce metadata would be extremely burdensome, with no countervailing discovery or evidentiary benefit to the Plaintiff.

Ms. Niemisto states that Cumis stores information in three electronic formats: APEX files, Lotus Notes (email), and Microsoft Office files. She affirmatively states that APEX was "custom created" for use by CUMIS for policy and claims management, and does not generate metadata. Thus, with regard to APEX files, the issue is moot: Defendant cannot produce what does not exist.

With regard to Lotus Notes email messages, Ms. Niemisto states that they "contain only a small amount of metadata. This includes the date and time of the creation of the message file, as well as a long string of characters that serves as a unique identifier for each message." She further states that she has reviewed the screen-shots of the email message produced for Plaintiff, and that "[a]ll metadata pertaining to the individual messages, except for the unique identifier referred to in the above paragraph is visible on these printouts." Hence, except for an "identifier" that would have no evidentiary value, the relevant metadata (such as date and time of creation) appears in the PDF copy. Were this not the case, there would be value in producing the metadata. However, since the PDF copies contain all the relevant information that Plaintiff would otherwise glean from the metadata, I agree with Defendant that producing the metadata for the emails would be unduly burdensome.

*3 Ms. Niemisto states that in the ordinary course of business, documents generated by Microsoft Office are kept in paper form. (This is the form which Defendant has produced to Plaintiff). She states further that producing the metadata for these documents would consume substantial resources. The substantive information contained in Microsoft Office documents

Not Reported in F.Supp.2d, 2007 WL 4098213 (E.D.Mich.)
(Cite as: 2007 WL 4098213 (E.D.Mich.))

speaks for itself, and is reflected in the discovery that has already been provided to Plaintiff. Given the admonitions of *Williams v. Sprint, Wyeth, and Kentucky Speedway, supra*, regarding the relative lack of worth of metadata, and the lack of any showing by Plaintiff that the metadata underlying Microsoft Office documents would be likely to lead to the discovery of relevant evidence, I agree with Defendant that the production of this metadata would be overly burdensome with no corresponding evidentiary value.

III. CONCLUSION

Because this Court's order of May 4, 2007 did not address the issue of metadata or "native format" files, it cannot be said that Defendant's failure to produce that information is a violation of that order. Therefore, there is no basis to sanction the Defendant. Further, having now read the submissions and heard the arguments of the parties, the Court finds, for the reasons stated above, that Defendant's objections to the production of metadata are well founded, and the May 4, 2007 order shall be clarified to reflect that Defendant shall not be required to produce its electronically stored documents in "native format" or to produce metadata.

Plaintiff's Motion for Sanctions [Docket # 166] is DENIED.

SO ORDERED.

E.D.Mich., 2007.
Michigan First Credit Union v. Cumis Ins. Society,
Inc.
Not Reported in F.Supp.2d, 2007 WL 4098213
(E.D.Mich.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2006 WL 5097354 (E.D.Ky.)
(Cite as: 2006 WL 5097354 (E.D.Ky.))

Only the Westlaw citation is currently available.

United States District Court,
E.D. Kentucky,
at Covington.
KENTUCKY SPEEDWAY, LLC, Plaintiff
v.
NATIONAL ASSOCIATION OF STOCK CAR
AUTO RACING, Inc., et al., Defendants.
Civil Action No. 05-138-WOB.

Dec. 18, 2006.

Arthur R. Miller, Harvard Law School, Cambridge, MA, Daniel J. Walker, Justin A. Nelson, Susman Godfrey, LLP, Seattle, WA, Michael P. Fritz, Susman Godfrey, LLP, Dallas, TX, Stephen D. Susman, Vineet Bhatia, Susman Godfrey, L.L.P., Houston, TX, Fay E. Stilz, James Rubin Cummins, Paul M. Demarco, Stanley M. Chesley, Waite, Schneider, Bayless & Chesley Co., LPA, W.B. Markovits, Markovits & Greiwe Co., LPA, Cincinnati, OH, Mark D. Guilfoyle, Deters, Benzinger & Lavelle, P.S.C., Crestview Hills, KY, for Plaintiff.

