

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

AURORA COOPERATIVE ELEVATOR
COMPANY,

Plaintiff,

v.

AVENTINE RENEWABLE ENERGY –
AURORA WEST, LLC; and AVENTINE
RENEWABLE ENERGY HOLDINGS, INC.

Defendants.

CASE NO. 4:12-cv-00230-JMG-CRZ

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL
AVENTINE TO SEARCH FOR AND
PRODUCE EMAIL RECORDS**

I.
INTRODUCTION

Defendants, Aventine Renewable Energy Holdings, Inc. and Aventine Renewable Energy – Aurora West, LLC (collectively “Aventine”), oppose Plaintiff’s Motion to Compel Aventine to Search for and Produce Email Records (Filing No. 104). Aventine has negotiated in good faith to come to an agreement with Plaintiff, Aurora Cooperative Elevator Company (the “Coop”), on email search terms and custodians that will reasonably locate emails responsive to the Coop’s requests for production of documents. Aventine has now searched the emails of 11 total custodians using 9 different search parameters proposed by the Coop. Aventine has reviewed 8014 emails and attachments, resulting in a production of 1745 documents consisting of 9441 pages, and it still has 14,338 emails and attachments to review. Each time Aventine thinks it is closing in on finalizing its production of documents, the Coop asks for more. The positions

Aventine has taken with respect to the email searches are reasonable, and the Court should therefore deny the Coop's motion.¹

II.
THE PARTIES' NEGOTIATIONS ON EMAIL SEARCHES

The parties have participated in substantial negotiations over custodians and search terms, pursuant to Paragraph (6)(b) of the Final Progression Order (Filing No. 50). On October 9, 2013, while the Coop's initial motion to compel was still awaiting the Court's ruling, Aventine agreed to search, for the purpose of locating documents responsive to Plaintiff's First and Second Sets of Requests for Production of Documents, the Aventine email accounts of eight custodians using four very broad search terms:

- Aurora and (production or capacity or capability or output or gallons or mgpy or gpy)
- Aurora and Kiewit
- Aurora and Fagen
- Aurora and construct*

(Filing No. 105-9). This search resulted in 8014 total documents (emails plus attachments) that Aventine's counsel reviewed, from which Aventine produced 1745 documents consisting of 9441 pages.² Aventine's counsel from Baird Holm spent almost 300 hours reviewing these emails and preparing the responsive emails for production.

In addition, for John Castle, former CEO, Aventine ran these searches not only on his Aventine email backup, the results of which are included in the description above, but also on his personal computer Outlook files. These searches on Mr. Castle's personal computer Outlook

¹ Ironically, the Coop is refusing to follow the same search protocols for their three main witnesses: George Hohweiler, President/CEO; Robert Brown, CFO; Chad Carlson, VP of Grain. Unless the Coop changes its mind, Aventine will soon be filing a motion to compel.

² This is in addition to 6297 documents consisting of 45,539 pages produced from sources other than email. Arrangements are being made between the parties for production of additional hard copy documents.

files resulted in more than 13,000 documents. Rather than review more than 13,000 documents for a single custodian, Aventine's counsel attempted to negotiate with the Coop's counsel on a way to narrow the searches and hopefully therefore the results needing to be reviewed.

Prior to the Court's order on the Coop's initial motion to compel, the Coop had demanded additional custodians and search terms to be used in locating responsive documents. Aventine took the position that these search terms and custodians were encompassed by Aventine's objections to the Coop's requests for production, which were before the Court on the Coop's initial motion to compel. Therefore Aventine would not agree to these search terms and custodians at that time but offered to reconsider its position after the Court had ruled on the motion.

The Court issued an order on the Coop's motion to compel on December 16, 2013. As promised, Aventine did then reconsider its positions on a number of the custodians and search terms requested by the Coop, and in negotiations that lasted from December 6, 2013 (following the hearing before the Court on the Coop's motion) to January 13, 2014, Aventine agreed to add three additional custodians and five additional search terms:

- Aurora /20 (value or valuation or sale or price or bid)
- Manuel and (((commodities or options or futures) and (margin or loss* or lost*)) or resign*)
- twin /10 (Aurora or AW or Mt. Vernon or "Mount Vernon" or MTV)
- "Molecular sieve" or molesieve
- (Aurora or Pasbrig or Groah) and (distill* or "water content" or moisture or specification or volume or rate or amount or boiler or troubleshoot or "critical path" or bottleneck or condition*)

(Filing No. 105-11 at 2-3). The first three of these search terms were to apply to all of the original custodians and one of the new custodians. (*Id.*) The last two search terms were to be used only with respect to two of the new custodians. (*Id.*) This second round of searches, with

respect to all custodians other than Castle, resulted in 2,622 total documents (emails plus attachments), which Aventine's counsel are currently reviewing.

