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2023 E-DISCOVERY CASE LAW YEAR IN REVIEW

Significant Decisions Related to the Practice of Electronic
Discovery, Information Governance, and Privacy

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Introduction

Winston & Strawn LLP's eDiscovery & Information Governance Practice is pleased to offer insights into the decisions and developments that took place in e-discovery, information governance, and privacy in 2023. We hope that the following summaries and information will continue to aid your understanding of these important and rapidly evolving areas of law, and we look forward to helping you stay abreast of upcoming developments.

As we look back on 2023, we perceive several important themes that we predict will carry forward into and take on even greater significance in 2024: collaboration and short-message format discovery, generative AI, modern attachments, document versions, and continued evolution of European data privacy regimes.

THE ONGOING SHIFT IN HOW WE COMMUNICATE

Procedural rules and case law generally lag the broad adoption of new technologies. Workers and consumers generally get very comfortable with a new way of communicating before those tools start coming to the frequent attention of judges. The rapid expansion of collaboration and instant messaging tools to facilitate communication—most often in addition to, rather than instead of, email—during the Covid-19 pandemic has somewhat short-circuited this typical cycle. 2023 saw a larger number of decisions involving the preservation and production of data from tools such as Teams, Slack, and Google Chat. Many courts are increasingly familiar with these tools (many are using them, after all) and increasingly comfortable with their complexities and nuances. *Lubrizol Corp. v. IBM Corp.* (page 41) is a good example, and touches on an arena we think will be of greater focus for litigants and courts in 2024 and beyond—unitization and grouping of short-format collaboration messages for purposes of production. Many observers have noted that an

increasing percentage of “substantive” business communications are occurring in these platforms; “IM” is not just for “quick and informal” communications anymore, and the rapid development of case law around these tools demonstrates that they are rapidly gaining similar primacy as sources of relevant evidence in litigation. The reality is that producing organizations will have to adopt processes and best practices for conducting preservation, collection, culling and review against such data sources. To that end, the industry and courts have yet to fully vet some of the more complex issues around these data sources, including production format and redactions.

CHATGPT AND THE RISE OF THE MACHINES

It is safe to say that in 2023, generative artificial intelligence took the world by storm. Headlines, academics, thought leaders, speakers, TV talking-heads, school children, and everyone in between, have heralded the rise of “generative” AI tools like OpenAI's GPT and wondered continually about how

these impressive technologies will change the way we work and create. Lawyers and legal technologists have been no exception, looking on these tools as a mixture of the inevitable evolution of mature technologies and magic. Large language models (“LLMs”) such as GPT3 & 4 and Bard, in particular, show the promise of being able to work wonders with tasks that have plagued legal budgets, seemingly able to analyze, parse, and summarize incredibly large volumes of text quickly. Since OpenAI’s ChatGPT3 chatbot became broadly available, many have questioned whether the legal field—and the role of the lawyer—will suffer seismic shocks as a result. In that sense, we believe a lot of what has been written is hype, confusion, and misinformation. A few observations:

The Good: With their ability to digest and discern patterns within large datasets of text, LLM tools offer the promise that they can and will be able to aid lawyers in tasks ranging from basic document review to deep factual and issue research to support case development, witness prep, and motions and trial research. We believe strongly that this role really will only be to aid lawyers in these tasks—not to replace them. But the same client concerns around troublesome facts, confidential and proprietary information, privilege, and overproduction of irrelevant documents that hindered broad adoption of TAR 1.0 are going to impact the adoption and widespread use of broadly focused AI tools. In addition, these tools are relatively immature as it relates to industry-specific applications, but they will improve quickly as the tools become trained for specific circumstances. In short, these technologies are likely to bring tremendous efficiencies and to have meaningful impact on legal budgets for both law firms and corporate legal departments.

The Bad: LLM technology is not a panacea (or bugaboo) for all things legal. Rather, generative AI is another tool, all of which have positives and negatives. By way of example, gen AI models create content based upon their training. The extent and

nature of that training is not transparent with most of these platforms, including the foundational models that many industry-specific tools and applications are being built upon. There are often multiple answers to the same question (even when a human brain is crafting the response) and the result can be probability-weighted according to the model’s training. Many of the most prominent models are strikingly inconsistent, offering varying, differing, or even contrasting responses to the same prompt. This contrasts with most mature machine-learning technologies used in the legal industry, which rely on algorithms that are well-understood, consistent, and trainable, and which provide results that are measurable for precision and recall. A generative AI engine, however, by its very nature is not measured to a standard of precision or recall—one cannot build such a measure of validation against the results.

Additionally, most current implementations are not fully containerized—that is, information given to the tool by the user does not remain contained within a single secure environment in which it was uploaded—including some tools that actually claim to be. Rather, text generally is transmitted out to a foundational LLM residing on a server outside the firewall of the user’s organization, be that a client, law firm, or service provider. This reality raises confidentiality, trade secrets, and privilege concerns for many clients. To the extent that each individual document cannot be tracked on this journey, and a record of complete destruction generated by the processing LLM, using these tools to analyze a third-party or opposing party’s production may also implicate the terms of most contemporary protective orders. To this end, we recommend litigants consider protective orders that limit whether, how, and under what circumstances a receiving party may use these tools with respect to highly confidential documents produced in litigation.

At this point, the ABA and the state bars are moving to form task forces and committees to provide guidance on the use of gen AI tools. It is likely to be

some time before clear guidance is provided and, thus, to some extent, law firms and organizations must adopt policies based upon now-known best practices—a landscape that shifts practically daily.

The Ugly: By now everyone knows that ChatGPT and other LLM tools can “hallucinate” and make up “facts” with a high degree of verisimilitude. The unfortunate case of a lawyer using ChatGPT to research case law and receiving multiple very real-sounding, properly formatted citations that did not actually exist is cautionary not just in that specific case. For one thing, for an ediscovery tool to be used to facilitate a document production, summarize pleadings or received documents, or research facts for deposition or trial prep, there is simply no room for the possibility of “hallucination.” That sort of inadvertent inaccuracy could have ramifications ranging from duplicated work and costs to loss on critical motions to sanctions for the client and attorneys involved. Perhaps worse, the uncanny appearance of truth that LLMs are capable of weaving could create opportunities for bad actors to mislead opposing parties and courts—deception that could be very costly and time-consuming to detect and cure, if it can be at all. Consequently, it is important when using such a tool to understand whether and to what extent guardrails are built in, as well as what independent validation is necessary in order to ensure that lawyers are operating consistent with their ethical obligations.

Cost is another very significant issue. Given that most (but *not* all of the early models being built for ediscovery) leverage one of the foundational models, the cost to use these models is very high – adding the potential of 10 to 50 cents *per document* to the cost of ediscovery. The result is that for the average case it is unlikely a litigant would be able to load the entire data set into the tool without significant costs. In response, various providers are suggesting alternative approaches for the use of these models in e-discovery to include using the models for document summaries, for identification of

training sets to be used in conjunction with TAR classifiers, or against only a subset of highly relevant documents. Over time, the cost will come down as providers pivot towards either cheaper, portable, or proprietary models that don’t necessarily leverage the more costly foundational models.

We are confident that the legal technology industry, practitioners, and courts will work their way through these and related issues. We suspect it’s going to be an interesting few years until the industry feels “settled” around the use of these technologies in the same way it does around the use of TAR, CAL, and other mature algorithmic tools. Enjoy the ride!

MODERN ATTACHMENTS, MODERN PROBLEMS

Last year, the issue commonly referred to as “modern attachments” gained substantial attention among the plaintiffs’ bar and the judiciary. “Modern attachments” refers to the practice of using a “link” or “hyperlink” to transmit a document with an email or chat message, as opposed to attaching a distinct copy of the document to the message. While the use of links has been around for years, it has gained popularity within the last year, particularly in the Microsoft 365 and Google Workspace application suites, which today more actively encourage linking to a document rather than attaching a copy.

Requesting parties are increasingly sophisticated about this issue given the proliferation of Microsoft 365 and Google Workspace over the last few years, and thus we have noted an uptick in requesting parties demanding that linked attachments be produced along with transmittal emails—in essence demanding that traditional email families be assembled from these pieces. Very sophisticated parties add the nuance that the attachment produced must be the same *version* of the document transmitted at the time of the email—not just the latest version in the client’s cloud storage.

Unfortunately, the ability to preserve, collect, and produce linked documents is not simple or

straightforward. Rather, depending upon the platform at issue, the mix of the organization's services, and the physical location of the documents, the organization may not have the ability to easily identify and produce linked documents; other clients may have only limited ability. For example, with the right mix of services and the right level of licensing, it may be rather easy within Microsoft 365 to export linked documents (even the precise linked version) from OneDrive or SharePoint along with transmitting emails. But the level of ease drops (and the level of cost rises) precipitously when an organization is not fully on Microsoft 365 or Google Workspace for all relevant services. For organizations using a mix of services that are not entirely within a Microsoft or Google instance, even to *identify* linked documents can be technically challenging and highly burdensome, leaving aside complex issues of possession, custody, or control that also may arise.

Only a handful of courts have addressed the issue of modern attachments to date, with no clear guidance as to whether there is a general obligation to make "traditional families" from "modern attachments." Most have focused squarely on whether RFPs and ESI protocols in the case required the production. See *Nichols v. Noom Inc.*, 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021) (ESI protocol interpreted not to require production of hyperlinked documents as attachments to cover emails); *In re StubHub Refund Litig.*, 2023 WL 3092972 (N.D. Cal. April 25, 2023) (page 67) (ESI protocol required production of hyperlinked documents as attachments to cover emails); *In re Meta Pixel Healthcare Litig.*, 2023 WL 4361131 (N.D. Cal. June 2, 2023) (page 66) (denying motion to compel entry of ESI protocol requiring defendant to produce hyperlinked documents with cover emails).

Given the rapid adoption of Microsoft 365 and Google Workspace in recent years, we believe more and more litigants and courts will grapple with this issue in the coming months.

VERSIONS UPON VERSIONS UPON VERSIONS UPON VERSIONS . . .

On the topic of versions, another incipient issue in ediscovery practice is the modern explosion of document versions. While some operating systems and cloud storage services have automatically saved incremental versions of documents for years, the rapid adoption of Microsoft 365 and the latter's setting versioning to "on" and "500 versions" by default in OneDrive and SharePoint (where it cannot be disabled) has brought versioning to many organizations that previously lacked the functionality. As a consequence, many organizations are now in possession of not just millions of documents, but hundreds of millions of traceable and retrievable versions of those documents. As noted above, we have already seen sophisticated requesting parties seeking retrieval of specific versions of documents in connection with email productions, confident in the knowledge that those versions remain available for collection. We have also begun to see requesting parties seeking all available versions of certain subsets of documents likely to be highly relevant to the issues in their cases. We perceive that this will be increasingly common in 2024 and beyond, and that requesting parties (aided by advancing AI tools) will seek ever larger subsets of documents as they become adept at mining version changes for relevant evidence. Responding parties who don't wish to drown in a sea of document versions will want to sharpen their burden and proportionality arguments when confronted with these requests, as quantifying both the volume of data and the workflow challenges of handling a large volume of similar documents will be important to convincing a court to grant relief.

EUROPEAN PRIVACY – UNCERTAINTY CONTINUES

E.U. GDPR: Last year brought significant changes to the international privacy scene. In the biggest news, the European Commission approved a mechanism for European companies to transfer protected personal data to US entities, the E.U.-U.S. Data

Privacy Framework (see page 84)—a spiritual successor to Privacy Shield. While this development carries substantial promise for E.U. based parties engaged in transatlantic business, uncertainties remain. First, it only applies to entities that fall within the regulatory ambit of the Federal Trade Commission or the U.S. Department of Transportation, excluding most U.S. companies. Second, privacy activist Max Schrems, whose lawsuits brought the original Safe Harbor program and its successor, Privacy Shield, to an end, has already announced an intention to challenge this newest regulation in court, so that companies may be hesitant to undertake the self-certification process until that challenge is resolved. And third, the restrictive eligibility requirements for U.S. companies render the Framework unavailable to assist E.U. based companies embroiled in U.S. litigation, as law firms and most legal service providers are not eligible to self-certify. We anticipate that many companies will continue to operate under the legacy mechanisms of Standard Contractual Clauses and Binding Corporate Rules until the Framework's status is well-settled and/or eligibility is expanded, despite the hardships that transfers under those mechanisms impose.

French Blocking Statute: The so-called “French Blocking Statute” (loi n°68-678 of July 26, 1968, modified by the Statute n°80-538 of July 16, 1980) prohibits the communication to foreign authorities of information that could harm the sovereignty of or the security of economic interests essential to France, unless the communication complies with an applicable international channel (Article 1). The French Blocking Statute also prohibits the collection and communication of information to be used as evidence in foreign proceedings (civil, administrative, or criminal) outside of an applicable channel, such as the Hague Convention on the Taking of Evidence Abroad (Article 1 bis).

There has been a lot of activity around the enforcement and impact of the French Blocking Statute as a result of amendments to the legal

framework of the French Blocking Statute in February and March 2022, and the allocation of additional regulatory funding for its enforcement.

Whereas the scope of the prohibitions and the criminal sanctions attached to the Statute remain unchanged, the amended framework added an obligation on French entities to notice any request for production of documents and information to the Strategic Information and Economic Security Service (SISSE). SISSE then issues an opinion on the application of the French Blocking Statute to the requested production, specifying the appropriate channel for communication. The opinion, which can be cosigned by the French Ministries interested (usually Justice, Foreign Affairs and Finances) can be shared with the foreign authorities (it is provided with a translation in the foreign language) and describes the appropriate channel to be used to communicate the requested information. In most U.S. civil and commercial cases, the Court will have to send a request for authorization to the French Ministry of Justice, in compliance with the Hague Convention.

This new framework is part of an effort by French authorities to strengthen the French Blocking Statute and have it recognized and respected by foreign authorities, especially U.S. Courts. While the French Government is willing to assist French companies to facilitate the production of information to foreign authorities (and encourages them to refer to the Statute as the “French Evidence Statute”), it also warned that it will prosecute any known violation.

In response to these changes, we have seen more companies seek the appointment of a commission under Article 17 of the Hague Convention as a procedural mechanism to facilitate compliance with the Statute and the transfer of evidence consistent with French sovereignty considerations. In short, we are seeing a resurgence in the Statute, but in a manner that generally allows a transfer. Parties should, however, anticipate that additional time will be required to address the procedural requirements of the Statute and the Convention.

Preservation, Spoliation, and Sanctions

The 2015 Amendments to Rule 37(e) were intended to enhance uniformity and predictability around the preservation burdens faced by parties to litigation, as well as to the types of actions that might lead to onerous sanctions. Some rule-makers and practitioners also believed they would have the effect of decreasing the frequency with which severe sanctions, now reserved for acts of intentional spoliation, would be doled out. As courts have become more familiar and confident in applying the framework of amended Rule 37(e), we increasingly see courts focused on and wrestling with, first, the kinds of conduct that rise to the level of reflecting “intent to deprive,” and, second, the nature and severity of “curative measures” short of sanctions where intent to deprive has not been shown. With respect to the former, we are concerned about a recent trend of case over the last few years that erode the language of Rule 37(e)(2) sanctions to conduct that falls short of destruction with “intent to deprive,” including a Court of Appeals decision that seemingly resurrects a pre-2015 amendments negligence standard for awarding jury instruction sanctions (*Rossbach v. Montefiore Medical Center*). The past few years have seen what we believe to be an inappropriate expansion of the use of evidentiary remedies in the context of Rule 37(e)(1) curative measures that appear to stand in contrast to the spirit and purpose of the 2015 amendments. We note that some highly respected judges have strong feelings to the contrary that such evidentiary relief under the “curative measures” prong of Rule 37(e)(1) are not only authorized but necessary in certain cases. The following cases address these and other issues relating to the imposition or denial of sanctions.

ACE AMERICAN INSURANCE CO. V. FIRST CALL ENVIRONMENTAL, LLC

#sanctions; #severe-sanctions; #preservation; #rule37; #intent-to-deprive; #adverse-inference

In *Ace American Insurance Co., et al. v. First Call Environmental, LLC*, 2023 WL 137456 (E.D. Pa. Jan. 9, 2023), United States District Judge John M. Gallagher granted the plaintiffs’ motion for spoliation sanctions. In the underlying litigation, the plaintiffs alleged negligence and breach of contract against the defendant, stemming from a fire that the plaintiffs alleged broke out because the defendant improperly remediated environmentally hazardous substances at the property of the plaintiff Bulk Chemicals.