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MEMORANDUM ORDER

J. GREGORY WEHRMAN, United States Magistrate Judge.

*1 On October 12, 2006, this court denied plaintiff's motion to compel defendant to produce certain highly

confidential financial documents, but without prejudice to renew that motion upon full compliance with the order. Plaintiff Speedway subsequently renewed the motion orally, and a telephonic hearing was held at 10:30 a.m. on November 21, 2006 on the renewed motion. In addition to plaintiff's renewed motion to compel, the hearing addressed plaintiff's oral motion to compel Mike Helton, NASCAR president, to answer questions regarding the total compensation received by that witness. Finally, the court addressed plaintiff's November 9, 2006 motion to seal certain documents and International Speedway's motion for leave to file a surreply concerning plaintiff's October 13 motion to compel.

Bill Markovits and Mark Guilfoyle appeared on behalf of plaintiff; Helen Maher and Stuart Singer appeared on behalf of defendant NASCAR; and Guy Wade, Rob Craig and Glenn Padgett appeared on behalf of defendant ISC.^{FN1} In addition to appearances by counsel, Karen Leetzow, Jim France, and Gary Crotty were present as representatives of NASCAR. Court reporter Joan Averdick recorded the telephonic proceedings.

^{FN1}. All appearances were made telephonically.

In addition to the three motions discussed at the telephonic hearing, this Memorandum Order will address Speedway's sealed motion to compel, originally filed on October 27, 2006 [DE # 134].

I. Plaintiff's Oral Motion to Compel Salary Information

At the parties' request, the court previously held a conference call on November 15, 2006 concerning plaintiff's oral motion to compel a defense witness, the President of NASCAR, to disclose information concerning his total pay package during his deposition. The court took under submission defendants' objection based on relevancy, pending further argument and briefing on the issue. On November 21, the court heard further oral argument concerning this issue and has reviewed the case law cited by the parties. The court concludes based upon the argument and case law

Not Reported in F.Supp.2d, 2006 WL 5097354 (E.D.Ky.)
(Cite as: 2006 WL 5097354 (E.D.Ky.))

presented that the compensation of the referenced witness may be relevant to show bias. *See e.g., Hayes v. Compass Group U.S.A., Inc.*, 202 F.R.D. 363 (D.Conn.2001). However, due to the sensitivity of the information, it must be treated by the parties as "highly confidential" under the existing protective order.

II. Plaintiff's Renewed Motion to Compel Financial Records

Most of the parties' dispute is centered on whether certain financial documents must be produced by defendant NASCAR in response to plaintiff's requests. The court's October 12, 2006 summary of the dispute is repeated herein for the convenience of the court:

Plaintiff served its first request for production on February 17, 2006. Defendant responded in March, but declined to produce all "tax returns" or "audited or unedited financial statements, including income statements, balance sheets and operating statements for NASCAR and its affiliated entities." NASCAR objected both on grounds of relevancy for most of the documents, and because the request would require NASCAR to disclose "confidential business information and trade secrets to a proclaimed competitor." The latter objection is at least partially ameliorated by the existing protective order in the record.^{FN2}

FN2. That said, the court is not oblivious to the fact that preventing disclosure of sensitive financial information to a competitor is always a better form of security than the most detailed protective order.

*2 NASCAR's relevancy objection is based on the fact that it operates eleven other racing series and numerous businesses, including movie and television productions, which are wholly unrelated to the Nextel Cup Series and/or premium stock car racing that is the subject of this lawsuit. NASCAR also has subsidiaries which conduct businesses which NASCAR contends are unrelated to the subject matter of the first amended complaint. NASCAR has offered to produce financial documents limited to "the markets set forth in the First Amended Complaint." In fact, NASCAR has already provided all profit and expense information relating to the NEXTEL Cup Series.

Plaintiff responds to NASCAR's relevancy objection with four basic arguments: 1) the documents are relevant to show market share; 2) the documents are relevant due to the possibility of cross-subsidization; 3) the documents are relevant to show overlap with ISC; and 4) additional documents are needed to demonstrate the types of relevant documents available.