Aventine also agreed to run narrowed versions of the original searches on the documents pulled from Castle's email files in the hopes of narrowing the results. Unfortunately, the results were not substantially reduced, and Castle's emails and attachments still amount to more than 11,000 documents. Aventine's counsel and the Coop's counsel are currently conferring on how to further narrow these results.

III. **DISCUSSION**

A. Aventine Will Agree to a Reasonable Compromise on Searching the Emails of its New CEO, Mark Beemer, but the Coop's Overbroad Demands Should Be Rejected

Mark Beemer became the President of Aventine Renewable Energy Holdings, Inc. in December 2012. Because Beemer began his current position and employment with Aventine more than five months after the construction of the Aurora West plant was required to be completed, it is not reasonable for the Coop to request Aventine to run all of the searches on Beemer's emails agreed to for the original eight custodians. For example, Beemer will have very limited (and secondhand at best) information regarding the construction of the Aurora West plant. Thus, the second search term proposed by the Coop for Beemer's emails—(Aurora or AW) /20 construct*—is unlikely to generate information the Coop does not already have from running this search on all of the primary people involved in the construction of the plant. The Coop offers nothing but speculation regarding what emails Beemer “certainly would have been involved in.” Such speculation does not justify running overbroad searches that will result in significant additional cost for Aventine.

Aventine is willing to compromise. It will agree to the following search term with

respect to Beemer's emails for the purpose of locating documents responsive to the Coop's requests for production:

- (Aurora or AW) /20 startup or value! or sale

This search term should locate most of the emails the Coop has asserted that Beemer should have that would be relevant and responsive to the Coop's requests for production.

B. The Coop Presents Nothing More Than Speculation In Seeking Emails From Borgen and Godbout, and Defendants Have Offered A Reasonable Alternative

As an initial matter, the Coop is incorrect in its assertion that "[t]he Court has already ruled that Aventine must produce documents related to the "retirement of Tom Manuel in 2011 and Mr. Manuel's involvement in speculative trading in commodities futures or securities." In fact, none of the Coop's 29 Requests for Production addressed in the Court's December 16, 2013, Order seeks documents regarding Manuel's retirement or his involvement in trading. (Filing No. 93). The discussion in the Court's Order regarding Manuel's retirement and trading activities is relevant only to the subpoena the Coop sought to serve on Aventine's financial advisor, Houlihan Lokey. (*Id.* at 13). Aventine has nonetheless agreed to run a search term requested by the Coop that is designed to seek emails regarding Manuel's termination and his trading activities: Manuel and (((commodities or options or futures) and (margin or loss* or lost*)) or resign*. Aventine agreed to run this search on the emails of nine custodians: Tom Manuel, John Castle (both on the emails within the Aventine server and those on his personal computer), Kevin Adams, Art Hemmerlein, Adam Groah, Richard Finical, Brian Pasbrig, John Valenti, and Jeff See. (Filing No. 105-11 at 2-3). Aventine then proposed the following compromise regarding running this same search within Borgen's and Godbout's emails: "If in our review of the emails gathered from those searches, we discover evidence that Borgen or

Godbout would have emails that would be responsive to an inquiry about the reasons for Manuel's departure from Aventine, we will reconsider running the 'Manuel' search in Borgen's and Godbout's emails." (*Id.* at 3). In justifying this compromise, Aventine explained that Borgen and Godbout "were Manuel's right-hand guys, hired by him and reporting to him. Because of this, even assuming the documents you seek exist (we do not believe they do), there is no reason to believe Borgen or Godbout would have been included on such emails." (*Id.*). The Coop has provided no evidence that Borgen or Godbout would have emails regarding Manuel's retirement—just its own unsupported speculation that "both would *likely* have been involved in Manuel's 'retirement.'" (Filing No. 104 at 3) (emphasis added). This speculation is insufficient to require Aventine to incur the cost of running the "Manuel" search on the emails of these two custodians and reviewing the emails generated as a result of those searches when Aventine's proposed compromise is more than reasonable. The Coop has provided no evidence to date tying Manuel's resignation to construction issues at the AW plant or trading losses (or even that Aventine had such losses), nor shown that it cannot get such information from no less than nine other Aventine custodians using the "Manuel" search term it has proposed. If the Coop can provide such evidence upon its review of the emails, Aventine has already agreed to revisit the addition of these custodians. The Court should therefore deny the Coop's motion to compel Aventine to search the emails of Borgen and Godbout.

C. Mount Vernon "Turnover" Report Email Records Are Not Responsive To The Coop's Requests for Production

As the Coop admits, the Final Progression Order clearly envisioned that the parties would negotiate custodians and email searches only for the purpose of producing emails "in response to a request for production of documents pursuant to Federal Rule of Civil Procedure 34." (Filing

No. 50). Emails referencing Mount Vernon Turnover Reports are simply not responsive to any of the Coop's 38 requests for production of documents. Therefore, the Court should not require the production of such reports and should not require Aventine to undertake the unnecessary additional burden and expense of searching for them.