During discovery, the plaintiffs’ Requests for Production sought, among other things, documents relating to the defendant’s “Daily Tailgate Safety Meetings.” These “Tailgate” documents were forms that the defendant’s employees would fill out and upload to a web-based application called Basecamp in order to identify hazards at a particular jobsite. Despite the defendant’s company policy requiring

the preparation and uploading of these documents, the defendant initially claimed “it had no responsive documents.” This claim crumbled when an employee deposition revealed he had completed and uploaded Tailgate documents relating to work at the plaintiff’s site, casting doubt on the defendant’s response. In addition, the defendant claimed its employees were not located near the fire, but the plaintiffs later produced surveillance footage of the facility showing one of the defendant’s employees located near where the fire started. This resulted in the defendant issuing a “corrected” narrative. Armed with evidence of missing ESI, misleading statements, and what appeared to be bad-faith conduct by the defendant, the plaintiffs moved for sanctions for spoliation of evidence.

Judge Gallagher first considered whether spoliation had occurred, and he concluded that it had. Specifically, he found that (i) the alleged spoliated ESI was in the defendant’s control; (ii) the ESI was clearly related to the plaintiffs’ claim of negligence; (iii) the defendant’s initial denial and subsequent

failure to produce the Tailgate documents constituted actual suppression or withholding of evidence; and (iv) the likelihood of litigation arising from the fire was reasonably foreseeable, thereby triggering a duty to preserve evidence. Notably, the defendant offered no explanation or justification for the loss of the Tailgate documents.

Having established spoliation, Judge Gallagher then considered whether an adverse inference sanction was appropriate, guided by four crucial factors. Though this analysis, Judge Gallagher found: (i) the defendant's high degree of fault due to its control of the missing documents, the defendant's lack of explanation for the documents' disappearance, and potential bad faith indicated by the defendant's "correction" of its initial false and misleading statements; (ii) the significant prejudice suffered by the plaintiffs due to the unique nature of the Tailgate documents and their potential demonstration of the defendant's awareness of fire hazards; (iii) the inadequacy of lesser sanctions in addressing the prejudice caused; and (iv) the need to deter similar behavior in future litigation by imposing a significant consequence. In light of the above, Judge Gallagher determined "an adverse inference against Defendant by way of jury instruction" was warranted and, as such, granted the plaintiffs' motion for sanctions. As Judge Gallagher explained, "Here, the Court finds an adverse inference is an appropriate sanction because it is narrowly tailored to Defendant's non-production of the Tailgate Documents and directly addresses any resulting prejudice to Plaintiffs. Because there is no lesser sanction that will avoid substantial unfairness to Defendant in this case, this factor weighs in favor of granting sanctions in the form of an adverse inference."

EDITOR'S NOTE

*This case, along with **Amann v. Office of the Utah Attorney General, et al.**, 2023 BL 395779 (D. Utah Nov. 2, 2023) and **Skanska v. Bagelheads**, 75 F.4th 1290 (11th Cir. Aug. 2, 2023), demonstrates that some*

courts are either equating "bad faith" with Rule 37(e)(2)'s "intent to deprive" requirement for severe sanctions for spoliation, or – if not making them interchangeable – using a finding that a party acted in bad faith as the basis for inferring the requisite intent to deprive. While this broader approach to the intent to deprive standard may only be followed by a minority of courts, parties should take note and research whether their court has adopted this "bad faith" standard.

AMANN V. OFFICE OF THE UTAH ATTORNEY GENERAL

[#sanctions](#); [#severe-sanctions](#); [#rule37](#); [#intent-to-deprive](#); [#text-messages](#)

In **Amann v. Office of the Utah Attorney General, et al.**, 2023 BL 395779 (D. Utah Nov. 02, 2023), United States District Judge Jill N. Parrish denied the plaintiff's and the defendants' cross-motions for sanctions for spoliation of ESI. The plaintiff sought entry of a default judgment; the defendants sought an adverse inference and adverse presumption instruction at trial. The plaintiff sued the defendants for wrongful termination, alleging violations of Title VII of the Civil Rights Act of 1964 and Utah's Whistleblower Act. The defendants countered that the plaintiff's termination was lawful, as it was based on his harassing a co-worker.

In the plaintiff's motion, he argued that a default judgment sanction was appropriate because the defendants failed to issue an adequate Legal Hold and that resulted in a failure to preserve relevant data. In response, the defendants claimed that the Legal Hold they issued was sufficient and that any relevant ESI that might not have been preserved was replaced and produced by alternative means. In the defendants' motion, they argued that sanctions are appropriate against the plaintiff because he deleted emails and text messages that are directly relevant to their defense. The plaintiff admitted to deleting the ESI, but argued that none of it was relevant.

Judge Parrish’s analysis began with an observation that the sanctions the parties sought through their motions were severe and that any decision to grant them required a finding of bad faith. Judge Parrish then walked through the evidence that each party presented to support their arguments and concluded that their respective motions were “deeply intertwined with issues of fact and credibility that will ultimately be decided by the jury” and, moreover, “the issue of the parties’ *bad faith* in the events leading up to this litigation (and bleeding into litigation conduct) will probably be among the most crucial questions for the jury to consider...” (emphasis in the original). Judge Parrish acknowledged the court’s inherent authority to sanction parties to litigation, but decided that where, as here, the question of whether either party acted in bad faith and the related questions of their motives and credibility were deeply fact-bound and fell squarely within the province of the jury, she would leave it to the jury to decide. As such, Judge Parrish denied both parties’ motions, explaining that “[r]ather than close the door through issuing terminating sanctions, the court will let this litigation run its proper course and part the parties to develop evidence and argument regarding the preservation or possible spoliation of evidence and make their case to the jury about what inferences should or should not be had from the production or non-production of evidence.”

EDITOR’S NOTE

*This case, along with **Ace American Insurance Co., et al. v. First Call Environmental, LLC**, 2023 WL 137456 (E.D. Pa. Jan. 9, 2023) and **Skanska v. Bagelheads**, 75 F.4th 1290 (11th Cir. Aug. 2, 2023), demonstrates that some courts are either equating “bad faith” with Rule 37(e)(2)’s “intent to deprive” requirement for severe sanctions for spoliation, or – if not making them interchangeable – using a finding that a party acted in bad faith as the basis for inferring the requisite intent to deprive. While this broader approach to the intent to deprive standard*

may only be followed by a minority of courts, including those in the 11th Circuit, parties should take note and research whether their court has adopted this “bad faith” standard. Here, Judge Parrish did not address the question of whether either party acted in bad faith and instead left it for the jury to decide. As such, we do not have the benefit of any guidance on the application of the bad faith standard to Rule 37(e)(2).

BUNGIE, INC. V. AIMJUNKIES.COM

#sanctions;

In **Bungie, Inc. v. AimJunkies.com, et al.**, 2023 WL 7184427 (W.D. Wash. Nov. 1, 2023), U.S. District Judge Thomas S. Zilly granted the plaintiff’s Rule 37(e) motion for sanctions for spoliation of evidence.

In the underlying litigation, the plaintiff claimed, among other things, that the defendants’ distribution of Cheat Software for the plaintiff’s Destiny 2 video games infringed the plaintiff’s copyright for same. Before filing suit, the plaintiff sent the defendants cease-and-desist letters that gave notice of the alleged infringement, identified forms of evidence to be preserved, and cautioned that spoliation of evidence could result in the plaintiff pursuing sanctions for same. After receiving the letters, the defendants nevertheless deleted various data relating to the Cheat Software, including, without limitation, records relating to the sale of the Cheat Software and images of Destiny 2 that the defendants used in their marketing of the Cheat Software. Indeed, one of the defendants admitted to wiping four hard drives with data relating to the Cheat Software. The instant motion seeks sanctions for this spoliation.

Judge Zilly’s analysis began by determining whether there had been spoliation. Guided by the factors from Rule 37(e), Judge Zilly found that (i) the destroyed evidence constituted ESI; (ii) the defendants had a duty to preserve the ESI; (iii) the defendants failed to take reasonable steps to preserve the destroyed evidence; and (iv) the

destroyed evidence was irretrievably lost, as demonstrated by the defendants' failure to alter automatic content deletion protocol or otherwise try to preserve relevant evidence and by one of the defendants' willful wiping of the hard drives.

Having found spoliation, Judge Zilly turned to deciding what type of sanctions were appropriate. Judge Zilly noted that sanctions under Rule 37(e): (i) require a finding that the loss of the destroyed evidence was prejudicial to the moving party; and (ii) where such prejudice is found, severe sanctions like adverse jury instructions or default judgments will only be allowed upon a further finding that the spoliating party acted with intent to deprive the moving party of the information's use in the litigation. Here, Judge Zilly first found the requisite prejudice to the plaintiff and, on the question of intent, found "substantial circumstantial evidence that Defendants acted with the requisite intent necessary to impose a severe sanction." As to the type of sanctions to order, Judge Zilly noted that when deciding the propriety of terminating sanctions, courts consider the following five factors: "(i) the public's interest in expeditious resolution of litigation, (ii) the court's need to manage its docket, (iii) the risk of prejudice to the party seeking sanctions, (iv) the public policy favoring disposition of cases on their merit, and (v) the availability of less drastic sanctions." Guided by these factors, Judge Zilly observed that although the defendants' spoliation was egregious, terminating sanctions were too severe and not supported by the factors referenced above or the evidence. Judge Zilly, therefore, concluded that the lesser sanction of an adverse jury instruction was appropriate and ordered that the plaintiff would be allowed to present evidence of the defendant's spoliation and, in addition, there would be an instruction to the jury that it may presume that the spoliated evidence was unfavorable to the defendants.

CONVERGENT DISTRIBUTORS OF TEXAS, LLC V. ALEXANDER CAPITAL, LP

#sanctions; #preservation; #esi-protocol; #rule37; #spoliation; #intent-to-deprive

In **Convergent Distributors of Texas, LLC v. Alexander Capital, LP**, 2023 WL 2751541 (S.D.N.Y. March 31, 2023), U.S. District Judge Jed S. Rakoff denied the defendant's motion for an adverse inference sanction for spoliation of ESI under FRCP 37(e)(2), but instructed the decision was without prejudice to requesting other appropriate relief under Fed. R. Civ. P. 37(e)(1) in their motions *in limine* or at trial.

The plaintiff, the assignee of claims in the bankruptcy proceeding of a pharmaceutical company called Inpellis, brought this adversary proceeding alleging breach of contract and fraud claims against the defendants related to their work on Inpellis's failed initial public offering. After discovery, the defendants filed the instant motion, seeking an adverse inference instruction under FRCP 37(e)(2) based on the plaintiff's failure to preserve Inpellis's server and the electronic records contained thereon after first suing the defendants.

Judge Rakoff's analysis focused on the specifics of Rule 37(e)(2), which explicitly limits a court's power to issue adverse inference instructions based on the failure to preserve electronically stored information to situations where the court finds that "the party acted with intent to deprive another party of the information's use in the litigation." Judge Rakoff reviewed the history of the Inpellis server and determined that the defendants had not demonstrated the requisite intent, but rather, had – at best – shown that the plaintiff was grossly negligent. Indeed, as Judge Rakoff noted, at no time after the Inpellis server first became the property of the bankruptcy trustee did the bankruptcy trustee or the plaintiff ever access, copy, review or preserve the server. Moreover, it appeared that the bankruptcy trustee either allowed a third party to

dispose of the server or placed it in a storage unit that it ultimately abandoned after representing to the bankruptcy court that the unit only contained “miscellaneous outdated records not necessary to the administration of the case....”

According to Judge Rakoff, while the record clearly demonstrated spoliation and negligence – if not gross negligence – it did not support any inference that the trustee or the plaintiff intentionally allowed the Inpellis server to be lost or destroyed so as to deprive the defendants of evidence contained thereon. And, as Judge Rakoff noted, absent the requisite intent, there was no basis for imposing a Rule 37(e)(2) adverse inference instruction. Judge Rakoff therefore denied the defendants’ motion, but also held that because the defendants had clearly demonstrated spoliation due to negligence – or arguably gross negligence – the denial was without prejudice to defendants seeking other relief via motions *in limine* or at trial.

IN RE: FACEBOOK, INC. CONSUMER PRIVACY USER PROFILE LITIGATION

#sanctions; #privacy; #privilege; #cooperation

In **In re: Facebook, Inc. Consumer Privacy User Profile Litigation**, 2023 WL 1871107 (N.D. Cal. Feb. 9, 2023), United States District Judge Vince Chhabria imposed monetary sanctions against the defendant and its outside counsel, finding that their conduct in discovery amounted to a sustained, bad-faith attempt to push the plaintiffs to settle for less than they would have otherwise. Judge Chhabria awarded the plaintiffs \$925,078.51 for fees and costs incurred due to the discovery misconduct.

The lawsuit alleged the defendant shared plaintiffs’ personal information with other companies. The parties reached a settlement for the underlying litigation in August 2022. However, the plaintiffs’ motion for sanctions remained pending. Judge Chhabria identified four areas of discovery misconduct. However, he only sanctioned the defendant and its counsel for two of those.

The defendant conducted an investigation to identify applications that might have misused private user information (the Application Developer Investigation or “ADI”). In discovery, the plaintiffs requested information relating to the ADI and the defendant objected, claiming that non-lawyer communications and documents created during the investigation were protected by the attorney-client and work product privileges, because the investigation would not have been conducted absent the threat of government investigation and civil litigation. An *in camera* review of a sample of the documents by a Magistrate Judge determined that the vast majority of the ADI documents were not privileged and the defendant needed to produce them. The Magistrate Judge ultimately held the defendant’s blanket assertion of privilege over the ADI documents was not appropriate and ordered production of a subset of the documents. Despite this, the defendant continued to withhold the ADI documents from production.

Confronted with the defendant’s continued withholding of the ADI documents, Judge Chhabria noted that a court may impose sanctions under its inherent powers when a party, among other reasons, has acted in bad faith. Judge Chhabria found that the defendant and its counsel should be sanctioned for “their repeated use of frivolous legal arguments to delay the production of highly probative evidence related to the App developer Investigation.” He clarified that he was imposing sanctions not for the defendant’s initial claim of blanket privilege over the ADI documents, but rather, for its conduct in response to the Magistrate Judge’s Order rejecting the defendant’s blanket assertion of privilege. Further, the Special Master had ordered the defendant to produce all documents related to the ADI communications, with exceptions for truly privileged attorney-client communications. Judge Chhabria found that the defendant’s continued delay and obfuscation amounted to bad faith in the face of these orders. Judge Chhabria also rejected the defendant’s argument that it need not collect

additional documents relating to the ADI beyond what it had already collected through 2019. Judge Chhabria determined that this argument amounted to bad faith in light of the Special Master’s Order since the ADI was known to have been ongoing during 2020. Judge Chhabria also found bad faith in the defendant’s refusal to use search terms such as “ADI” or “app Developer Investigation” to identify documents relating to the ADI.

Similarly, Judge Chhabria held that the defendant’s frivolous arguments justifying its delay in producing data of the named plaintiffs’ was also sanctionable . Judge Chhabria noted that the defendant was ordered three times over the course of two years to produce this data. Judge Chhabria highlighted that the named plaintiffs’ data was necessary to determine what specific information the defendant had shared with other companies. The defendant argued that it only needed to produce information it shared with other companies, and not information that it claimed it had not shared. Judge Chhabria rejected this argument, noting that withholding of these documents would conflict with the plaintiff’s rights to evaluate the veracity of the defendant’s assertions in litigation.

FREEMAN V. GIULIANI

#sanctions; #severe-sanctions; #default-judgment; #rule37; #intent-to-deprive; #spoliation

In **Freeman v. Giuliani**, 2023 WL 5600316 (D.D.C. Aug. 30, 2023), United States District Judge Beryl A. Howell granted the plaintiffs’ Rule 37(e) motion for sanctions in the form of an entry of default judgment. The underlying litigation is a defamation lawsuit filed by two Georgia election workers who alleged the defendant falsely accused them of fraud while counting ballots in the 2020 presidential election.

The record in this case is replete with examples of the defendant’s repeated efforts to thwart the discovery process at every turn, including repeated and willful failures to comply with his duty to preserve ESI. The procedural history that resulted in

the instant motion included multiple court orders requiring the defendant to explain his discovery conduct, including his efforts to preserve ESI, and requiring him to comply with applicable procedural rules. Unfortunately, the defendant’s responses repeatedly failed to provide information sufficient to assure the plaintiffs that all potentially relevant ESI had been preserved, and the plaintiffs – realizing they would never get a sufficient, straightforward response from the defendant – moved the court pursuant to Rule 37(e)(2) to sanction the defendant with an order of entry of default for his deliberate preservation and other discovery failures.

Judge Howell observed that “sanctions are warranted under Rule 37(e) when (1) [ESI] should have been preserved in the anticipation or conduct of litigation; (2) a party failed to take reasonable steps to preserve the ESI; (3) ESI was lost as a result; and (4) the ESI could not be restored or replaced by additional discovery.” Applying these criteria to the facts of his case, Judge Howell determined that sanctions were indeed warranted. Specifically, Judge Howell found that the defendant had a duty to preserve his ESI; that said duty arose by late 2020 to early 2021; that he failed to take reasonable steps to preserve his ESI; and that because of his failure, the ESI was “irretrievably lost.”