Plaintiff first argues that limiting records to the markets of premium stock car racing is unfair because "all facets of NASCAR relate to, and are dependent on, revenues derived from premium stock car racing." Plaintiff alleges that all NASCAR profits "whether in sponsorship, licensing, or branded hot dogs" can be traced back to relate to the Nextel Cup Series. In that sense, plaintiff argues very broadly that the financial information is relevant to show NASCAR's "market power." Only financial data concerning the relevant market is relevant, a point not disputed by plaintiff. Instead, plaintiff seeks an extremely broad definition of the relevant market.

Plaintiff next argues that broad information is relevant because of the possibility of "cross-subsidization." Plaintiff explains that NASCAR "may" have loaded expenses into the "competition" financials, decreasing apparent profitability in that area, while increasing profitability in a different area concerning which no financial data is produced. Defendants object that the mere "possibility" of this type of "cross-subsidization" should not entitle the plaintiff to otherwise irrelevant financial data.

Plaintiff's third argument in favor of relevancy is that the financial data for all businesses is necessary "to the extent there is any overlap with ISC." However, NASCAR contends that it is improper to assume "overlap" between NASCAR and ISC unrelated to the relevant product market for premium stock car racing or the market for "the right to host" such races. To the extent that NASCAR has shared expenses with ISC, defendant argues that they are disclosed in ISC's public filings with the government, available on the SEC's website since 1998. Plaintiff objects that it should not have to accept "at face value ISC's summary description of the overlap between ISC and NASCAR."

Not Reported in F.Supp.2d, 2006 WL 5097354 (E.D.Ky.)
(Cite as: 2006 WL 5097354 (E.D.Ky.))

Finally, the parties argue about whether plaintiff should be required to review the financial documents already in its possession

*3 ...

... [P]laintiff will be required to review the financial documents already in its possession (a small subset of the overall document production) and to more specifically identify which financial documents it continues to seek. For its part, defense counsel will be directed to identify what specific financial documents exist concerning NASCAR'S "unrelated" businesses and affiliates which NASCAR is declining to produce on grounds of relevancy. Even if defendant's confidence is misplaced that plaintiff "[does] not need the additional financial information," plaintiff's review of the previously produced documents should help narrow plaintiff's requests and/or assist plaintiff in presenting a better argument on the relevancy of undisclosed documents in a renewed motion if necessary. Notwithstanding the breadth of discovery in general, plaintiff has not yet satisfied its burden to show that the wholesale production of sensitive financial documents from affiliated businesses is relevant.

[DE # 133, pp. 2-4].

The court thereafter ordered defendant to "complete production of responsive financial documents and provide plaintiff with a specific list of financial documents responsive to plaintiff's broad requests but not produced on grounds of relevancy" and ordered plaintiff to "review all financial documents produced by defendant within thirty (30) days of the date of this order in order to better determine whether it needs additional financial information and if so, what information it seeks."

At the November 21 hearing, defense counsel argued that plaintiff had not complied with its obligations under the October 12 order, while plaintiff's counsel argued that defendant had been equally remiss. Having reviewed the parties' submissions to chambers in preparation for the telephonic hearing, I conclude that neither party is blameless.^{FN3} Nonetheless, the economy of judicial resources mandates resolution of the parties' ongoing dispute.

FN3. NASCAR did not specifically identify a list of documents it was continuing to withhold until November 15, 2006. For its part, Speedway's counsel admitted that it had not reviewed every financial document previously produced.

Plaintiff has filed the affidavit of an expert economist who broadly states that "[f]inancial documents of the nature requested by Plaintiff from NASCAR *may* be useful in determining issues of market definition and market power." (Emphasis added). In response, defendant has filed the affidavit of its expert which disagrees with both the "premises and conclusions relating to the need for all financial information from NASCAR and its affiliates" attested to by plaintiff's expert. The court finds the affidavits of these experts to be of little assistance.

Following the November 21 hearing, defendant NASCAR and plaintiff Speedway both submitted additional pleadings in correspondence form to the court, which correspondence has been considered by this court for purposes of this discovery dispute but not filed of record. Having revisited the arguments previously presented by the parties in their written memoranda concerning the plaintiff's original motion to compel, and having reviewed the parties' most recent submissions and arguments, I conclude that NASCAR should be compelled to produce some of the financial documents requested under the "highly confidential" designation of the parties' protective order.