When the parties first started negotiating custodians and search terms in September, the Coop proposed the following search term: ("Mt. Vernon" or "Mount Vernon") and (production or capacity or capability or output or gallons or mgpy or gpy) or twin. Aventine objected to this search term because at best it would have generated documents responsive only to Plaintiff's Request for Production No. 21, which sought "Documents sufficient to show the rate at which ethanol has been produced at the Mount Vernon Ethanol Plant from December 1, 2010 to the present."³

Aventine had objected to Request No. 21 as seeking irrelevant material, and the request was one of the subjects of the Coop's initial motion to compel. Thus, this search term was one of a number of search terms proposed by the Coop on which Aventine took the following position:

³ The Coop's requests for production include only 5 other requests regarding the Mount Vernon facility:

Request No. 17: All agreements between you and any third party pursuant to which you undertook responsibility to site, design, construct, or equip the Mount Vernon Ethanol Plant.

Request No. 18: All agreements between you and Fagen, or between Fagen and its subcontractors, relating to the Mount Vernon Ethanol Plant.

Request No. 20: Documents sufficient to show all equipment removed from the Aurora West Ethanol Plant that was installed at the Mount Vernon Ethanol Plant.

Request No. 29: All press releases you have issued and all news articles or other media coverage you have collected relating to the Aurora West Ethanol Plant or the Mount Vernon Ethanol Plant, together with all records of interviews or statements relating to the Aurora West Ethanol Plant or the Mount Vernon Ethanol Plant that were given to the press by any of your employees or contractors.

Request No. 30: All documents related to your decision to fund development or operation of the Mt. Vernon Ethanol Plant, or any other facility owned and operated by you, as opposed to development or operation of the Aurora West Ethanol Plant.

The Mount Vernon turnover reports are not responsive to any of these requests.

After the Court rules on Plaintiff's Motion to Compel (Doc. No. 61) and Motion for Leave to Issue Non-Party Subpoena (Doc. No. 56), which orders will hopefully more clearly define the appropriate scope of discovery for this case, Defendants agree to revisit its positions on the appropriate custodians, search terms, and responsive documents.

(Filing No. 105-9).⁴

As already explained, after the Court ruled on the Coop's initial motion to compel, Aventine complied with its promise to revisit its positions on appropriate search terms and custodians. With respect to the Coop's Request for Production No. 21, Aventine informed the Coop that it "agreed to produce reports for Mount Vernon that shows the production levels on a more or less daily basis." (Filing No. 105-11 at 4). That fully satisfies the Coop's Request No. 21 demanding "Documents *sufficient* to show the rate" of ethanol production at Mount Vernon. The Coop never requested all documents related to production or operations at Mount Vernon, and as the Court recently confirmed, the deadline for issuing written discovery requests in this case is long past.⁵

The Coop also contends that the turnover reports are responsive to its Request No. 10, which sought documents Aventine "prepared, reviewed, or otherwise relied upon in anticipation of

⁴ The Coop complains that Aventine did not "object to running the Mt. Vernon search terms requested by Aurora Co-op on the grounds that they were outside Aurora Co-op's requests for production of documents." (Pltf's Motion, Filing 104, at 6). Aventine was clear from the start that it was objecting to the Rule 34 request as whole and that if the Court ruled that Aventine had to comply with the request, the parties would have to revisit search terms. In addition, Aventine specifically told the Coop that "[i]f ... an initial review indicates that the majority of documents being identified through the search are not responsive to Plaintiff's discovery requests, Defendants may seek to narrow the current search terms" and further "reserve[d] the right to assert any other appropriate objections to producing the documents collected in the search." (Filing No. 105-9).

⁵ As Aventine has earlier explained to the Court, the Coop previously rejected Aventine's suggestion that the parties hold open the written discovery deadline to be reset after the Court ruled on the Coop's motion to compel. (Filing No. 106 at 3-4). Aventine's precise point in those discussions was that the parties might want additional discovery after learning the Court's views on the scope of discovery in this case and after seeing initial document productions. The Coop instead stood firm and would not "agree to further extend the deadline for serving written discovery." (*Id.*). The Coop thus foreclosed its own right to serve additional written discovery that may have requested with particularity the turnover reports it now seeks.

operating the Aurora West Ethanol Plant.” If any turnover reports were in fact prepared, reviewed, or otherwise relied upon in anticipation of operating the Aurora West Ethanol Plant (i.e., responsive to Request No. 10), Aventine would have produced them. The Coop is not entitled to what it now seeks: all of these reports regardless of whether they are responsive to Request No. 10.

D. Conclusion

For all of the reasons set forth above, Aventine respectfully requests this Court to deny Plaintiff’s Motion to Compel Aventine to Search for and Produce Email Records.

Dated: February 5, 2014

Respectfully submitted,

s/ Allison D. Balus

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CERTIFICATE OF SERVICE

I certify that on February 5, 2014, I caused the below counsel of record in this action to be served with the foregoing by filing the document with the Court's CM/ECF system:

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