Having determined the threshold requirements were satisfied, Judge Howell turned to the question of whether the requested sanction – an entry of default judgment under Rule 37(e)(2) – was warranted. To decide this issue, Judge Howell considered the applicability of three well-established justifications for such sanctions: (1) whether the “errant party’s behavior severely hampered the other party’s ability to present his case”; (2) whether the “prejudice caused to the judicial system when the party’s misconduct has put an intolerable burden on a district court by requiring the court to modify its own docket and operations in order to accommodate the delay”; and (3) whether there was a “need to sanction conduct that is

disrespectful to the court and to deter similar misconduct in the future.” Judge Howell determined that each justification applied to the instant litigation. Specifically, he found that the defendant’s failure to preserve his ESI and his failure to otherwise comply with the court’s orders severely hampered the plaintiffs’ ability to prove their claims, wasted the plaintiffs’ time, significantly delayed the litigation, and forced the expenditure of significant judicial resources that never improved the defendant’s discovery compliance. Moreover, Judge Howell further found that the defendant’s repeated flaunting of his discovery obligations despite his admitted 50 years of experience as an attorney, demonstrated “utter disrespect” to the court and supported a need to deter further non-compliance. Based on these findings, Judge Howell held that an entry of default was warranted and granted the plaintiffs’ motion.

FLUOR FEDERAL SOLUTIONS, LLC V. BAE SYSTEMS ORDNANCE SYSTEMS, INC.

[#sanctions](#); [#esi-protocol](#); [#rule37](#); [#motion-to-compel](#); [#rule26](#)

In **Fluor Federal Solutions, LLC v. BAE Systems Ordnance Systems, Inc.**, 2023 BL 39241 (W.D. Va. Feb. 7, 2023), United States Magistrate Judge Robert Ballou denied the plaintiff’s motion for sanctions to recover costs for re-deposing five witnesses after the defendant belatedly produced nearly 80,000 documents mistakenly withheld due to a vendor error. The underlying construction dispute included voluminous document productions and a contentious discovery process.

On June 3, 2022, Judge Ballou granted the defendant’s motion to amend the scheduling order to extend the discovery deadline from June 16, 2022 to September 16, 2022. On June 8, 2022, the defendant discovered a vendor de-duplication error had caused an under-production of documents, which it disclosed on June 16. Judge Ballou held an informal discovery conference regarding this error on July 14, 2022, and ordered the defendant to

make rolling productions of the documents, to be completed by August 1, 2022. The defendant ultimately produced over 79,000 additional documents prior to August 1, 2022; however, the belatedly produced documents resulted in the plaintiff re-deposing five fact witnesses. The plaintiff sought to recover the costs and fees it incurred to prepare for and take those depositions pursuant to Federal Rules of Civil Procedure 16 and 37(c)(1).

Judge Ballou’s analysis focused on three questions: 1) whether a party had violated a discovery order or the FRCP; 2) whether the violation was harmless or substantially justified; and 3) what sanction was appropriate for the violation. In determining whether the defendant had violated a discovery order or Rule, Judge Ballou noted that FRCP 26(e) requires a party to timely disclose relevant information during discovery and to provide timely supplementation “if the party learns that in some material respect the disclosure or response is incomplete or incorrect.” Judge Ballou also highlighted that FRCP 16(f)(1)(C) allows a court to impose sanctions if a party fails to obey a scheduling order.

Judge Ballou further observed that sanctions are appropriate under FRCP 37(c)(1) if a party fails to provide information in discovery as required by the FRCP, “unless the failure was substantially justified or is harmless.” Judge Ballou then laid out the Fourth Circuit’s five-factor test to determine the appropriate sanction to impose under Rule 37(c)(1): (1) the surprise to the party against who the evidence would be offered; (2) the ability of the party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the discovery; and (5) the explanation of the non-disclosing party for its failure to provide the discovery.

The plaintiff argued sanctions were appropriate under Rules 16(f) and 37(c) because the defendant failed to “timely” supplement its production in and failed to have reasonable procedures in place to locate and produce responsive documents. The

defendant countered that it did not discover the vendor error until after the Scheduling Order was amended, and that it did not violate the Scheduling Order because it completed its production more than a month before the close of discovery. The defendant further argued that it did not violate its Rule 26(e) duty to supplement its discovery responses because it quickly notified the plaintiff of the de-duplication issue.

Judge Ballou agreed with the plaintiff that the documents belatedly produced were untimely because they would have been produced earlier in discovery if not for the error. He further noted that the vendor's error was ultimately the defendant's responsibility. Nevertheless, Judge Ballou declined to impose sanctions under the Fourth Circuit's five-factor test.

Judge Ballou reasoned that while the production was untimely and a surprise, the defendant immediately notified the plaintiff of the error and cured the surprise by producing the documents before both the court's deadline and the close of discovery, without impacting other deadlines or the trial date. Judge Ballou also held the defendant's actions after recognizing the vendor error were consistent with Rule 26(e). He found that the defendant promptly notified the plaintiff and the court of the error, timely supplemented its production, and allowed the re-deposition of witnesses that the Plaintiff had identified. Judge Ballou opined that the re-depositions were the only sanction he could apply under the circumstances and, thus, no additional sanctions were warranted.

GLOBUS MEDICAL, INC. V. JAMISON

#sanctions; #signal; #ephemeral-messaging; #privacy; #rule37; #preservation

In **Globus Medical, Inc. v. Jamison**, 2023 WL 2127410 (E.D. Va. March 10, 2023), United States Magistrate Judge Lawrence R. Leonard denied the plaintiff's motion for sanctions under Rule 37(e)(2)

based on the defendants' use of the Signal messaging application.

In the underlying litigation, the plaintiff filed suit against several former employees alleging breaches of non-compete, non-disclosure, and non-solicitation agreements (NCNDAs). As part of its case, the plaintiff argued that the defendants' use of Signal, an encrypted messaging application that "allow[s] users to permanently hide the content of their messages and/or that they even sent them," constituted spoliation of evidence and warranted sanctions. Specifically, the plaintiff sought an adverse inference—a presumption that any lost communications were harmful to the defendants' case. The defendants countered that they used Signal solely for patient privacy, not to hide potential NCNDA violations. They also noted that only two of the defendants used Signal's auto-delete feature, and they produced 178 pages of messages from the other defendants – including messages involving the two defendants who had activated the disappearing messages feature. They challenged the claim of "lost" evidence and argued the plaintiff could not show any actual prejudice.

Judge Leonard sided with the defendants and denied the motion for sanctions. He based his decision on the four-part test outlined in Rule 37(e) for determining if sanctions are appropriate for failure to preserve electronic evidence (ESI). The plaintiff, he ruled, failed to establish at least two of the required elements: that ESI had been lost and that the ESI could not be restored or replaced through additional discovery. Specifically, Judge Leonard was not convinced that any information was truly lost for the five defendants who simply used Signal without activating the auto-delete feature. And, as to the two defendants who had activated the feature, Judge Leonard observed that the plaintiff had failed to prove that the messages were irretrievable. Indeed, to the contrary, the produced messages included copies of the deleted messages, sourced from the accounts of the other five defendants. Moreover, and importantly, Judge

Leonard highlighted the plaintiff's failure to produce any evidence that there was reason to believe additional messages were missing. This, Judge Leonard emphasized, was a critical failure. He even suggested ways the plaintiff could have strengthened its case, such as deposition testimony or questioning other defendants about potential Signal communication during the relevant period.

In light of these findings, Judge Leonard concluded that the plaintiff had failed to "establish the first requirements of Rule 37(e)" and, as such, denied the plaintiff's motion for sanctions.

EDITOR'S NOTE

This case illustrates the challenges of proving spoliation with encrypted messaging apps. It underscores the importance of concrete evidence to demonstrate both the loss of information and its potentially damaging nature. For parties considering similar claims, this case sounds a cautionary note, emphasizing the need for a robust approach to gathering evidence and convincing the court of its irretrievability before seeking sanctions.

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION

#sanctions; #severe-sanctions; #spoliation; #preservation; #instant-messages; #collaboration; #intent-to-deprive

In **In re Google Play Store Antitrust Litigation**, 2023 WL 2673109 (N.D. Cal. March 28, 2023), United States District Judge James Donato awarded sanctions against the defendant for spoliation of chat data. The defendant used Google Chat for internal instant messaging and observed a long-standing policy of automatically deleting chat messages after 24 hours. That short period could be extended indefinitely if the user changed an individual chat thread to "History On." Importantly, the defendant did not automatically switch all chat threads to "History On" for employees who were placed on legal hold, instead relying on individual employees to change the setting for chats that could be relevant to litigation. Further, even when a thread was changed to "History On," employees—including

those on legal hold—retained the ability to delete individual messages or whole threads.

Judge Donato found that the defendant's failure to take reasonable steps to preserve chat data was intentional and designed to shield communications from discovery. First, Judge Donato rejected the notion that Google Chat was used as a "social outlet akin to an electronic break room." While the defendant asserted that Google Chat was "typically" used for quick, one-off questions or personal discussions, the Court found that the evidence indicated Google Chat was used to discuss "substantive business topics." Thus, the Court found that evidence potentially relevant to the litigation may not have been preserved.

Judge Donato also found it problematic that the choice of whether to preserve Google Chat messages was left to employees. He observed that approximately 360 individuals were subject to litigation hold for the case, and around 40 were designated as custodians. However, even though the defendant had the technical capabilities to preserve Chat history for all those employees, it declined to do so and instead permitted the employees to decide which, if any, of their chats should be preserved. Judge Donato described this as a "carte blanche" arrangement and pointed out an "obvious danger of this approach" is that employees may not be able to discern which communications should be preserved.

Judge Donato also noted the defendant's questionable compliance with data preservation requirements. He observed that testimony by the defendant's employees indicated that they may not have been able or willing to comply with litigation holds requiring them to preserve their Chat communications. For example, one employee testified that he "believed that he could comply with Google's document preservation obligations by creating and preserving a summary of a substantive business communication rather than preserving the actual communication itself." In another example,

which the Court referred to as a “highly spotty practice[],” an employee said he was aware of being subject to litigation holds but still chose not to preserve relevant chats. When another employee brought up the litigation holds, the employee responded, “Ok maybe I take you off this convo.” Judge Donato observed that little effort was made by the defendant’s legal or compliance teams to supervise or enforce preservation obligations, likening the defendant’s approach to “don’t ask, don’t tell.” He noted that “Google did not check to see if custodians were actually preserving relevant Chats as directed by the hold notice, and did nothing in the way of auditing or monitoring Chat preservation.” The Judge found that this decision “aggravated the situation.”

On the whole, the Court concluded that the record supported the finding that “Google intended to subvert the discovery process, and that Chat evidence was ‘lost with the intent to prevent its use in litigation’ and ‘with the intent to deprive another party of the information’s use in the litigation.’” The Court awarded reasonable attorney’s fees and costs to the plaintiffs for bringing the motion for sanctions. However, Judge Donato withheld ruling on a sanction for intentional spoliation under Rule 37(e)(2). Instead, Judge Donato ruled that he “would like to see the state of play of the evidence at the end of fact discovery” before making a decision about an appropriate sanction.

EDITOR’S NOTE

While it sparked panic in the legal departments of many organizations wrestling with the burden of preserving and producing chat data, we do not believe this decision stands for the proposition that all chat data must be preserved in the course of every litigation. Judge Donato started with relevance, finding that relevant communications were made using Google Chat as a matter of fact. He also was convinced not merely that the defendant did not have adequate policies in place to mitigate unintentional loss, or that it simply had

erred in failing to properly preserve a marginal data source, but rather that the defendant’s technical ability to properly and universally preserve the communications at issue rendered its failure to do so a conscious choice to shirk its preservation obligation. Taken together, we think the cautionary note struck by this decision is a reminder that managing attorneys and litigators should work hard to get a real, thorough, and honest understanding of how their clients’ employees are using communication and collaboration tools, including chat, and from there to make conscientious decisions about the level of intervention necessary—consistent with the principles of proportionate and reasonable preservation—to make sure that relevant communications are not lost. This said, we believe this case may be cited (right or wrong) for the broader inference that a failure to adopt automated preservation strategies with respect to a category of ESI—when such tools are plausibly available—is evidence of failure to take reasonable steps to preserve that ESI, and may also be taken as evidence of intentional destruction. Practitioners will want to think carefully about how to clarify and distinguish this decision, which is characterized by complicated facts and a muddy record.

HUNTERS CAPITAL, LLC V. CITY OF SEATTLE

#sanctions; #severe-sanctions; #adverse-inference; #rule37; #intent-to-deprive; #spoliation; #text-messages; #curative-measures; #evidence-instruction

In **Hunters Capital, LLC, et al. v. City of Seattle**, 2023 WL 184208 (W.D. Wash. Jan. 13, 2023), United States District Judge Thomas S. Zilly granted in part and denied in part cross-motions for sanctions for mobile device data spoliation. Judge Zilly denied the plaintiffs’ request for an entry of default judgment, but granted their alternative request for adverse inference instructions against the defendant. And he denied the defendant’s request for an adverse jury instruction, but agreed to allow the defendant to

present evidence of spoliation by one individual plaintiff.

The case related to organized “occupy” protests that took place in Seattle in June and July 2020. The plaintiffs—local property and business owners—alleged that the protests caused them economic harm and, in addition, that the defendant’s employees supported and encouraged the protests to the plaintiffs’ greater detriment. During discovery, it emerged that parties on both sides had a “missing text messages” issue, and the cross-motions for sanctions followed.

On the defendant’s side, several key city officials, including the Mayor and Chief of Police, failed to preserve text messages related to the protests and the plaintiffs’ claims. Notably, between the time that the plaintiffs sent preservation letters to the defendant and the dates the defendant issued legal holds, the key officials deleted thousands of text messages. The defendant argued that a finding of spoliation was inappropriate, pointing to its repeated issuing of legal holds to its employees and its efforts to replace the missing messages with collections from other employees, and noting that Rule 37(e) does not call for perfection. Judge Zilly, however, disagreed. He observed that the key officials’ blatant disregard for the legal hold notices and subsequent deletion of thousands of relevant text messages, the fact that the direct exchanges between these key officials could not be replaced or restored, the defendant’s failure to follow its own protocols to preserve the data, and its delay in notifying the plaintiffs of the missing data all added up to a failure to take reasonable steps to preserve. As Judge Zilly noted, such conduct “was much more egregious than a failure to achieve perfection.”

Judge Zilly then addressed whether sanctions were warranted. Judge Zilly observed that, under Rule 37(e), where a court finds ESI has been lost, it may impose sanctions if the moving party was prejudiced by the loss, or, upon a finding of intent to deprive a party of the information’s use in the litigation, it may

impose severe sanctions such as a default judgment or an adverse inference instruction. Judge Zilly determined there was significant evidence to support a finding of the requisite intent to deprive, but concluded that it was only circumstantial and, therefore, did not support the severe sanction of an entry of default. As such, Judge Zilly held that the lesser sanction of an adverse inference jury instruction was appropriate and held that he would “issue an adverse instruction at trial that the jury *may* presume that the city officials’ text messages (deleted after Plaintiffs commenced this action) were unfavorable to the City.” He further ruled that the plaintiffs would be allowed to present evidence and argument at trial about the defendant’s deletion of the text messages.

On the plaintiffs’ side, while most of the missing messages were deemed non-actionable, Judge Zilly found that the missing messages associated with one of the individual plaintiffs prejudiced the defendant and held that he would allow the defendant to present evidence and argument at trial regarding these missing messages.

JENNINGS V. FROSTBURG STATE UNIVERSITY

[#sanctions](#); [#preservation](#); [#rule37](#); [#spoliation](#); [#intent-to-deprive](#); [#text-messages](#)

In **Jennings v. Frostburg State University**, 2023 WL 4567976 (D. Md. June 27, 2023), United States District Judge Ellen L. Hollander denied the plaintiff’s motion for sanctions despite finding that the defendants had spoliated evidence from the mobile phones of two custodians.

In the underlying dispute, the plaintiff raised claims for disability discrimination, retaliation, and failure to accommodate. The plaintiff moved for spoliation sanctions alleging that just before the close of discovery, the defendants produced an affidavit indicating that they had destroyed the text messages for two discovery custodians.

Judge Hollander observed that the motion was governed by Rule 37(e), first addressing whether the text messages at issue should have been preserved at the time they were erased. Judge Hollander provided that the duty to preserve evidence begins “somewhere between the knowledge of the dispute and direct, specific threats of litigation.” He noted that events that trigger the duty to preserve include receipt of a demand letter, receipt of a preservation demand, a threat of litigation, or notice that a potential plaintiff filed an EEOC charge.