*4 NASCAR contends that discovery should be limited to financial records concerning the NEXTEL cup, arguing that other courts have not permitted discovery into product lines outside those alleged in the complaint. *See e.g., Mfting Research Corp. v. Greenlee Tool Co.*, 693 F.2d 1037, 1042-43 (11th Cir.1982)(affirming denial of discovery of defendant's sales of conduit benders where the relevant product was the cable bender, a very different and distinct tool); *Vilastor Kent Theater Corp. v. Brandt*, 18 F.R.D. 199 (S.D.N.Y.1955)(records concerning first run theaters were not subject to discovery where plaintiffs, alleging Sherman Act violations concerning denial of second run theaters, failed to show relevance of first run theater records); *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 16 F.R.D. 173, 174-175

Not Reported in F.Supp.2d, 2006 WL 5097354 (E.D.Ky.)
(Cite as: 2006 WL 5097354 (E.D.Ky.))

(S.D.N.Y.1954)(same).

I conclude that the cases cited by the defendant are largely distinguishable based upon the additional showing of relevance made by plaintiff in this case. As a rule, information is discoverable if: 1) "relevant to the claim or defense of any party;" 2) "reasonably calculated to lead to the discovery of admissible evidence;" and 3) not subject to privilege. Rule 26(b)(1), Fed.R.Civ. P.; Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 402 (6th Cir.1998). Once a party raises an objection to discovery based on relevance, "the burden shifts to the party seeking the information to demonstrate that the requests are relevant to the subject matter involved in the pending action." Allen v. Howmedica Leibinger, 190 F.R.D. 518, 522 (W.D.Tenn.1999).

Although plaintiff failed initially to carry its burden to show the relevance of the requested information, plaintiff has now carried that burden in part with respect to market definition. The defendant disputes plaintiff's definitions of the market in question. Plaintiff argues persuasively at this juncture that revenues, expenses, and other financial information relating to at least some of NASCAR's businesses outside of the NEXTEL Cup is relevant to define and distinguish premium stock car racing from other motorsports within and outside NASCAR. See e.g., International Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242 (1959)(comparing revenues from championship boxing contests to revenues from nonchampionship boxing programs to define relevant market as championship contests); NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984)(defining college football as separate market by reviewing broad information relating to broadcasters, advertisers and viewers).

Despite carrying its burden to show the relevance of some of the financial data it seeks, plaintiff still falls short of carrying its burden to show the relevancy of the broad financial information plaintiff seeks relating to ISC. Plaintiff argues that the additional information might be relevant to demonstrate additional interrelationships between NASCAR and ISC. In light of the breadth of the requests and the sensitivity of the information and the fact that much information is already of public record through public filings by ISC, the court declines to require production outside of information previously produced relating to the pre-

mium stock car racing market.

*5 In addition, because plaintiff has barely crossed the threshold of making the showing of relevance required for production of such sensitive records at this time to better define the relevant market, the court will limit plaintiff to documents from no more than three calendar years, not to include data prior to 1997. If upon further analysis of this sampling of documents, plaintiff and plaintiff's expert are able to make a much stronger showing of relevance, the court will reconsider plaintiff's request for additional documents. All the financial information ordered to be produced by this Memorandum Order is subject to the previously entered protective order.

III. Plaintiff's Sealed Motion to Compel Certain Categories of Documents

Plaintiff Speedway seeks to compel four categories of documents which NASCAR and ISC have refused to produce: 1) documents in ISC's possession prior to 1997; 2) documents in ISC's possession concerning the formation of a joint venture with a non-party; 3) metadata concerning author and document creation information from ISC; and 4) documents relating to a prior antitrust case, Ferko v. Nascar, et al.

As a preliminary matter, defendant ISC accuses plaintiff of engaging in a deliberate strategy "by exponentially increasing the time and money ISC must pay if it is to comply" with discovery requests, in order to make discovery so expensive that the defendant will be forced into settlement. ISC bases its accusation upon a comment made by plaintiff's banker in a commercial and industrial underwriting analysis:

one of the more likely outcomes of the suit is that the discovery phase continues for a period of time until it becomes too uncomfortable for ISC and NASCAR and an offer is made to purchase the track....

