

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE DELTA/AIRTRAN BAGGAGE) CIVIL ACTION FILE
FEE ANTITRUST LITIGATION) NUMBER 1:09-md-2089-TCB

**SPECIAL MASTER’S SUPPLEMENT TO REPORT AND
RECOMMENDATION**

This is a Supplement to the Special Master’s Report and Recommendation filed on November 21, 2014 (“the R&R”) [520]. This Supplement concerns the December 22, 2014 deposition of Delta employee Kelly Brown.

Background

Kelly Turner Brown joined Delta’s Computer Security and Investigative Response Team (“CSIRT”) in 2006 and in 2010 became the team lead. Delta moved Ms. Brown to another position within Delta in 2012, where she remains today. (Tr. 396-97). As found in the R&R, CSIRT is directly and indirectly responsible for a number of the mistakes that Delta made in discovery in this case, including some mistakes that were made when Ms. Brown led CSIRT.

In 2013, Ms. Brown was interviewed by Plaintiffs' expert in the course of his investigation, and was called by Plaintiffs to testify at the August 2014 hearing on Plaintiffs' Motion for Discovery Sanctions. Several weeks after the hearing, Ms. Brown – still a Delta employee – called Plaintiffs' counsel, Ms. Kraynak. [520, page 85]. The call led to a hearing with Judge Batten, the deposition of Ms. Brown, and further hearings before the Special Master. Ms. Brown's deposition and hearing testimony is addressed at length in the R&R.

On December 4, 2014, after the R&R was issued, Ms. Brown again called Plaintiffs' counsel, Ms. Kraynak, and left a voice message asking how she could speak with Plaintiffs' counsel. Ms. Kraynak transmitted the message to Delta's outside counsel, Randall Allen. Mr. Allen told Plaintiffs' counsel that Delta would not consent to Ms. Brown, still a Delta employee, communicating directly with Plaintiffs' counsel.

After the parties were unable to reach agreement on a protocol for interviewing Ms. Brown, Judge Batten held a telephone conference concerning the matter. Judge Batten ruled that Ms. Brown should be interviewed by the Special Master. [526].

The Special Master held a conference call with counsel for the parties on December 17, 2014. The Special Master indicated that he would interview Ms. Kelly on December 19, 2014. At the suggestion of the parties, the Special Master agreed to have the interview in the form of a deposition – that is, transcribed and under oath. The Special Master also directed Delta’s counsel to circulate to the Plaintiffs and the Special Master the documents that Ms. Brown had given to Delta’s counsel that were responsive to Plaintiffs’ discovery requests. Delta did so on December 18, 2014, indicating that copies of the documents had all been produced to the Plaintiffs in the ordinary course of discovery. Also pursuant to the Special Master’s direction, Delta’s counsel transmitted to the Special Master (but not to Plaintiffs’ counsel), documents that Ms. Brown had given to Delta’s counsel that Delta contended were *not* responsive to Plaintiffs’ discovery requests.

On December 19, 2014, counsel for the parties assembled at the offices of Plaintiffs’ counsel in Atlanta for Ms. Brown’s deposition. Shortly before the deposition was scheduled to begin, Delta transmitted word from Ms. Brown that Ms. Brown was not feeling well and was working from home. Though she was apparently well enough to work from home, Ms.

Brown said that she would not be attending the deposition. After further consultation with counsel for the parties, the Special Master directed that Ms. Brown make herself available for a telephonic deposition on December 22, 2014.

Ms. Brown was deposed on December 22, 2014. The Special Master led the questioning, and then gave counsel for Plaintiffs and Defendants the opportunity for further examination.

Discussion

In her December 22 deposition, Ms. Brown testified that she called Plaintiffs' counsel because she had not received an adequate response from Delta's lawyers concerning the errata sheet for her first deposition and because she had remaining substantive concerns about two issues.¹ Ms. Brown testified that Delta's counsel had told her that she was not to contact Plaintiffs' counsel, but she did so anyway.

As to the errata sheet, Ms. Brown was unable to explain the nature of her concerns. Ms. Brown confirmed that she was allowed to complete the errata sheet in the ordinary course. As a matter of fact, the errata sheet was circulated to all parties and the Special Master by October 18, 2014.

¹ In the interest of time, this Supplement is being drafted and filed before the transcript of Ms. Brown's testimony becomes available.

Ms. Brown also raised two substantive issues that were addressed in the R&R. First, as to Delta's failure to preserve a September 2009 NAS snapshot taken in connection with the "slot swap" investigation, Ms. Brown testified that she had new information or documentation to the effect that Delta's Mr. McClain had originally decided to preserve the September 2009 snapshot for this litigation, only to reverse course and order its destruction in 2010.

This allegedly new information does not have an impact upon the reasoning or recommendations of the R&R. The R&R did not conclude that Delta had no obligation to preserve the September 2009 NAS "snapshot." Instead, the R&R concluded that there was no evidence that the September 2009 snapshot contained any unique information. (Delta preserved a July 2009 snapshot). [See 520, pages 56-57]. In her December 22, 2014 deposition, Ms. Brown testified that she was unaware of any unique information on the September 2009 snapshot. This testimony is consistent with the R&R's factual findings.

The second issue that Ms. Brown addressed was the "merger tapes," also addressed in the R&R. [520, pages 89 - 91]. Ms. Brown testified that she had located spreadsheets that provided additional support for her

earlier testimony that certain tapes she saw in 2011 were merger tapes that PwC did not log. This testimony provides no reason to reconsider the recommendations made in the R&R. The spreadsheets upon which Ms. Brown basis her testimony are not new, but instead were produced by Delta to Plaintiffs. Ms. Brown has no personal knowledge about this issue apart from what may be gleaned from the spreadsheets themselves – spreadsheets which Ms. Brown had no role in preparing. Plaintiffs had full access to these spreadsheets before the hearing on the Motion for Discovery Sanctions and called Ms. Brown to testify. Plaintiffs had the opportunity to present this argument and evidence at the hearing to the extent they chose to do so.

Conclusion

Based on the foregoing, no substantive change to the Report & Recommendation is warranted. In addition, Ms. Brown's December 22 deposition does not warrant an extension of time for the filing of objections to the R&R.

This 24th day of December, 2014.

/s/Bruce P. Brown
Bruce P. Brown
Special Master