Although the plaintiff filed an EEOC charge on March 19, 2019, the plaintiff argued that the defendants should have reasonably anticipated litigation in November 2018 when he sent a letter challenging their decision to not renew his employment. Judge Hollander agreed with the plaintiff that the defendants should have reasonably anticipated litigation as early as November 2018. Judge Hollander reasoned that the plaintiff’s November 2018 letter explicitly mentioned discrimination. The defendants further admitted that one of its employees expressed concern that the plaintiff’s termination might not be defensible in court. Moreover, within days of receiving the plaintiff’s letter, the defendants’ leadership sought legal advice from its in-house counsel. Because the facts showed that the plaintiff raised the issue of discrimination in his 2018 letter and because of the defendants’ actions in response to that letter, Judge Hollander concluded that the defendants’ duty to preserve relevant information was triggered upon receipt of the plaintiff’s November 2018 letter. Further, because the two cell phones were erased prior to this date, and because the defendants did not implement a litigation hold until 2021, Judge Hollander concluded that the cell phone data should have been preserved, but was not.

Judge Hollander then addressed whether the defendants destroyed the evidence with a culpable state of mind as is required to impose spoliation sanctions under Federal Rule of Civil Procedure

37(e). Judge Hollander noted that under Rule 37(e), a court may only impose sanctions “upon finding that the party acted with the intent to deprive another party of the information’s use in litigation.” Judge Hollander interpreted the “intent to deprive” as requiring willful or intentional conduct. Moreover, Judge Hollander stated that the burden to demonstrate intent is on the moving party.

The plaintiff argued that the cell phone data was improperly deleted, and that the intent element was satisfied by its leadership conferring with in-house counsel. However, Judge Holland found that the plaintiff was arguing that the defendants failed to preserve evidence, rather than arguing that the defendants had destroyed evidence. Because of her reliance on the plaintiff’s arguments, Judge Holland found that the conduct at issue was the defendants’ failure to implement proper litigation hold, rather than intentional destruction of evidence. Judge Holland then noted that courts have generally considered the failure to implement a litigation hold gross negligence. Accordingly, Judge Holland declined to award the plaintiff sanctions, holding that he failed to carry his burden to demonstrate that the defendants intended to deprive him of the cell phone data.

JOHNSON V. COOS COUNTY

#sanctions; #severe-sanctions; #preservation; #default-judgment; #rule37; #intent-to-deprive; #spoliation; #email

In **Johnson v. Coos County, et al.**, 2023 WL 4002680 (D. Ore. June 14, 2023), United States District Judge Ann Aiken granted the plaintiff’s for sanctions and awarded a terminating sanction against one of the defendants. The underlying litigation is a wrongful death action arising out of the death of an inmate at Coos County Jail. The motion was directed to the defendant medical service provider whose nurse was on duty at the jail the night the inmate was booked.

The undisputed facts show that (1) “an evidence preservation letter and tort claim letter” were sent to

all defendants; (2) the defendant medical services provider received these letters, but never issued a litigation hold; (3) since the inmate's death and the transmission of the letters, the defendant medical services provider implemented two email purges that resulted in the destruction of relevant emails, including those of the nurse, her manager, and other custodians; (4) once purged, the emails were permanently deleted and not recoverable; and (5) despite numerous opportunities to reveal the truth about the email purges, the defendant medical service provider concealed that information from both the plaintiff and the court for several months. Based on these facts, and applying Rule 37(e), Judge Aiken readily determined that spoliation had occurred. Specifically, Judge Aiken held that the defendant had a duty to preserve the emails courtesy of the evidence preservation letter and the tort claims letter; the defendant's failure to issue a litigation hold following receipt of the letters clearly demonstrated a failure to take reasonable steps to preserve the email; the defendant's two email purge events resulted in the destruction of all email for the relevant custodians; and, finally, those emails were neither recoverable nor replaceable.

Having found spoliation, Judge Aiken turned to the question of sanctions, focusing on whether the defendant had intentionally destroyed the ESI. Judge Aiken's analysis relied on *Estate of Moreno v. Correctional Healthcare Companies*, 2020 WL 5740265 (E.D. Wash. June 1, 2020), a case with several similarities to the instant matter. For example, both involved the death of an inmate while in custody; both involved the same defendant medical services provider; both involved the same email purges that resulted in the destruction of most, if not all, of the defendant's relevant emails after receiving a document preservation request; and both involved the defendant concealing the email purges through early discovery, resulting in motions to compel. Relying on these facts, together with testimony from the defendant's corporate officers that the motivation for the email purges was, "in part, to avoid

the discovery of bad emails in litigation," the *Moreno* court found the defendant's destruction of ESI had been intentional. Relying on *Moreno*, Judge Aiken found that, here, too, the defendant's email destruction was intentional.

Rather than immediately ordering the terminating sanction, Judge Aiken first analyzed the propriety of such a harsh penalty using the factors that the Ninth Circuit established in *Leon v. IDX Systems Corp.*, 464 F.3d 951 (9th Cir. 2006): (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; and (4) the public policy favoring disposition of cases on their merits. Applying these factors, Judge Aiken concluded that they weighed in favor of a termination sanction. The defendant urged Judge Aiken to consider alternative penalties, but Judge Aiken explained that absent this severe sanction, the defendant might continue with its deceitful misconduct. Indeed, as Judge Aiken noted, the defendant's "deceptive misconduct in this case continued unabated despite the imposition of a default sanction in *Estate of Moreno* for essentially the same misconduct." As such, Judge Aiken granted the plaintiff's motion, entered default judgment against the defendant medical care provider, and ordered that the matter would proceed to trial against the defendant to determine damages.

KELLY V. FASHION NOVA, INC.

[#sanctions](#); [#evidence-instruction](#); [#rule37](#); [#intent-to-deprive](#); [#spoliation](#); [#youtube](#)

In **Kelly v. Fashion Nova, Inc.**, 2023 WL 8006877 (C.D. Cal. Oct. 30, 2023), United States District Judge Rozella A. Oliver granted the defendant's motion for sanctions for spoliation, concluding that plaintiff failed to take reasonable steps to preserve, and went as far as to intentionally delete, YouTube videos identified as evidence.

In connection with an underlying claim for patent and trademark infringement, the parties turned to

YouTube videos for evidence. The defendant identified five YouTube videos on a channel associated with the plaintiffs that it wanted to use as extrinsic evidence in its defense. Defendant's counsel notified the plaintiffs of its intention to use the videos. However, two months later, the videos were unavailable, evidently having been "removed by the uploader." The defendant accordingly moved for sanctions for spoliation pursuant to Federal Rule of Civil Procedure 37(e).

Judge Oliver explained that once the defendant placed the plaintiffs on notice of its intention to use the videos as evidence, the "[p]laintiffs had a duty to preserve to this evidence to the extent [the plaintiffs] had access to, or indirect control over, such evidence." Here, the plaintiffs failed to take reasonable steps to preserve the videos. Judge Oliver found that it was irrelevant that a third party had created the videos. Provided that the plaintiffs had the ability to access and review the YouTube channel in question and knew of the defendants' intention to use the videos as evidence, the plaintiffs "should have taken reasonable steps to preserve the videos."

Judge Oliver also determined that the plaintiffs acted with the intent to deprive, noting that "intent may be inferred where a party is on notice that documents potentially are relevant but failed to take the steps necessary to preserve them." Judge Oliver provided that relevant factors used to determine intent include (1) the timing of the deletion; (2) the method of deletion (automatic vs. affirmative); (3) selective preservation; (4) the reason some evidence was preserved; and where applicable, (5) the existence of institutional policies on preservation. Judge Oliver found the timing of the vanishing videos to be suspicious. The videos had been available on YouTube for 11 years, but within two months of the defendant informing the plaintiffs of its intent to use the videos as evidence, they disappeared. Moreover, Judge Oliver also noted evidence of selective preservation. "The one video

[the plaintiffs] relied on for their claim construction was never deleted, whereas all five of the video identified by [the defendant] as extrinsic evidence were deleted..." This inconsistency led Judge Oliver to conclude that the plaintiffs acted with the intent to deprive.

Turning to prejudice, Judge Oliver stated that, "[a] finding of intent can support an inference that the opposing party was prejudiced by loss of information that would have favored its position." No further finding of prejudice was required.

Although Judge Oliver did not believe the plaintiffs' actions warranted dismissal, she nonetheless determined that, at trial, the defendants would be entitled to present evidence regarding the lost videos, and the Court would recommend to the jury that it may presume that the lost videos were unfavorable to the plaintiffs. Judge Oliver also rejected the plaintiffs' argument that the Court should consider its lack of sophistication when imposing sanctions. Judge Oliver stated, "[t]his is not a case of an individual making a determination of legal relevance or losing ESI due to automatic deletion, where the lack of legal or technical sophistication might play a significant role." Instead, the plaintiffs were represented by counsel and had affirmatively deleted the videos, so the plaintiffs could not blame deletion on a lack of technical knowledge.

LAMB. V. LIBERTY UNIVERSITY

[#sanctions](#); [#severe-sanctions](#); [#dismissal](#); [#rule37](#); [#intent-to-deprive](#); [#spoliation](#); [#text-messages](#); [#email](#); [#cloud](#)

In **Lamb. v. Liberty University**, 2023 WL 2172729 (W.D. Va Feb. 22, 2023), United States District Judge Norman K. Moon granted the defendant's Rule 37(e)(2) motion for sanctions for spoliation of ESI. The sanction sought was a denial of the plaintiff's motion to amend the complaint. The underlying litigation is a lawsuit for wrongful termination. Since the court had previously dismissed the plaintiff's first amended complaint for failure to state a claim, the

sanction requested and awarded in this case — the denial of the plaintiff’s motion to file an amended complaint — effectively dismissed the plaintiff’s lawsuit with prejudice.

Key to the defendant’s argument was an agreed-upon protocol for producing devices containing potentially relevant data. This included laptops, cell phones, external media, and the plaintiff’s Evernote account. Upon analysis by an independent expert, the produced devices revealed a disturbing picture. Specifically, the expert’s report showed that (i) the devices hadn’t been used before the plaintiff’s termination, suggesting premeditation in data storage; (ii) only data downloaded from Evernote after termination was present, casting doubt on completeness; and (iii) significant data from the Evernote account seemed missing, raising suspicion of deletion.

During an earlier hearing, the plaintiff admitted (i) that he used other devices (another laptop and a thumb drive) to access the data and copy it to the devices he produced; (ii) that rather than producing the other devices, he destroyed them; and (iii) that he deleted files from his Evernote account. The plaintiff also confirmed that the cell phone was new and admitted that, after being terminated, he had turned in his old phone to his carrier in exchange for a new one and did not copy any of the information to the new phone. To defend his actions, the plaintiff claimed that he had copied and deleted Evernote data to reduce the volume of data that needed to be analyzed to minimize costs; that his old phone did not have any work-related emails because the company shut down his email after firing him, and it did not have any relevant texts because he typically deleted them; and that he thought his actions complied with his obligations under the Protocol.

Judge Moon found the plaintiff’s explanations, including cost concerns and irrelevance, unconvincing and determined that the evidence supported a finding that the plaintiff failed to take reasonable steps to preserve the missing ESI and

also that the plaintiff acted with intent to deprive so as to satisfy Rule 37(e)(2). Specifically, Judge Moon observed that the inconsistencies and oddities in the plaintiff’s testimony (including the asserted belief of conformity with the Protocol) demonstrated a lack of credibility and good faith by clear and convincing evidence, that the plaintiff knew his actions were outside the bounds of the law when he destroyed the evidence, and that the plaintiff did so with the purpose of depriving the defendant of the use of that evidence in this litigation.

Judge Moon then turned to “the only outstanding element”—“whether the missing evidence can be restored or replaced by the parties’ good faith efforts.” Judge Moon examined the evidence of the significant effort undertaken by the defendant to determine whether the missing ESI could be restored or replaced—including subpoenaing third parties, pursuing forensic analysis, and directing interrogatories to the plaintiff—and ultimately determined that despite these extensive recovery efforts, “a significant amount of the ESI at issue could not be restored or replaced through additional discovery.” Based on this conclusion, Judge Moon granted the defendant’s requested sanction of denying the plaintiff’s motion to amend his complaint. This effectively dismissed the lawsuit with prejudice, a severe consequence for the plaintiff’s failure to properly preserve evidence.

MCLAUGHLIN V. LENOVO GLOBAL TECHNOLOGY

#sanctions; #severe-sanctions; #rule37; #preservation; #adverse-inference; #intent-to-deprive; #forensic-exam; #spoliation; #email; #evidence-preclusion

In **McLaughlin v. Lenovo Global Technology**, 2023 WL 4602089 (D. Mass. July 18, 2023), United States Magistrate Judge Judith G. Dein granted in part and denied in part the defendant’s motion for spoliation sanctions, based on a finding that the plaintiff had intentionally wiped his company-issued laptop clean before returning it, potentially compromising crucial data in his lawsuit against Lenovo for unpaid commissions and expenses.

Following termination in 2020, the plaintiff filed suit seeking reimbursement for claims dating back to 2017, exceeding the company's five-day policy limit. Recognizing the laptop's potential evidentiary value, Lenovo repeatedly requested its return, emphasizing that employee laptops housed critical data such as emails and calendar items, and they were likely irretrievable if wiped. Despite these warnings, the plaintiff wiped the laptop, claiming he transferred some data to external SD cards before returning it. After the plaintiff produced the laptop and an SD card, the defendant's forensic examiner determined that the laptop's hard drive had been wiped clean or was brand-new. In addition, the examiner could not find any .pst files containing emails or calendar items. In response, the plaintiff produced a second SD card containing calendar items. The examiner concluded that the .pst file was not identical to the one maintained on the defendant's servers. The defendant filed the instant motion for spoliation sanctions, seeking either an entry of default or, alternatively, an order precluding the plaintiff from "(1) relying on any documents, emails, or calendar entries copied from the laptop in attempting to prove his claims to unpaid commissions and business expenses, (2) relying on the expense reports he supposedly created in 2020 by referencing calendar entries that do not exist in the .PST [email and calendar] file he returned to the defendant in 2021, in support of his claim to unpaid expenses, and (3) claiming that he did not have knowledge of the terms of Lenovo's commission policies." Moreover, the defendant also requested that if the case went to trial, the jury be given an adverse inference instruction.

Guided by Rule 37(e), Judge Dein first determined that the defendant had spoliated relevant ESI. Specifically, she found (i) the plaintiff's admitted wiping of the laptop constituted destruction of ESI; (ii) the ESI was relevant to the claims and defenses at issue in the litigation and should have been preserved; and (iii) the destruction occurred in such

a way that the ESI likely could not be restored, reconstructed, or replaced.

In addition, Judge Dein also determined that "[the plaintiff] acted with intent to deprive [the defendant] of the information, thereby qualifying for heightened sanctions under Rule 37(e)(2)." The defendant argued strenuously for the harsh sanction of dismissal of the action, but Judge Dein ultimately determined that such a harsh sanction was not appropriate in this case. To reach this decision, Judge Dein examined various factors, including the prejudice to the defendant. While she concluded that there was prejudice to the defendant, she also acknowledged some uncertainty about the defendant's ability to recover the missing ESI. As such, and observing that "the presence of bad faith and prejudice, without more, do not justify the imposition of dispositive sanctions," Judge Dein denied the defendant's request for an entry of default judgment, and instead issued an order that limited the plaintiff's use of calendar entries to those that might be on the defendant's servers. He also ordered that if the case goes to trial, an adverse instruction to the jury was warranted.

MEDCENTER HOLDINGS INC. V. WEB MD HEALTH CORP.

#sanctions; #preservation; #intent-to-deprive; #spoliation; #cloud; #rule37; #curative-measures; #evidence-preclusion

In **Medcenter Holdings Inc., et al. v. Web MD Health Corp., et al**, 2023 WL 5963616 (S.D.N.Y. Sept. 14, 2023), United States District Judge Gabriel W. Gorenstein granted and denied, in part, the defendants' motion for sanctions for spoliation of ESI.

The underlying dispute involves an action for misappropriation of trade secrets and breach of contract. The plaintiff alleged that the defendants colluded to recruit an executive from the plaintiff to join one of the defendant companies. The plaintiff alleged that, in the process, the defendants stole a significant amount of proprietary data from the

plaintiff's servers, including a database containing physician contact and other "non-contact" information (the "Physicians database"), as well as a Salesforce database. The plaintiff listed these databases in its Rule 26 disclosures, but as litigation progressed, the plaintiff disclosed that their access to the databases and most of the information therein had been terminated because the plaintiff could no longer afford to maintain them. Some of the data had been backed up, but some data was not recovered and was permanently lost. Specifically, the plaintiff backed up contact information but not "non-contact" information from the Physicians database, and had downloaded the information from its Salesforce database into Excel spreadsheets. Defendants filed a motion for sanctions alleging that the plaintiff spoliated both databases.

Judge Gorenstein analyzed the motion by applying Rule 37(e). First, he considered when the plaintiff's duty to preserve the two databases in question arose, noting that "the standard is an objective one, asking whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." The defendants argued that the plaintiff's duty to preserve arose as early as June 2016, when the plaintiff made various threats of legal action. However, Judge Gorenstein rejected these arguments because the legal action the plaintiff was then threatening had nothing to do with the two databases. Judge Gorenstein instead found that the plaintiff's duty to preserve the databases began in 2017, when it noticed unusual activity by one of the defendants who had access to them.