The most likely scenario at this point in the lawsuit if the discovery phase continues and becomes overly costly or cumbersome for ISC and NASCAR, the attorneys would expect an offer from ISC to purchase the track.

Commercial and Industrial Underwriting Analysis for Kentucky Speedway produced by Huntington Bank,

Not Reported in F.Supp.2d, 2006 WL 5097354 (E.D.Ky.)
(Cite as: 2006 WL 5097354 (E.D.Ky.))

DE # 136, p. 1 and Ex. 1 at p. 8. As of the date of its responsive memorandum, defendant ISC represents that it has spent over five months and more than three million dollars in responding to plaintiff's document discovery requests.

Plaintiff objects to the charge, which it calls "unsubstantiated." Plaintiff asserts that it is unreasonable for defendant to base such a serious allegation on a third party consultant's speculative opinion on the "likely outcome" of this litigation. However, defendant notes that this same conclusion is referenced in two separate documents, one of which reflects a handwritten note from a meeting between plaintiff and its bankers. The President of Speedway, Mark Simendinger, admits he was in attendance at that meeting but neither admits nor denies having made the statement. Defendant argues that the most likely source of the third party's opinion on the outcome of this litigation was plaintiff itself.

*6 The court has some concerns with breadth and timing of plaintiff's requests, but does not find based upon the record to date that plaintiff has acted out of malice or with a "strategy to use discovery as a weapon to blackmail ISC into settling the lawsuit." DE # 136 at p. 2. Should additional or stronger evidence of ill motive arise, the court may revisit this issue.

A. Pre-1997 Documents

Speedway alleges that defendants NASCAR and ISC have monopolized markets for premier stock car racing and premier stock car racetracks over a prolonged period of time. Construction on the Kentucky Speedway did not begin until 1997; the track hosted its first race in 2000. However, Speedway has alleged that NASCAR and ISC began a course of conduct whereby they "starved competing racetracks of revenue so that ISC [could] buy a track at a reduced price" prior to Speedway's construction. DE # 134 at p. 2, Complaint at ¶ 31. Plaintiff seeks ISC documents from 1992 to 1997 in order to discover information relating to ISC's alleged "growth strategy, attempts to expand, attempts to stifle competition by other major motorsports facilities, attempts to obtain a race, the scheduling and sanctioning of Winston Cup races, and ISC's conspiracy with NASCAR." DE 134, at 3. In support, plaintiff cites *Continental Ore v. Union Carbide*, 370 U.S. 690 (1962), in which the Supreme Court held that the trial court had erred in excluding

evidence relating to a period of time prior to the plaintiff arriving in the country in 1938.

Petitioner's sought to introduce evidence that the conspiracy and monopolization alleged began in the early 1930's, that overt acts in furtherance thereof occurred in the 1930's, and that it was pursuant to this anticompetitive scheme that respondents sought to and did eliminate petitioners from the vanadium industry after 1938. This evidence was clearly material to petitioners' charge that there was a conspiracy and monopolization in existence when they came into the industry, and that they were eliminated in furtherance thereof. We do not mean that a trial court may not place reasonable limits upon such evidence or set a reasonable cut-off date, evidence before which point is to be considered too remote to have sufficient probative value to justify burdening the record with it.

370 U.S. at 709-710.

In this case, Speedway alleges that a similar anti-competitive conspiracy existed prior to Speedway's construction. As an example, plaintiff points to the Homestead-Miami Speedway, where construction began in 1993 with the track opening in 1995. ISC produced a January 1997 document discussing the purchase of the Homestead-Miami track, as well as a June 1996 document which plaintiff alleges demonstrates that ISC was discussing the purchase of that track at that date. Plaintiff notes that a 2003 ISC document suggests that ISC's growth strategy was put into place "in the mid 1990's." In 1996 ISC became a public company.

*7 ISC objects to production of any documents prior to 1997, arguing that any alleged harm to plaintiff could only occur after plaintiff came into existence, and that forcing ISC to review its documents anew for the 1992-1997 time period is unreasonably burdensome. On the facts of this case, I agree that the burden to ISC outweighs any potential benefit to Speedway and therefore will deny the requested discovery.