Judge Gorenstein found that because the plaintiff downloaded the Salesforce database, albeit to a different form, that ESI was not "missing" and denied the motion with respect to the Salesforce data.

However, Judge Gorenstein found that the plaintiff failed to take reasonable steps to preserve the non-contact data in the Physicians database. The plaintiff argued that backing up the data was impractical due to prohibitive cost, but as Judge Gorenstein noted, it

did not provide any explanation as to why that was the case. That said, Judge Gorenstein did not agree with the defendants' argument that the plaintiff's "selective preservation" of data should be taken as evidence of its intent to deprive the defendants of use of the information in the litigation. Judge Gorenstein noted that in cases where courts have found "selective preservation" to evince intent to deprive, "there was evidence that obviously favorable data was preserved and unfavorable data was deleted," which he observed was not the case here.

Judge Gorenstein noted that when "spoliation has caused prejudice to the moving party, the Court may impose measures no greater than necessary to cure the prejudice." As such, he ordered that the plaintiff should be precluded from presenting evidence as to the nature or value of the non-contact data that it lost. Judge Gorenstein reasoned that, even though the plaintiff had evinced no intent to deprive the defendants of use of the data in the litigation, preclusion of this evidence was warranted to avoid prejudice, as "it would be unfair to defendants to require them to counter evidence" regarding the lost data—which they were alleged to have accessed inappropriately—when neither party any longer had access to it.

EDITOR'S NOTE

This is a well-reasoned decision that thoroughly evaluates all of the facts prior to awarding sanctions. Notably, Judge Gorenstein found that the plaintiff failed to take reasonable steps when it neglected to download its data before it became inaccessible; not that the plaintiff's inability to pay to continue to host the data constituted a failure. This is consistent with the prevailing interpretation of Rule 37(e) and the Advisory Committee's Comment to the same—preservation steps need not be perfect (maintaining the data untouched in its hosted environment at high cost), but only reasonable (downloading a local copy for preservation purposes). We also note the important

*distinction Judge Gorenstein made with respect to the defendant's "selective preservation" theory of intent, which is an increasingly common argument in spoliation briefing. The mere act of preserving one piece of ESI but losing another should not be taken as evidence of intent to deprive; rather, to truly suggest intent to deprive, there should be sufficient evidence in the record that the preserved ESI was helpful to the spoliator, while the lost ESI would have been helpful to the requesting party. See **Kelly v. Fashion Nova, Inc.**, 2023 U.S. Dist. LEXIS 207931 (C.D. Cal. Oct. 30, 2023) (page 22) for an example of the latter.*

OLIVER V. AMAZON.COM SERVICES

#sanctions; #rule37; #preservation; #spoliation; #intent-to-deprive

In **Oliver v. Amazon.com Services**, 2023 WL 3322382 (E.D. Wis. May 8, 2023), United States Magistrate Nancy Joseph rejected the plaintiff's motion for sanctions for spoliation under FRCP 37(e)(2). The underlying litigation is a wrongful termination action, where the plaintiff alleges sexual harassment, retaliation, and various types of discrimination. During discovery, the plaintiff requested certain video footage from the warehouse where the plaintiff worked. During a discovery conference, the defendant admitted on the record that, pursuant to its records retention policy, its video footage is deleted after 14 days and, therefore, it had no video footage to produce. The plaintiff moved for sanctions for spoliation under Rule 37(e)(2), seeking an adverse inference, an order that the defendant be prohibited from raising certain defenses, and an order that all of the plaintiff's claims be found as having been established.

Judge Joseph first addressed the issue of whether there was spoliation under Rule 37(e). Applying the 4 criteria described in the rule, Judge Joseph found that the destroyed video footage constituted spoliation. Specifically, Judge Joseph found that (i) the requested video footage constitutes ESI; (ii) the defendant had a duty to preserve the data, with said

duty dating back to the date that the plaintiff filed a complaint with the Wisconsin Equal Rights Division and the EEOC, almost one year before the filing the lawsuit; (iii) the defendant's destruction of the video footage after the duty to preserve arose demonstrates that the defendant failed to take reasonable steps to preserve the data; and (iv) the destroyed video footage could not be restored or replaced through additional discovery.

Having found spoliation, Judge Joseph turned to the question of whether the spoliation resulted in prejudice to the plaintiff and, if so, whether the defendant had acted with the requisite intent to deprive the plaintiff of the use of the surveillance video footage, such that the requested sanctions were warranted. On the question of prejudice, Judge Joseph determined that the destroyed video footage had caused the plaintiff some prejudice. Indeed, as Judge Joseph noted, if the plaintiff alleged one version of the events that led to the subject termination, and others had a different version of the events, the surveillance video footage could resolve the question by showing what happened in real time. However, Judge Joseph also observed that while the video footage, had it been produced, would have resolved some issues, it likely would not have confirmed all of the allegations in the plaintiff's complaint.

Having found some prejudice to the plaintiff, Judge Joseph next addressed whether the defendant had acted with the requisite intent to deprive. The plaintiff's argument in favor of finding the requisite intent included (i) the defendant's failure to comply with the EEOC regulation that requires employers to preserve records relevant to formal charges of discrimination; and (ii) the defendant was able to preserve surveillance video when doing so benefitted the defendant. Judge Joseph rejected both assertions, explaining that (i) failure to comply with the EEOC regulation does not, on its own, show the necessary intent to deprive; and (ii) the fact that the defendant knew how to retain surveillance video

footage also does not prove that in this case, the defendant destroyed the footage in order to deprive the plaintiff of the information. Having found that the plaintiff failed to prove the intent required under Rule 37(e)(2), Judge Joseph rejected the motion for sanctions for spoliation.

OLIVER V. MEOW WOLF

#sanctions; #severe-sanctions; #preservation; #email; #rule37; #intent-to-deprive; #adverse-inference

In **Oliver v. Meow Wolf**, 2023 WL 122505 (D.N.M. January 6, 2023), United States Magistrate Judge Steven Yarbrough granted in part, and denied in part, the defendants' motion to reconsider the court's earlier order on the defendants' first motion for sanctions for plaintiff's deletion of emails. Specifically, Judge Yarbrough granted the defendants' request for an order permitting them to introduce into evidence the plaintiff's deletion of emails, and also granted the defendants' request for attorneys' fees. However, Judge Yarbrough denied the request for an adverse inference jury instruction.

Earlier in the case, the defendants moved for sanctions against the plaintiff. The defendants claimed the plaintiff spoliated evidence when she deleted five years' worth of email from her Gmail account. At the time, the court denied the defendants' motion, holding that "[a]lthough the timing of Plaintiff's deletion of these emails is suspicious, the circumstantial evidence related to Plaintiff's deletion of these emails is insufficient for the Court to conclude that Plaintiff deleted these emails with the intent to deprive Defendants from discovering them." The defendants now asserted that they had new evidence — the plaintiff's text messages from the day before she deleted her emails — that reflect "her intent to assert a claim against [the defendants] at the time of her mass deletion." Accordingly, the defendants filed this motion, entitled "Motion to Reconsider Sanctions for Spoliation in Light of New Evidence Revealing Plaintiff's Intent the Day Before her Mass Email Deletion," seeking three sanctions: (1) an order

permitting them to introduce into evidence plaintiff's deletion of emails; (2) an adverse inference instruction; and (3) attorney's fees and costs.

Judge Yarbrough agreed with the defendants that this new evidence clearly demonstrated that the plaintiff acted in bad faith and had the necessary intent to deprive when she deleted the emails and that, consequently, sanctions were appropriate. However, Judge Yarbrough limited the sanctions to allowing the defendants to introduce evidence of the plaintiff's email deletion and attorneys' fees, and denied the request for an adverse inference jury instruction. Judge Yarbrough determined that, in this case, the adverse inference that the defendants requested was better suited for the jury to decide. Judge Yarbrough explained that while it was clear that the plaintiff had deleted her emails in bad faith, uncertainties relating to such issues as the relevance of the deleted emails weighed in favor of allowing the jury to consider the evidence and decide for itself whether an adverse inference should be drawn.

PABLE V. CHICAGO TRANSIT AUTHORITY

#sanctions; #severe-sanctions; #preservation; #rule37; #signal; #ephemeral-messaging; #spoliation; #intent-to-deprive; #dismissal

In **Pable v. Chicago Transit Authority**, 2023 WL 2333414 (N.D. Ill. March 2, 2023), United States Magistrate Judge Heather K. McShain issued a ruling that recommended granting the defendant's Rule 37(e) motion for sanctions for spoliation of ESI and, moreover, recommended the dismissal of the plaintiff's complaint with prejudice as the appropriate sanction.

The underlying action is a whistleblower lawsuit stemming from the plaintiff's November 2018 resignation from the defendant in lieu of termination. The plaintiff, a skilled programmer, discovered a vulnerability within the defendant's system and, along with a colleague, tested it on public transit in other cities without authorization. Notably,

communications between the plaintiff and his colleague occurred on Signal, an encrypted messaging application that was never approved by the defendant for work-related communications. Placed on administrative leave by the defendant, the plaintiff and his colleague resigned shortly thereafter. Approximately one year later, in December 2019, the plaintiff filed the instant whistleblower complaint against the defendant.

During discovery, the defendant uncovered a disturbing pattern of evidence suppression. Indeed, the plaintiff admitted to intentionally deleting Signal messages with his colleague after litigation had begun. Additionally, inconsistencies and dishonesty plagued his explanations regarding missing data on his cell phone. As a result, the defendant filed the instant motion for sanctions.

Judge McShain’s analysis began by addressing the threshold question of spoliation under Rule 37(e) and determined that the plaintiff had spoliated the data at issue. Specifically, Judge McShain determined that (i) the data at issue, including the Signal messages exchanged between the plaintiff and the colleague, constituted ESI; (ii) the plaintiff had a duty to preserve the subject ESI, a duty that began on October 29, 2018 – the date when the plaintiff solicited two attorneys about suing the defendant, which Magistrate Judge McShain interpreted to reflect the requisite duty-triggering anticipation of litigation against the defendant; (iii) the ESI at issue was relevant because it contained communications relating to the vulnerability discovery and the administrative leave – all of which went to the heart of the plaintiff’s claim against the defendant and the defendant’s counterclaim against the plaintiff – and, consequently, should have been preserved; (iv) the evidence clearly supported a finding that the ESI was lost because the plaintiff, at a minimum, failed to take reasonable steps to preserve it and, moreover, admitted to intentionally deleting it; (and (v) the subject ESI was permanently deleted, was not available in any backup locations or on any other

devices, and, as such, could not be restored or replaced through other discovery.

Having established spoliation, Judge McShain turned to the question of appropriate sanctions. First, as required under Rule 37(e)(2), she determined that the plaintiff acted with the intent to deprive the defendant of the data’s use in the litigation. The fabricated stories, shifting explanations, and the deliberate use of Signal’s “Disappearing Message” function pointed towards a calculated effort to hide potentially damaging information. Having found the requisite intent, Judge McShain turned to the question of whether the harsh sanction of dismissing the case was appropriate. Noting the plaintiff’s repeated and intentional spoliation, the plaintiff’s lack of credibility, and the significant harm caused to the defendant’s defense, Judge McShain concluded that dismissal with prejudice was the only adequate sanction. Lesser sanctions, she opined, would fail to reflect the seriousness of the misconduct and adequately punish the plaintiff for his dishonesty.

RAPP V. NAPHCARE

#sanctions; #severe-sanctions; #intent-to-deprive; #spoliation; #rule37; #default-judgment

In **Rapp v. Naphcare, et al.**, 2023 WL 3741475 (W.D. Wash. May 31, 2023), United States District Judge David G. Estudillo granted the plaintiff’s motion for default judgment sanctions against defendant Kitsap County for the deletion of video surveillance footage.

The plaintiff’s decedent was booked into Kitsap County Jail after getting into an argument with his partner. Two days later, the plaintiff was found dead in his jail cell by apparent suicide at approximately 1:42 p.m. on January 2, 2020. On January 17, 2020, plaintiffs’ counsel sent defendant Kitsap County a preservation letter asking that all video footage of the plaintiff while in custody be preserved. The defendant exclusively tasked one of its correctional

officers to identify and preserve the relevant footage.

However, the correctional officer unilaterally determined that the only footage that needed to be preserved was information directly related to the plaintiff's suicide. Further, because the surveillance cameras purportedly do not record inmates in their cells, and because the inmates were locked down on January 1, 2020 and could not leave their cells, the officer did not preserve any footage from January 1, 2020. The officer did not watch all of the footage to confirm his assumptions. After the parties engaged in discovery for months, the defendant county disclosed that it did not have video from 1:00 p.m. to 11:59 p.m. on January 1, 2020. The plaintiff filed this motion for sanctions.

Judge Estudillo found that the video footage was relevant electronically stored information that should have been preserved, was not, and is not available from other sources. Judge Estudillo then found that the defendant failed to take reasonable steps to preserve the video evidence, relying heavily on the correctional officer's testimony that no preservation instructions, written or otherwise, were given as to what specific information should be preserved, and that the correctional officer was solely responsible for determining what videos were or were not responsive to the plaintiff's preservation letter. To support this position, Judge Estudillo cited precedent finding that "counsel have been required to take an active, affirmative role in advising their clients about the identification, preservation, collection and production of ESI." Accordingly, Judge Estudillo found that the defendant county failed to take reasonable steps to preserve the videos "when it took no steps to implement what have long been considered standard ESI preservation practices."

Judge Estudillo then analyzed whether the defendant county acted with an intent to deprive evidence. He concluded that it did, emphasizing (1) the responsible officer was aware that the

preservation letter requested copies of "all videos" featuring the decedent, (2) it "would have been standard operating procedure to preserve all video that [the decedent] appeared on during his confinement," but (3) the responsible officer did not view any of the videos he deleted prior to deleting them. Judge Estudillo noted that "courts have inferred an intent to destroy evidence where parties were willfully ignorant of their obligations to preserve evidence," and here observed that the officer's "missteps go well beyond gross negligence and permit the Court to infer an intent to deprive Plaintiffs of this video evidence."

Judge Estudillo finally imposed default judgment sanctions on the defendant. Prior to doing so, he analyzed whether less drastic sanctions may be appropriate. The defendants proposed an adverse jury instruction. However, Judge Estudillo found that an adverse jury instruction could prejudice the other defendants in the case and ordered default judgment as to the defendant county because no lesser available sanction was available.

SILICON GENESIS CORP. V. EV GROUP E. THALLNER GMBH

[#sanctions](#); [#protective-order](#); [#rule37](#)

In **Silicon Genesis Corp. v. EV Group E. Thallner GmbH**, 2023 WL 6882749 (N.D. Cal. Oct. 18, 2023), United States District Judge Jacqueline S. Corley granted the plaintiff's motion for monetary contempt sanctions against the defendant for violating the protective order in place in this lawsuit. by using confidential information plaintiff produced in this action to file a separate foreign lawsuit.

The underlying litigation is an IP matter where the plaintiff sued the defendant for failing to pay royalties under a patent licensing agreement. During discovery, the plaintiff produced an email, along with several attachments, that its president/CEO sent to two third parties. The attachments included one of the defendant's confidential technical documents. The plaintiff had marked the documents

Confidential. The defendant filed a complaint in the Commercial Court of Vienna, alleging that the plaintiff shared its confidential information in violation of the underlying litigation’s protective order. The plaintiff then filed the instant motion, alleging the defendant’s use of its confidential information—namely, the disclosure of the president’s communication in the Austrian action—violated the protective order in place in this IP lawsuit, and seeking monetary sanctions for same.

Judge Corley examined the evidence and determined that the defendant had violated the protective order and that sanctions were appropriate. First, Judge Corley observed that “[t]he plain language of the protective order preclude[d] the use outside this litigation of confidential information produced in this litigation.” And yet, despite this unambiguous prohibition, the defendant used the plaintiff’s confidential information to launch the Austrian action. Moreover, the defendant admitted to same in its Austrian complaint. Judge Corley stated that “[t]his admission alone established by clear and convincing evidence [the defendant] used confidential information [the plaintiff] produced in this action to initiate a foreign lawsuit against [the plaintiff] – conduct squarely prohibited by the Protective Order.” In addition, Judge Corley rejected the defendant’s claim that because it did not attach to its Austrian complaint any discovery material from this action that was marked Confidential, it did not violate the protective order. Judge Corley observed that “this argument misse[d] the point,” and made clear that the protective order’s prohibition on the use of the plaintiff’s confidential information did not require a sharing of the actual documents. Moreover, Judge Corley also rejected the plaintiff’s claim that its use of the confidential information was merely a technical violation and, therefore, not sanctionable. Specifically, Judge Corley determined that the undisputed evidence demonstrated that the defendant’s use of the plaintiff’s confidential information was intentional, in bad faith, and

amounted to a “blatant violation of the Protective Order.”

Having found the defendant had violated the protective order, Judge Corley granted the plaintiff’s motion for monetary sanctions. In addition, Judge Corley went further and specifically ordered (i) that the defendant was prohibited from using the plaintiff’s confidential information to launch any other litigation against the plaintiff; and (ii) that the plaintiff’s confidential email (that the defendant used to launch the Austrian lawsuit) would now be designated “Attorneys’ Eyes Only” and that, as such, the defendant must return all copies of same to its counsel.

ROSSBACH V. MONTEFIORE MEDICAL CENTER

#sanctions; #severe-sanctions; #preservation; #rule37; #intent-to-deprive; #default-judgment

In **Rossbach v. Montefiore Medical Center**, 81 F.4th 124 (2d Cir. Aug. 28, 2023), the U.S. Court of Appeals for the Second Circuit upheld the district court’s award of a dismissal of the plaintiff’s claims as a sanction for spoliating evidence. The case was one for employment discrimination case. The plaintiff had relied upon screenshot image of sexually suggestive text messages that she said she received from her former supervisor to support her claim for sexual harassment and discrimination. According to the plaintiff, the image was generated by taking a photograph of the messages on an iPhone 5 using a newer iPhone X, because the iPhone 5 had screen issues that prevented her from capturing a screenshot. The iPhone 5 was still available at the time of trial but could not be unlocked using passcodes the plaintiff provided, while the iPhone X was no longer available—the plaintiff had “traded it in for a new phone” after it “had started to malfunction.” The district court credited expert testimony concluding that the image was not consistent with the text messaging app on the iPhone 5 and also pointed out inconsistencies with the plaintiff’s claims about the phone (including

first testifying that the phone's screen was cracked so she could not take a screenshot, and then later explaining why her passcodes didn't work by stating that the screen became cracked after she give it to her attorney for preservation). The district court found, in the first instance, that the plaintiff had committed a fraud upon the court that justified dismissal, and in the alternative, that she had intentionally destroyed relevant ESI by rendering her iPhone 5 inaccessible and trading in her iPhone X, justifying dismissal under Rule 37(e)(2).

On appeal, the plaintiff challenged, among other things, the district court's finding of spoliation, arguing that her conduct did not satisfy Rule 37(e)(2)'s "intent to deprive" standard. The Second Circuit denied her appeal on this ground. The Court held that, "[e]ven if the district court were to have credited [the plaintiff's] testimony about the misfortunes that befell her iPhones (which it did not, finding, for example, that [the plaintiff] intentionally withheld her correct passcode), the 'culpable state of mind' for a spoliation claim need not be intentional or willful, and may be found where the spoliation occurred due to negligence," citing *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir. 2002). The Court concluded that the plaintiff's "failure to preserve her iPhones and their data, and [her counsel's] failure to ensure that his client did so, demonstrated a disregard of their discovery obligations" were sufficient to satisfy the negligence standard set out in *Residential Funding*.

EDITOR'S NOTE

*This is a troubling decision, as it seems to endorse a mere negligence standard as sufficient to satisfy the "intent to deprive" requirement of amended Rule 37(e)(2). Lower courts have previously observed that the Residential Funding negligence standard was abrogated by the 2015 amendment of Rule 37—including, notably, S.D.N.Y. District Judge Rakoff in **Convergent Distributors of Texas**, above (page 13) (see 2023 WL 2751541 at *8). Time will tell how*

district courts will incorporate this new decision in their analyses going forward.

SKANSKA USA CIVIL SOUTHEAST, INC. V. BAGELHEADS, INC.

#sanctions; #severe-sanctions; #rule37; #preservation; #intent-to-deprive; #default-judgment; #spoliation

In **Skanska USA Civil Southeast, Inc. v. Bagelheads, Inc.**, 75 F.4th 1290 (11th Cir. Aug. 2, 2023), the Eleventh Circuit affirmed the district court's ruling that granted the defendant's motion for Rule 37(e) sanctions because the plaintiff failed to preserve relevant text messages. The plaintiff is a construction company who owned barges that damaged the Pensacola Bay Bridge during Hurricane Sally. Anticipating numerous economic loss claims from local businesses, the plaintiff filed limitation proceedings in district court, looking to minimize its exposure. The defendant is a local business claimant that joined the proceedings, looking to recover economic losses it sustained.

The district court concluded that the plaintiff had acted negligently and, in addition, sanctioned the defendant for spoliating ESI under Rule 37(e) – specifically, data from five out of thirteen custodians' cell phones had been destroyed. The district court found that the plaintiff had failed to back up the cell phone data and, moreover, failed to suspend its ordinary cell phone destruction policies. Moreover, the district court ruled that the plaintiff acted with intent to deprive the defendant of the cell phone data. It emphasized that it "saw no cogent explanation, apart from bad faith, for [the plaintiff's] systematic failure to make *any* effort to preserve cell phone data until at least seven months after the litigation hold was (technically) in place." As such, the district court made two adverse inferences against the plaintiff and ordered it to pay the defendant's costs and attorneys' fees for the sanctions motion.

The plaintiff appealed to the Eleventh Circuit, making several arguments against the spoliation findings, including claims that it had taken reasonable steps

to preserve the data, as evidenced by its verbal data retention instructions and written legal hold letter issued shortly after the hurricane; the deleted messages could be restored or replaced from other custodians' data and/or depositions; its failure to back up the data and suspend the data deletion policies did not amount to bad faith; and relying on bad faith as the basis for sanctions under Rule 37(e) was inappropriate because "bad faith" requires an affirmative act (as opposed to a failure to act). The Eleventh Circuit rejected each of these arguments. Specifically, it found that the purported retention instructions and legal hold did not result in data preservation; while some of the message could potentially be restored or replaced, others could not; the plaintiff's conduct – a failure to take action to ensure the data was preserved, amounted to "bad faith"; and Rule 37(e) sanctions based on "bad faith" could be established by both an affirmative act and a failure to act. The Eleventh Circuit noted that its review followed the clear error standard, the standard for factual findings. It explained that if its reviewer were de novo, the question of bad faith would have been a close one: "On the one hand, we find 'the plaintiff's] utter failure to implement even the most basic data-protection safeguards egregious – so egregious that an inference of bad faith is easy to make. On the other hand, this is not a case with direct evidence of bad faith; it is also plausible from this record that [the plaintiff] was 'just' grossly negligent." It then added that applying the "clear error" standard, the district court's "inference of bad faith here was not clear error." As such, the Eleventh Circuit affirmed the district court's decision.

EDITOR'S NOTE

In this decision, the Eleventh Circuit also briefly addressed the propriety of relying on "bad faith" as a basis for Rule 37(e) sanctions, specifically asserting that the "intent to deprive another party of the information's use in litigation is the equivalent of bad faith in other spoliation contexts." In addition, it observed that in this case, "the district court and both parties have assumed that 'intent to deprive'

*and 'bad faith' are the same." This case, along with **Amann v. Office of the Utah Attorney General, et al.**, 2023 BL 395779 (D. Utah Nov. 02, 2023), **Ace American Insurance Company, et al. v. First Call Environmental, LLC**, 2023 WL 137456 (E.D. Pa. Jan. 9, 2023) and **Skanska v. Bagelheads**, 75 F.4th 1290 (11th Cir. Aug. 2, 2023), demonstrates that some courts are either equating "bad faith" with Rule 37(e)(2)'s "intent to deprive" requirement for severe sanctions for spoliation, or – if not making them interchangeable – using a finding that a party acted in bad faith as the basis for inferring the requisite intent to deprive. While this broader approach to the intent to deprive standard may only be followed by a minority of courts, parties should take note and research whether their court has adopted this "bad faith" standard.*

WALKIE CHECK PRODUCTIONS V. VIACOMCBS

#rule37; #preservation

In **Walkie Check Productions v. ViacomCBS, et al.**, 2023 WL 5154416 (S.D.N.Y. July 24, 2023), U.S. District Judge Katherine Polk Failla denied the plaintiff's Rule 37(e)(2) motion for an adverse inference sanction for spoliation of evidence. The underlying action was for copyright infringement. The plaintiff is the owner of a registered copyright relating to a show called "House Party." In 2015, the plaintiff pitched the show to the defendants, but the pitch never resulted in an agreement between the parties. In 2020, the defendants launched their own "House Party" series, and the plaintiff subsequently sued for copyright infringement. In this motion for sanction, the plaintiff claims that the defendants failed to record and preserve several livestream episodes of the subject series after receiving notice of the plaintiff's intention to sue, and thus only produced 39 of the approximately 90 episodes.

Judge Failla's decision relied on controlling case law about spoliation: "The party seeking discovery sanctions on the basis of spoliation must show by a preponderance of the evidence: (i) that the party

having control over the evidence had an obligation to preserve it at the time it was destroyed; (ii) that the records were destroyed with a culpable state of mind; and (iii) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." In addition, Judge Failla further relied on case law instructing that "[f]or spoliation sanctions to be appropriate ... it is necessary that the sought-after evidence actually existed and was destroyed." In other words, parties have no duty to preserve data when such data never existed.

As to the first factor – the duty to preserve – the plaintiff contended that the defendants' duty arose on the date the plaintiff issued its notice of intent to sue, and that each time the defendants failed to record and preserve episodes after that date, they failed to comply with their preservation obligation. Judge Failla, however, rejected this argument. According to Judge Failla, "preservation obligations are exactly that – obligations to preserve potential evidence that, by definition, must already exist," and "parties have no obligation to affirmatively create new records." Judge Failla then held that "[b]ecause preservation obligations do not include an affirmative duty to produce new records, the defendants' failure to implement a practice of recording their livestreams, even after receiving the alleged infringement notice from the plaintiff, cannot be the basis for a spoliation claim."

While this determination alone was sufficient to deny the spoliation motion, Judge Failla noted that even if she had found the defendants had the requisite duty to preserve, she would still have concluded that sanctions were not warranted. Specifically, Judge Failla noted that the evidence presented failed to demonstrate either the requisite culpable state of mind or that the lost evidence would have supported the plaintiff's claims. Specifically, Judge Failla determined that (i) the defendants' failure to record and preserve livestream episodes after receiving

the notice to sue was, at best, negligence; and (ii) beyond the title, the parties' respective series were completely different and the plaintiff had not provided anything that would have substantiated its claim of copyright infringement. As such, Judge Failla denied the plaintiff's motion for sanctions.

EDITOR'S NOTE

This is an interesting decision illuminating the limits of the duty to preserve in the modern technological world and is likely instructive beyond the contours of livestreamed episodes. To be sure, most modern collaboration software such as Microsoft Teams and Zoom have and continue to evolve to offer meeting recording and automatic transcription services, as well as other useful features that could create discovery challenges. This decision makes clear that the duty to preserve does not impose an obligation for litigants to create records not otherwise generated in the ordinary course of business. There is no duty to preserve information that never existed. Applying this reasoning, litigants should be mindful of their policies regarding meeting recording and transcription. If such data exists, it is subject to the duty to preserve. No such duty exists if these recordings and transcripts are not created in the ordinary course of business.



Scope of Discovery/Proportionality

Discovery is limited to that which is both relevant to the claims and defenses in the litigation and proportional to the needs of the case. Defining precisely where the boundary markers lie that separate the “in scope” from the “out of scope” can be a challenging prospect, as the factors listed in Rule 26(b)(1)(B) are not amenable to bright-line rules. Despite various efforts, judicial decisions as well as the ediscovery think tanks have been unable to put forward an analytical framework for the application of proportionality in practice since the 2015 Federal Rules Amendments. These cases reflect how various courts have applied the principle of proportionality in practice. What is clear from these cases is that the producing party will have to carry the burden to demonstrate that the discovery sought is neither relevant nor proportional to the claims and defenses. They further demonstrate that most courts are unwilling to consider cost-shifting as a practical means to place restraints on requesting parties that are unable or unwilling to focus their discovery on the evidence that is truly relevant and proportional to the claims and defenses.

ADAMSON V. PIERCE COUNTY

#motion-to-compel; #discovery-on-discovery; #30(b)(6); #preservation;

In **Adamson v. Pierce County**, 2023 WL 7280742 (W. D. Wash. Nov. 3, 2023), Senior United States Magistrate Judge Grady J. Leupold denied the plaintiffs’ motion to compel testimony regarding the defendants’ search for records responsive to the plaintiffs’ discovery requests. The defendant countered with a motion for a protective order arguing against discovery on discovery unless the plaintiffs demonstrated a specific deficiency in their production. Judge Leupold partially granted the plaintiffs’ motion for limited discovery on text messages and retention policies dated after 2019 due to a potential gap in the defendant’s productions.

The plaintiffs are nine Sheriff’s Deputies who sued the defendants alleging that they were wrongfully included on a “Brady List” of officers with credibility issues. Certain claims were dismissed but First Amendment retaliation and state law claims remain.

The defendant argued that the plaintiffs failed to meet and confer about the deposition topics. The plaintiffs countered that the defendant did not object to the topics in the notice for two full weeks. Judge Leupold found that “the parties share a burden to

meet and confer regarding the matters at issue in a 30(b)(6) deposition. Failure of one party to respond does not absolve the other of its duty to do so.”

After the parties met and conferred, Judge Leupold analyzed the 30(b)(6) deposition topics, allowing the plaintiffs to seek testimony on some of the requested topics but denying the other requests. Specifically, with respect to the defendant’s search for records responsive to discovery requests, Judge Leupold noted that “discovery on discovery is disfavored and, to be both relevant and proportional to the needs of the case, a party seeking it “must show a specific deficiency in the other party’s production.” The plaintiffs specifically sought testimony regarding the defendant’s (1) search for records responsive to discovery requests; (2) alleged destruction of text communications beginning in 2019; (3) text communications and text messages and policies generally; and (4) responses and interrogatories. In support of their request for testimony, the plaintiffs highlighted a purported gap in the defendant’s text message production beginning in 2019.

In support of their request for testimony, the plaintiffs appeared to have identified a gap in the defendant’s text message production beginning in 2019. Judge Leupold found that the plaintiffs had “established an

adequate factual basis to allow limited meta-discovery regarding text messages and text message policies after 2019. Accordingly, Judge Leupold ruled that plaintiffs may inquire as to the defendant's retention and preservation of text messages after 2019, including how the defendant retains and preserves text messages; the ability of individual employees to delete text messages from work phones; any restrictions the defendant had imposed upon employees to delete their text messages, and whether any metadata exists regarding the deleted text messages and what that metadata provides about the deleted messages. Judge Leupold denied the other requests as overly broad "discovery on discovery."

EDITOR'S NOTE

This decision highlights the reluctance of courts to order "discovery on discovery" absent a showing of a production deficiency. The standards for what is discoverable are relevance and proportionality. Absent a deficiency, discovery on discovery is generally disfavored by the courts. Moreover, this decision highlights that a limited discovery deficiency does not entitle the requesting party to overbroad relief. Judge Leupold denied the overarching relief the plaintiffs sought and limited testimony to the only area in which the plaintiffs could demonstrate that the defendant's production was deficient.

BOURRELL V. RONSCAVAGE

#motion-to-compel; #rule26; #proportionality; #burden; #privilege

In **Bourell v. Ronscavage**, 2023 WL 4145027 (D. Conn. June 23, 2023), United States Magistrate Judge Maria E. Garcia granted in part, and denied in part, the defendants' motion to compel the plaintiff to produce videos relating to the plaintiff's personal injury lawsuit seeking damages for an alleged traumatic brain injury. At issue were the defendants' Interrogatory No. 13 and Request for Production No. 9 seeking production of video journals produced by,

and in the custody of, the plaintiff that depict the plaintiff's injuries, symptoms, and recovery following the accident that was the subject of the lawsuit. The defendants filed the instant motion to compel after learning that the plaintiff had more than 23,000 videos regarding his injury and recovery, but had only produced 331 files. The plaintiff had objected to the defendants' motion, claiming it would be unduly burdensome to review the videos, create a log, and determine whether any of the videos were privileged. Notably, at no point during the time that the plaintiff agreed to, and produced, the 331 items did the plaintiff ever formally object or raise claims of burden or privilege. Indeed, it was not until after the defendants filed this motion to compel that the plaintiff first asserted an undue burden objection.