ISC objected to the production of pre-1997 documents shortly after receiving plaintiff's requests. In response to that objection dated April 24, 2006, plaintiff's counsel stated that he would review plaintiff's document requests and notify defense counsel "shortly" if plaintiff needed pre-1997 documents for a particular

Not Reported in F.Supp.2d, 2006 WL 5097354 (E.D.Ky.)
(Cite as: 2006 WL 5097354 (E.D.Ky.))

request. However, it was not until September 22, 2006-after ISC completed its initial production of documents-until plaintiff identified the additional documents it sought. Based upon previous document production costs, ISC represents that it would cost \$500,000 to complete the additional document review for pre-1997 documents. This burden is significant in and of itself, but even more so when considering that ISC's routine document retention policy would have mandated destruction of all pre-1997 documents in any event.

B. Documents Concerning Joint Venture

Plaintiff also seeks documents relating to the business relationship between ISC and a non-party, SMI, which is in the business of making toy die-cast cars and apparel. In a separate joint venture, ISC and SMI acquired a third company that owns racetracks: Plaintiff alleges that documents relating to the toy car venture are relevant because the formation of that joint venture "stems directly from ISC and SMI's attempt to acquire another racing facility." However, defendant ISC protests that the documents concerning the toy car venture concern an unrelated company and an unrelated business and have nothing to do with the venture relating to the racetrack company. Put simply, "[b]uilding and selling toy cars has nothing to do with 'hosting premium stock car races' and therefore is not relevant to any material issue in this case." DE # 136 at 13. I agree that the documents sought by this request are either entirely irrelevant or of such marginal relevance that the burden of production outweighs any possible benefit to the plaintiff. Plaintiff's motion concerning these documents will be denied.

C. Metadata

Metadata has been defined as "information about a particular data set which describes how, when, and by whom it was collected, created, accessed, or modified and how it was formatted." *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 646 (D.Kan.2005)(quoting Appendix F to *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information & Records in the Electronic Age*). Relying chiefly on the *Williams* case, plaintiff seeks metadata for virtually all records maintained in electronic form which have been produced to date.

*8 Rule 34 specifically includes the term "data compilations" as documents that must be produced, but does not define that term to necessarily include metadata. The amended version of Rule 34, which took effect December 1, 2006, provides that where a request does not specify the form of production, information must be produced "either in a form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable." Rule 34(b)(ii), Fed.R.Civ.P. The Advisory Committee Notes to the newly amended rule make clear that if the information is maintained in a way that makes it "searchable by electronic means," then "the information should not be produced in a form that removes or significantly degrades this feature." However, as one commentator has observed, "[n]either default form is intended to mandate production of metadata or embedded data." Allman, T., *The Impact of the Proposed Federal E-Discovery Rules*, 7 *Sedona Conf. J.* 31 (Fall 2006). *The Sedona Principles for Electronic Document Production* also suggest that a party should not be required to produce metadata absent a clear agreement or court order. Principle 12, *The Sedona Principles*.

In the rapidly evolving world of electronic discovery, the holding of the *Williams* case is not persuasive. Having the benefit of the newly amended rules, advisory notes, and commentary of scholars, I respectfully disagree with its conclusion that a producing party "should produce the electronic documents with their metadata intact, unless that party timely objects ..., the parties agree that the metadata should not be produced, or the producing party requests a protective order." As noted in the more recent *Wyeth v. Impax Laboratories, Inc.*, 2006 WL 3091331 (D.Del.2006), "[e]merging standards of electronic discovery appear to articulate a general presumption against the production of metadata." "Although plaintiff may protest that Delaware has adopted local standards which provide a "default standard" against the production of metadata, this court is convinced-at least on the facts of this case-that the production of metadata is not warranted.

The issue of whether metadata is relevant or should be produced is one which ordinarily should be addressed by the parties in a Rule 26(f) conference. Here, the parties clearly had no agreement that the electronic files would be produced in any particular format. Plaintiff did not notify defendant ISC that it sought metadata until seven months after ISC had produced

Not Reported in F.Supp.2d, 2006 WL 5097354 (E.D.Ky.)
(Cite as: 2006 WL 5097354 (E.D.Ky.))

both hard copy and electronic copies of its documents.

Plaintiff has not made any showing of a particularized need for the metadata. ^{FN4} Although plaintiff argues generally that it “needs document custodian information for the prosecution of its case” because “Kentucky Speedway has *no idea* of the origin of many of the documents” plaintiff does not identify any specific document or documents for which such information would be relevant and is not obtainable through other means. DE # 139, at p. 4. In most cases and for most documents, metadata does not provide relevant information. Metadata may or may not provide the information plaintiff seeks concerning specific documents in this case. Depending on the format, the metadata may identify the typist but not the document's author, or even just a specific computer from which the document originated or was generated.

^{FN4}. In its reply memorandum, Kentucky Speedway offers to stipulate that to the extent ISC identifies date, authorship, and custodial information, plaintiff will not seek metadata. To the extent that plaintiff seeks this information for every document thus far produced by ISC, the request is overbroad and unduly burdensome for the same reasons as indicated for the metadata request.

*9 To the extent that plaintiff seeks metadata for a specific document or documents where date and authorship information is unknown but relevant, plaintiff should identify that document or documents by Bates Number or by other reasonably identifying features. Responding to a request for additional information concerning specific documents would be far less burdensome to defendant and far more likely to produce relevant information. Should the parties be unable to resolve any dispute concerning any limited requests by plaintiff for metadata on a specific document or documents, the parties may contact the court by telephone for assistance.

D. Texas Litigation Documents

Plaintiff seeks a multitude of documents which otherwise would be protected from disclosure by the protective order entered by the Eastern District of Texas in *Ferko v. NASCAR, et al.*, Civil Action No. 02-cv-00050-RAS. Plaintiff has moved to intervene in Texas in order to modify the protective order to permit

use of the documents in this court. Defendant objects to this court issuing a ruling prior to a ruling by the Eastern District of Texas. Defendant has filed a separate motion to stay concerning this same issue. I agree that it is within the province of the United States District Court for the Eastern District of Texas to modify its own protective order, and therefore decline to address the issue in this court. ^{FN5}

^{FN5}. Plaintiff's motion to intervene for purposes of modifying the protective order was filed on August 15, 2006 in the Texas court, with reply memoranda last filed on November 10, 2006.

Accordingly, **IT IS ORDERED:**

1. Plaintiff's oral motion to compel defense witness Mike Helton to respond to questions concerning his total pay package is **granted**;
2. Plaintiff's motion to seal [DE # 138] is **granted**;
3. The motion of International Speedway for leave to file a surreply [DE # 140] is **granted**;
4. Plaintiff's oral renewed motion to compel disclosure of additional financial records is **granted**, solely to the extent specified herein:
 - a. Based upon the threshold showing of relevance, defendant NASCAR need produce only a “sampling” of financial data for a period not to exceed three years to be selected by plaintiff. For the selected years, defendant NASCAR shall produce all annual documents listed in the November 15, 2006 letter. Defendant need not produce monthly data, except to the extent that annual data is unavailable;
 - b. Only if plaintiff is able to make a much stronger showing of relevance after analysis of this sample data will the court consider a renewed request for additional data. In addition to the strictures in the parties' agreed protective order, the sample financial data may be made subject to reasonable additional restrictions to ensure adequate protection during copying and transfer;
 - c. Defendant NASCAR shall produce all tax returns requested for NASCAR, Inc. but defendant ISC need

Not Reported in F.Supp.2d, 2006 WL 5097354 (E.D.Ky.)
(Cite as: 2006 WL 5097354 (E.D.Ky.))

not produce tax records at this time;

d. To the extent not previously produced, Defendant NASCAR shall produce the supporting financial documents used to prepare financial summaries such as that attached as Exhibit 4 to plaintiff's November 20, 2006 correspondence to the court (1999 Nascar Busch Series Chart);

*10 e. Plaintiff shall notify defendant which three calendar years for which it seeks data within ten (10) days of this order, not to include data prior to 1997, following which defendant shall have an additional twenty (20) days in which to produce the records;

5. Plaintiff's motion to compel [DE # 134] is denied.

E.D.Ky.,2006.
Kentucky Speedway, LLC v. National Ass'n. of Stock
Car Auto Racing
Not Reported in F.Supp.2d, 2006 WL 5097354
(E.D.Ky.)

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