To decide the motion Judge Garcia relied on FRCP 26 and the proportionality factors set forth therein. Under Rule 26, a party may obtain discovery concerning any non-privileged matter that is relevant to any party's claim or defense and is proportional to the needs of the case. To determine the proportionality requirement, Rule 26 identifies six factors: "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Judge Garcia considered all six factors and determined they all weighed in favor of disclosure. As to the first factor (importance of the issues), Judge Garcia observed that the issues of the plaintiff's physical and mental well-being were important to the case and favored disclosure of the videos to prove or disprove the plaintiff's claim. Regarding the second factor (amount in controversy), Judge Garcia observed that the plaintiff's request for more than \$5 million in damages, as well as double or triple damages as allowed by law, also weighed in favor of disclosure. For the third factor (parties' relative

access to relevant information), Judge Garcia noted that the plaintiff never claimed that the videos were not reasonably accessible and, moreover, admitted to having direct access to them; as such, Judge Garcia held that this factor also weighed in favor of disclosure. As to the fourth factor (the parties' resources), Judge Garcia determined that this factor also weighed in favor of disclosure. Specifically, Judge Garcia noted that the plaintiff had already incurred the expense of transferring the videos and, in addition, was represented by two law firms who had substantial resources and were highly competent and capable of handling discovery in a large case. For the fifth factor (importance of discovery in resolving the case), Judge Garcia observed that there was no dispute over the importance of the videos and, as such, this factor weighed in favor of disclosure. For the sixth factor (whether the burden or expense of proposed discovery outweighs its likely benefit), Judge Garcia placed significant weight on the fact that the plaintiff had not asserted any burden objections until after the defendant filed the instant motion, and that once the plaintiff asserted the objection, the metrics the plaintiff offered to support its burden claim (e.g., the volume of data and the amount of time required to review it) were guesses that were not based on any factual data. Judge Garcia therefore determined that the plaintiff failed to demonstrate burden and, as such, held that the sixth factor also weighed in favor of disclosure.

Despite finding that all six factors weighed in favor of disclosure, Judge Garcia did not grant the defendants' motion in its entirety. Rather, in an effort to lessen any burden of production and review, Judge Garcia narrowed the production of videos to a random representative sampling. Specifically, Judge Garcia ordered the plaintiff to produce two weeks of video journals per month from the date of the accident to the present. Judge Garcia further ordered that if the plaintiff chose to review the videos in advance of production and withheld any videos based on the attorney-client privilege and/or

work product protection, the plaintiff would need to amend the privilege log accordingly, and produce the amended privilege log with the supplemental production.

IN RE: DIISOCYANATES ANTITRUST LITIGATION

#motion-to-compel; #search-terms; #esi-protocol; #text-messages; #tar; #proportionality

In **In Re: Diisocyanates Antitrust Litigation**, 2023 WL 427082 (W.D. Pa. Jan. 26, 2023), United States District Judge W. Scott Hardy denied the plaintiff's motion to compel the defendants Huntsman International, LLC ("Huntsman"), BASF Corporation ("BASF"), and Wanhua Chemical (America) Co., Ltd. ("Wanhua") to produce text messages as well as the full calendars of 45 custodians. The underlying dispute is a multi-district litigation alleging that the defendants conspired to reduce supply and increase prices for methylene diphenyl diisocyanate ("MDI") and toluene diisocyanate ("TDI"), both of which are precursor ingredients for the manufacture of polyurethane foam and thermoplastic polyurethanes.

Specifically, the plaintiffs sought an order compelling the defendants Huntsman, BASF, and Wanhua to produce text messages after only a linear review, as well as the full calendars of 45 custodians covering a five-year period. In denying the plaintiff's motion to compel, Judge Hardy noted that the calendars and text messages at issue had already been subject to search term review and that the defendants Huntsman, BASF, and Wanhua had substantially completed their respective document productions between March and April 2022, and had already produced thousands of calendar entries and text message transcripts.

The plaintiffs argued that these productions were inadequate, necessitating a linear review of text messages and production of complete custodial calendars, irrespective of search term hit. In response, the defendants noted that their search

term-generated productions were the result of extensively negotiated search terms agreed to by the plaintiffs. The defendants further argued that producing additional text messages and full calendars irrespective of relevance would contradict the terms of the parties' agreed-upon Stipulated Order Regarding Discovery of Electronically Stored Information ("ESI Protocol").

In denying the plaintiffs' motion, Judge Hardy highlighted that the plaintiffs proposed that the defendants use search terms to identify text messages and calendar entries, but not technology-assisted review ("TAR"). Further, Judge Hardy did acknowledge that the use of search terms is imperfect and could result in relevant documents being excluded from production. However, he also explained that not using search terms to cull large document populations risks expending time and resources to cut through large volumes of irrelevant documents. Accordingly, Judge Hardy affirmed that only a reasonable search for responsive information pursuant to a reasonably comprehensive search strategy is necessary. Judge Hardy also highlighted the principle that courts cannot and do not expect that any party can meet a standard of perfection. Judge Hardy also found that the agreed-upon ESI Protocol was persuasive in that it required the parties to "agree upon search methodologies with the goal of limiting the scope of document collection and review for production." Judge Hardy did acknowledge that there was some disagreement on search terms with certain defendants and allowed that the plaintiffs could propound follow-up requests for targeted discovery of text messages and calendar entries, which would be more proportionate to the needs of the case, consistent with the parties' agreed-upon ESI order.

IN RE FIRSTENERGY CORP. SECURITIES LITIGATION

#motion-to-compel; #proportionality; #rule26; #scope;
#rule45

In **In re FirstEnergy Corp. Securities Litigation**, 2023 WL 8100096 (S.D. Ohio Nov. 20, 2023), Special Master Shawn K. Judge granted the class plaintiffs' motion to compel and ordered non-party Energy Harbor ("EH") to produce documents and information that the plaintiffs had requested.

The underlying dispute is a class action brought by shareholders under the Securities Act of 1933 and the Securities Exchange Act of 1934 against FirstEnergy. The crux of the plaintiffs' claim is that FirstEnergy investors lost billions of dollars resulting from a drop in the stock price after bribery allegations against FirstEnergy and its executives came to light. EH is also not a traditional non-party. Rather, EH was formerly known as "FirstEnergy Solutions," a company that was part of the defendant First Energy Corporation.

Special Master Judge provided that pursuant to FRCP 26(b), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Special Master Judge concluded that the information the plaintiffs sought was "likely relevant to the claims and defenses at issue in this litigation." EH was formerly FirstEnergy Solutions, which had been a wholly owned subsidiary of FirstEnergy during the alleged bribery period. The fact that EH is now a separate company "does not erase its history and the relevance of its conduct." It would be a "logical disconnect" to conclude that EH has no interest in the litigation because the company was or is involved and the CEO of EH is a named defendant."

Special Master Judge subsequently analyzed the appropriate period of discovery in the underlying dispute find that it is "well settled that, "[i]n general, courts allow discovery to extend to events before and after the period of actual liability so as to provide context." In another securities fraud case, the court reasoned that a six-month extension after the class period was reasonable because it allowed relevant information to be discovered. Here, post-period

discovery would “yield valuable information as to why what was done...and who knew what was done and when they knew it.”

A court must “protect a non-party from significant expenses resulting from compliance.” The factors to determine this are “whether the nonparty has an interest in the outcome of the case, whether the nonparty can more readily bear the costs than the requesting party, and whether the litigation is of public importance.” Here, EH has a reputational interest in the outcome of the case and offered no evidence that it could not bear the cost of production. Additionally, Special Master Judge found that EH “has an obligation to the public and ... class members to fairly and fully disclose the non-privileged information within its possession, custody, or control.

HOEHL FAMILY FOUNDATION V. ROBERTS ASSET MANAGEMENT

#motion-to-compel; #rule26; #metadata; #production-format; #email; #proportionality

In **Hoehl Family Foundation v. Roberts Asset Management, et al.**, 2023 WL 3271517 (D. Vt. April 13, 2023), United States District Judge Geoffrey W. Crawford granted in part and denied in part the plaintiff’s motions to compel. The underlying litigation involves claims that the defendants improperly funneled millions of the plaintiff’s dollars into a struggling business in which the defendants had a financial interest. The plaintiff’s motions followed the defendants’ document productions, which the plaintiff maintained failed to satisfy the requirements of the court-approved discovery Order and, moreover, interfered with its ability to properly assess and organize the data in its document review database. In the motions, the plaintiff demanded that the defendants supplement their productions with complete and accurate metadata, including file extensions, document types, file names, and file creation dates, and, in addition, also demanded that the defendants produce documents that the plaintiff alleged were improperly withheld as privileged.

Judge Crawford began his analysis by acknowledging the legal standard for deciding these motions – Rule 26 of the Federal Rules of Civil Procedure. Rule 26 allows parties to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Against this framework, Judge Crawford considered the evidence provided, including the requirements of the court-approved stipulated discovery order; details relating to the defendants’ process for collecting, searching, reviewing and producing documents; the history of the parties’ ongoing dispute about the metadata, including an April 2023 ruling on the metadata; the specific set of documents to which the metadata request relates (a set of approximately 10,000 non-email documents, as opposed to the defendants’ entire production); and details relating to the documents that the plaintiffs claimed were improperly withheld on the basis of privilege.

As to the request that the defendants supplement their production with complete and accurate metadata, Judge Gallagher’s analysis resulted in a direction to the plaintiff to send the defendants a list of the approximately 10,000 documents for which it demanded complete and accurate metadata and an order that the defendant provide complete and accurate metadata for same. He observed that “[t]his imposes some burden on Defendants, but ... that is a function of the way in which the defendants chose to respond to the RFPs in the first place.” As to the request that the defendant produce documents it withheld as privileged, Judge Gallagher denied the request and instead ordered the defendants to produce a privilege log for those documents and, in addition, submit them for *in camera* review.

KAISER ALUMINUM WARRICK, LLC V. US MAGNESIUM LLC

#motion-to-compel; #relevance-redaction; #rule26; #scope

In **Kaiser Aluminum Warrick, LLC v. US Magnesium LLC**, 2023 WL 2482933 (S.D.N.Y. Feb. 27, 2023), Plaintiff Kaiser Aluminum Warrick objected to Defendant US Magnesium's use of relevancy redactions for non-responsive information, arguing that because a stipulated protective order had been entered in the case, there was no need to redact non-responsive content. The defendant argued that the information it redacted was both irrelevant and competitively sensitive. The underlying dispute related to magnesium production.

United States Magistrate Judge Katharine H. Parker conducted an in-camera review of a sample of documents at issue. Judge Parker recognized that courts have generally disallowed relevancy redactions from otherwise responsive documents because 1) a party should not be permitted to determine what portions of a document are irrelevant; 2) relevance redactions may eliminate context needed for an adversary to understand the unredacted portions of a document; 3) when a stipulated protective order is in place, the producing party's information is protected; 4) redactions take time and are therefore expensive and inconsistent with Federal Rule of Civil Procedure 1.

Despite these previous decisions, Judge Parker ruled that relevancy redactions can be appropriate in some cases. She reasoned that allowing a party to determine whether a document is relevant is standard discovery protocol and that there was no reason that a party could not determine the same for portions of a document as well.

Accordingly, Judge Parker granted and denied the plaintiff's motion in part. Judge Parker held that relevancy redactions must be evaluated on a case-by-case basis. She further held that when relevancy redactions are consistent with Federal Rules 1 and 26, do not deprive the receiving party of context,

and do not delay production, they may be appropriate. Judge Parker cautioned that producing parties should request permission from both the opposing party and the court to make relevancy redactions in advance of production. She further cautioned that relevancy redactions are expensive and time-consuming and that these redactions should not be used as a reason for a party to delay production. Judge Parker ultimately allowed the defendants to redact irrelevant information from otherwise responsive documents but ruled that column headers and information relating to magnesium production be produced without redactions and without delay.

LEWIS V. BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY

#motion-to-compel; #rule26; #proportionality; #apex-doctrine

In **Lewis v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College**, 2023 WL 7251507 (M.D. La. Nov. 2, 2023), United States District Judge Susie Morgan granted the plaintiff's motion to compel the appearance and testimony of the defendant's president William F. Tate, IV, thereby rejecting the defendants' argument that the deposition was barred by the apex doctrine. The underlying matter is a wrongful termination case where the plaintiff asserted, among other things, Title IX and Title VII retaliation claims against the defendant.

During discovery, the plaintiff issued a notice of deposition to Tate, believing that he possessed knowledge about the person or persons who made the ultimate decision to terminate the plaintiff's employment. The defendant opposed the notice, arguing that the deposition should be barred by the apex doctrine, "a judicially created doctrine that disfavors, absent good cause, the deposition of 'high level executives' lest they be subjected to numerous, repetitive, harassing, and abusive depositions."

To decide this motion, Judge Morgan first considered how the Fifth Circuit applies the apex doctrine, noting that it “does not apply it to strictly prohibit high level executives” such as Tate, but rather it allows such depositions “so long as the party seeking that deposition has first taken a 30(b)(6) deposition or deposed other lower ranking employees with more direct knowledge of the relevant facts.” Against this rubric, Judge Morgan observed that here, the plaintiff had already taken six depositions of such lower-ranking employees and had issued interrogatories and requests for production related to the same topics, but had not been provided a clear answer about who was responsible for her termination. Judge Morgan held that given these efforts, she would allow Tate’s deposition to go forward.

The above decision in favor of the plaintiff’s motion notwithstanding, Judge Morgan noted that additional support existed in FRCP 26, which allows a party “to obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” In particular, Judge Morgan focused on Rule 26’s proportionality factors, and determined that they, too, supported a decision to grant the plaintiff’s motion. For example, Judge Morgan observed that information about the person who made the decision to terminate the plaintiff, as well as information regarding the basis for that decision, were essential to the plaintiff’s retaliation claims. Moreover, Judge Morgan further noted that while this information was accessible to the defendant, it was inaccessible to the plaintiff other than through discovery.

In light of the above, Judge Morgan granted the plaintiff’s motion to depose Tate, but limited the deposition to three basic topics: (1) Tate’s involvement, if any, in the rehiring of Frank Wilson in 2021; (2) actions, if any, taken by Tate when notified of the allegations made against Wilson, and (3) Tate’s role, if any, in [the plaintiff’s] termination.

LUBRIZOL CORP. V. IBM CORP.

#motion-to-compel; #rule26; #proportionality; #slack;
#production-format; #short-message-format; #collaboration

In **Lubrizol Corp. v. IBM Corp.**, 2023 WL 3453643 (N.D. Ohio May 15, 2023), United States Magistrate Judge Jennifer Dowdell Armstrong granted the plaintiff’s motion to compel the defendant to produce the entirety of any Slack conversation containing 20 or fewer total messages that has at least one responsive message, and the 10 messages preceding or following any responsive Slack message in a Slack channel containing more than 20 total messages. And Judge Armstrong also ordered the plaintiff to do the same for Microsoft Teams messages. In the underlying litigation, the plaintiff alleges breach of contract, fraud, and various torts relating to a project to implement a new enterprise resource planning software known as S/4HANA.

The plaintiff had originally sought an order that the defendant produce the full Slack conversation history for any Slack thread containing at least one responsive message. The plaintiff later revised its request to the proposal that Judge Armstrong ultimately approved. The defendant objected to the proposal, asserting that it had already reviewed all Slack messages that hit on any of the parties’ agreed-upon search terms – as well as the 10 messages before and after any message that hit on the terms – and produced any message in that window that provided context. The defendant argued that its production satisfied the requirements of Rule 34(b)(2)(e)(i), and that the additional messages now sought were irrelevant and would be unduly burdensome to produce. Rule 34(b)(2)(e)(i) requires parties to produce documents as they are kept in the ordinary course of business. The defendant asserted that each individual Slack message is a discrete document, stored as individual JSON files, and that their individual nature required that they be treated as such for purposes of production, similar to individual hard copy documents that happen to be stored in the same box. The plaintiff, while not disputing that Slack

messages are stored as individual files, focused on the conversation aspect of the messages, asserted that they were akin to text messages, and argued that entire conversations between participants should be treated as single documents.

While the overarching issue was whether the defendant should be required to produce additional Slack messages, beyond those it had already produced, Judge Armstrong first addressed the predicate issue that was central to the parties' dispute — whether a court should view each individual message as a discrete document under Rule 34, or in the alternative, whether it should view an entire Slack channel as a single, continuous document. Judge Armstrong noted that this issue was one of first impression and, after considering both arguments, concluded that Slack messages are more comparable to text messages than hard copy documents in a box and, therefore, should not be treated as individual messages.

Having resolved the predicate issue, Judge Armstrong next turned to determining what additional messages, if any, the defendant should be required to produce. Judge Armstrong's analysis began by noting the different approaches that courts have been adopting. Examples include orders to produce entire text message conversations that contain at least some responsive messages; orders to only produce text messages that the producing party deems relevant; orders to produce text messages that hit on specific search terms along with relevant surrounding messages that provide context; and orders to produce all text messages between participants during a particular period of time, with a right to redact any messages, in whole or in part, that were purely personal in nature or related to business matters other than those at issue in the case. Against this guidance, Judge Armstrong considered the facts and circumstances of the case at hand and held in favor of adopting the plaintiff's proposed approach — that the defendant must produce the entirety of any Slack conversation

containing 20 or fewer total messages that has at least one responsive message, and the 10 messages preceding or following any responsive Slack message in a Slack channel containing more than 20 total messages.

Judge Armstrong acknowledged that this decision would require the defendant to produce messages beyond what it had already produced, and further acknowledged that such production could, indeed, include messages that the defendant believed were not relevant to the case. Judge Armstrong explained the basis for this decision, including the fact that while there was some dispute over whether all the withheld messages were truly irrelevant, it was undisputed that at least some of them were relevant and should have been produced; the presence of a protective order in the case substantially decreased any concerns regarding the production of purportedly irrelevant messages; and the defendant had failed to establish its claims of undue burden.

EDITOR'S NOTE

While this decision created a stir in ediscovery circles over the court's "endorsement" of the "10 before and after" form of production, we think it is important to stress the narrowness of this holding. IBM had already voluntarily unitized its Slack messages in that format for the purposes of search and review; Judge Armstrong's decision did not demand IBM adopt a unitization scheme that IBM objected to or could not reasonably comply with. Rather, Judge Armstrong only required IBM to change the scope of what it would produce according to that unitization—from IBM's preferred "responsive messages plus anything necessary for context" to "everything in the 20 messages group in which a responsive message is found." In the absence of codified or universally accepted unitization standards, many parties have adopted the approach of producing 24-hour segments or "digests" of messages or of producing X messages before and X messages after a relevant message. Both approaches are likely to result in the

production of irrelevant information. We do not believe that Judge Armstrong's decision should be cited for the proposition that "10 before and after" is a preferred solution. We believe that the production format for chats (whether individual messages, X messages before and after, X-hour segments, X-hour segments with only the relevant chats produced) should be considered, used, discussed, and/or negotiated depending upon the facts of the particular case and the data set at issue.

MCCORMICK & CO., INC. V. RYDER INTEGRATED LOGISTICS, INC

#motion-to-compel; #search; #search-terms; #rule26; #proportionality; #esi-protocol; #burden

In **McCormick & Co., Inc. v. Ryder Integrated Logistics, Inc.**, 2023 WL 2433902 (D. Md. March 9, 2023), United States District Court Chief Judge James K. Bredar affirmed a Magistrate Judge's Discovery Order that required the plaintiff to manually review the documents resulting from application of the parties' agreed-upon search terms, and further concluded that the discovery order did not contravene the proportionality factors set forth in FRCP 26(b)(1).

The underlying matter was a breach of contract case, seeking damages between \$2 million and \$3 million. Early in the proceedings, the parties negotiated and agreed to search terms and to an ESI Protocol. The Protocol provided, in pertinent part, that "a party's obligation to conduct a reasonable search for documents in response to discovery requests shall be deemed to be satisfied by reviewing documents that are captured by utilizing the methodology provided for in this Protocol" and that "[t]he fact that a document is captured by a search pursuant to this protocol does not mean that such document is responsive to a discovery request or otherwise relevant to this litigation and Parties may exclude such nonresponsive documents from production." Sometime later, after seeing the total documents returned by the agreed-upon search terms (almost 49,000 direct hit documents/almost

68,000 with families), the plaintiff took the position that it did not need to perform a document-by-document review and could instead produce the documents without review. The plaintiff filed a motion asking the court to enter the ESI Protocol as an order and, in addition, to declare that the Protocol did not require a document-by-document review. In its motion, the plaintiff estimated the cost of a document-by-document review as \$240,000 and argued it was not proportional to the case. Magistrate Judge David Copperthite, who Judge Bredar had designated to handle discovery disputes in the case, granted the motion in part, entering the ESI Protocol as a discovery order, but denied the request for a declaration that manual review was not required. Judge Copperthite reasoned that the ESI Protocol expressly contemplated manual review of the documents, that such a reasoning was consistent with FRCP 16(b)(1)'s command that only relevant evidence is discoverable, and that the estimated cost of \$240,000 for a dispute amount of \$3 million to \$4 million was proportional to the case. The plaintiff objected to the decision in Judge Copperthite's Discovery Order that required document-by-document review, and Judge Bredar reviewed pursuant to FRCP 72(a).

Applying the requisite clearly erroneous standard, Judge Bredar agreed with Judge Copperthite's decision and entered an order overruling the plaintiff's objection. First, Judge Bredar addressed the plaintiff's argument that the Discovery Order erroneously disregarded the plain language of the ESI Protocol. Judge Bredar's review of the ESI Protocol led to the conclusion that the language therein plainly required document-by-document review, and that the plaintiff's assertions to the contrary were nothing more than an attempt to rewrite the very protocol that it sought to have entered as an order of the Court. Next, Judge Bredar addressed the plaintiff's argument that requiring a document-by-document review contravened the proportionality standards set forth in FRCP 26(b)(1), and once again upheld Judge Copperthite's ruling.

Judge Bredar noted that while the Discovery Order did not march through each standard listed in Rule 26(b)(1), “it clearly took them into account, finding that the costs of the review were proportional to the needs of the case.” Judge Bredar added that “this conclusion is particularly appropriate where, as here, there appears to be a large volume of potentially responsive documents to an error by [the plaintiff]

whereby the documents of a key custodian were deleted despite a litigation hold.” Judge Bredar therefore upheld Judge Copperthite’s analysis, findings, and decision and entered an order overruling the plaintiff’s objections.



Possession, Custody, or Control

The changing nature of the workplace and the ways that employees and agents access and share documents and communications, mean that questions about who owns, controls, or has the right or ability to collect, preserve, and produce ESI can require careful analysis of complex, highly contextual facts. It also raises questions as to whether the traditional possession, custody and control analysis (including the noted split among the circuits, as well as employees' apparently rising rights with respect to their personal data even when generated or stored on work or work-related devices) should be revisited. These cases highlight whether the traditional notions of possession, custody, and control—as well as the existing legal framework around this important issue—are sufficient to account for the nuances of modern ESI storage and transfer.

FEDERAL TRADE COMMISSION V. AMERICAN FUTURE SYSTEMS, INC.

#pcc; #practical-ability; #proportionality; #rule26; #rule34; #slack; #collaboration; #motion-to-compel

In **Federal Trade Commission v. American Future Systems, Inc.**, 2023 WL 3559319 (E.D. Pa. May 17, 2023), United States District Judge Joel H. Slomsky adopted the recommendation of Special Master James J. Rohn, Esq. (2023 WL 3559899 (E.D. Pa. Mar. 28, 2023)) and granted in part, and denied in part, the plaintiffs' motion to compel the production of Slack messages from one of the defendants. In the underlying litigation, the plaintiffs accused the defendants of running a telemarketing scheme in violation of various federal and state statutes. During discovery, the plaintiffs learned that one of the defendants used Slack and sent a letter asking that defendant to "produce all Slack messages involving [its] employees from July 1, 2015 through to the present for all of [its] Slack accounts." The defendant refused, and the plaintiffs moved to compel.

The defendant opposed the motion, arguing that the Slack messages were not in its possession, custody, or control, and further arguing the messages were neither relevant nor proportional to the needs of the case. Concerning possession, custody, or control, the defendant argued that it used only the free level of account service for the employees relevant to the plaintiffs' claims, under which it only had access to 90 days of Slack messages and had no ability to export direct messages or private channels.

The Special Master rejected all of the defendant's arguments and recommended granting the plaintiffs' motion in part, and denying it in part. First, he held that the defendant did have control of the Slack data. He acknowledged that the defendant did not have physical possession of the data, but observed that control is not determined by "[l]egal ownership and physical possession" and instead is determined by a party's right, authority, or practical ability to obtain the documents from a non-party to the action." The Special Master observed that Slack never deletes messages, even in its free accounts, but "merely starts 'hiding messages and files older than 90 days'"—but that content remains in the account until deleted by the account owner. He also observed that Slack permits all account holders, including those on free accounts, to export all content, including hidden messages, private messages, and private channels, by making an application to Slack predicated on "valid legal process," which Slack averred to the FTC would include "a signed order from a judge" or "evidence that [the defendant] requires these exports to comply with an investigation or proceeding by a regulatory or law enforcement agency, including the FTC . . . [T]ypically a letter from the agency."

In light of this, the Special Master found that the defendant was able to comply with the plaintiffs' discovery request and had control over the data, even though the data ultimately resided remotely on servers owned by Slack (which the Special Master

noted to be “irrelevant,” because “documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.”

On the question of relevance, the Special Master observed that the subject Slack data likely contained information relating to telemarketing and therefore was relevant to the case. As to proportionality, the Special Master recited the factors set forth in FRCP 26(b)(1) and decided they weighed in favor of production. Specifically, the Special Master determined that access to the Slack data was in the defendant's control, the defendant's resources were not an obstacle to producing the Slack data, and the benefit of producing the data outweighed any burden it might impose on the defendant.

Judge Slomsky agreed with the Special Master's findings and adopted his recommendation to grant the motion by requiring the defendant to obtain its data from Slack and produce relevant and non-privileged Slack data, and to deny it insofar as it sought the production of the Slack data without allowing for review for relevance and privilege.

EDITOR'S NOTE

In his Report & Recommendation, Special Master Rohn noted the defendant cited the case of Laub v. Horbaczewski, 2020 WL 7978227 (C.D. Cal. Nov. 17, 2020), where the court reached a different conclusion. In Laub, the court found that a defendant on the free Slack account tier lacked possession, custody, and control over direct messages and private channels that it was not empowered to export under its license, and that it would not be proportional to the needs of the case to force the defendant to upgrade its account to allow it to export those categories of data. We note that Special Master Rohn characterized this decision as ultimately “based on a lack of proportionality.” We think this comes short of Laub's holding, but in either event, we think this decision spells the end of parties

being able to rely on Laub to argue they do not have possession, custody, or control over some Slack data when operating under free accounts. While it was never a secret, neither the parties nor the magistrate judge in Laub had notice of (or at least mentioned) Slack's policies concerning “valid legal process”—facts that here were elucidated via direct correspondence between the FTC and Slack in the course of this litigation. That parties using free accounts might access the full scope of their Slack data by presenting a court order capsizes Laub's reasoning and renders “control” over all Slack data for purposes of export a comparatively simple administrative task—something that just about every litigant who stumbles across Laub no longer has an excuse not to know.

MIRAMONTES V. PERATON, INC

#pcc; #practical-ability; #proportionality; #text-messages; #sanctions; #rule37

In **Miramontes v. Peraton, Inc.**, 2023 WL 3855603 (N.D. Tex. June 6, 2023), United States District Judge Jane Boyle considered a plaintiff's motion for case-ending sanctions against the defendant over the loss of text messages potentially relevant to the case.

The plaintiff began working for the defendant after the defendant acquired plaintiff's former employer. Following the acquisition, the defendant began a series of layoffs that included the plaintiff. The defendant justified these actions as part of a company-wide reduction in force driven by budgetary constraints. In his complaint, the plaintiff alleged the layoffs actually were discriminatory terminations based on employees' ages and races.

Following his termination, the plaintiff sent the defendant a litigation hold letter, detailing his allegations and providing notice for the defendant to preserve all relevant documents, including “emails, texts, attachments, and any other method or means of communications, internally or externally.” The defendant in turn instructed the plaintiff's former supervisor to preserve relevant emails, but did not specifically instruct him to retain text messages.

During the course of discovery, it was revealed that the former supervisor had deleted all text messages relevant to the plaintiff's claims and the series of layoffs. The supervisor testified at his deposition that he had knowingly deleted his text messages, because it was his ordinary practice to delete "all of his text messages within forty-eight hours" of receiving them. The plaintiff moved for sanctions, including a directed verdict.

Judge Boyle ruled on plaintiff's motion without reference to Federal Rule of Civil Procedure 37(e). Instead, she relied upon case law predating the December 2015 amendments to the Federal Rules which invoke the court's "inherent powers" to analyze the plaintiff's motion. She focused her analysis on five factors: (1) whether the defendant controlled the texts, (2) whether the defendant had a duty to preserve the texts, (3) whether the defendant intentionally destroyed the texts, (4) whether the defendant acted in bad faith, and (5) whether the defendant's failure to preserve the texts caused plaintiff prejudice.

Judge Boyle answered "yes" to all five factors. First, the defendant argued the relevant text messages were stored on employees' personal devices, not company-owned phones, and that it lacked a legal right to access the messages on demand. However, Judge Boyle noted that it was the defendant's practice not to issue company cell phones, but rather to encourage employees to use their personal cell phones for business purposes. Judge Boyle reasoned that erecting the "bright line" of a legal right of access would allow a company to "effectively shield a significant amount of its employees' business communications from discovery simply by allowing its employees to conduct business on their personal phones."

Second, she found the defendant had a duty to preserve the texts because the defendant had notice that the texts were possible evidence related to plaintiff's claims. Third, she found that the defendant intentionally destroyed the texts, because the supervisor intentionally deleted them, stating "The text messages were intentionally

destroyed. In his deposition, [the supervisor] admitted he destroyed the messages intentionally." Judge Boyle found the destruction occurred "within the course and scope of [the employee's] employment" and thus "the defendant can be held vicariously liable."

Fourth, the court reasoned that the defendant acted in bad faith. Following the defendant's receipt of plaintiff's litigation hold letter, the defendant instructed its employees to preserve relevant emails, but failed to instruct employees to preserve relevant text messages even though it knew "employees regularly used their personal cell phones for business purposes." This gap, she found, "demonstrates bad faith."

Finally, although the former supervisor testified that he had texted about the plaintiff only "once or twice," after receiving the plaintiff's demand letter, Judge Boyle also found that the plaintiff was prejudiced by the loss of text messages. She found that "a reasonable factfinder could conclude the deleted messages were relevant to [plaintiff's] claims," and because of this, "he was prejudiced by their deletion."

As a sanction, Judge Boyle rejected the plaintiff's request for case-ending sanctions or to strike the defendant's defenses, noting that there was no evidence the defendant had instructed the supervisor to delete the texts at issue and that the conduct here was not so "egregious" as to warrant severe sanctions. Instead, Judge Boyle denied the defendant's motion for summary judgment as a sanction for spoliation of the text messages; she also awarded the plaintiff three additional requests for production and five additional interrogatories.

EDITOR'S NOTE

We find a number of issues with respect to this opinion in its lack of application of Federal Rule 37(e) to the plaintiff's motion, under which a different result likely would have obtained, illustrating the minefield employers must navigate today where mobile data is concerned. The case law on the issue of possession, custody, or control of an employer

over an employee's personal devices is muddy, and litigants generally cannot rely on consistent application of standards. Courts in the Fifth Circuit generally follow the "legal right" standard for determining whether a party has "control" over data in the physical custody of a non-party. See Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 821 (5th Cir. 2004). Here, Judge Boyle rejected application of that standard. Regardless, of whether one agrees or disagrees with the holding, it highlights the importance of an employer in Peraton's shoes to have appropriate and updated B.Y.O.D., Mobile Device Usage, and Information Systems Acceptable Use policies in place to clearly set expectations around what data, and on what systems, the employer expects to extend its legal and practical control in the event of litigation.

OWEN V. ELASTOS FOUNDATION

#pcc; #practical-ability; #email; #hyperlink-attachments

In **Owen, et al. v. Elastos Foundation, et al.**, 2023 WL 2537287 (S.D.N.Y. March 16, 2023), the plaintiffs filed a putative class action lawsuit alleging that the defendant and some, but not all of its directors violated the Securities Exchange Act of 1933 by selling-and soliciting the sale of-unregistered securities in the form of cryptocurrency tokens.

An employee and director of the defendant was named as a custodian but was not individually named as a defendant in the lawsuit. The defendant produced documents collected from his corporate email account, personal computer, personal mobile device, and WeChat account, but did not search for or produce documents from his personal Gmail account. The director cooperated in discovery and allowed a search of his personal computer, mobile device, and WeChat account, but refused to allow a search of his personal Gmail account. The plaintiffs argued that the previously agreed-upon search terms should be run across the entirety of his personal Google account because discovery showed 1) that two (personal in nature) emails sent to his company email account were then forwarded to

his personal Gmail address; 2) that he received one work-related email sent to his personal Gmail address, which he then immediately forwarded to his corporate account; and 3) the defendant had produced metadata about two Google Docs associated with his personal Google account (but not the documents themselves). The plaintiffs argued that because these two documents were not produced, they must be stored in the director's personal Google account.

United States Magistrate Judge Barbara Moses assessed whether the director's personal Google account was within the defendant's "control" using the practical ability test, noting that there are a number of factors courts consider when determining if a defendant has the practical ability to obtain relevant documents from a non-party officer, director, or employee, including whether 1) the corporation can discharge the employee for failing to cooperate in discovery; 2) local law imposes a duty to respond to the discovery; 3) the corporation has secured the employee's cooperation in discovery; 4) the party has asked the non-party to turn over the documents at issue; and, if so, 5) the non-party was willing to do so.

Judge Moses also noted that the burden of demonstrating that the party from whom the discovery is sought has the practical ability to obtain those documents lies with the party seeking discovery. Judge Moses ultimately held that plaintiffs failed to meet this burden as the party seeking discovery here.

Judge Moses applied the practical ability factors to the instant dispute and reasoned that because the defendant is registered as an entity in Singapore and primarily operates out of China, where the director works, Singaporean and Chinese law would be relevant to the analysis. Despite this, the plaintiffs did not discuss Singaporean or Chinese law with respect to the question of "control." As a result, Judge Moses could not assume that the defendants had the same "practical ability" to coerce

compliance from the director that a U.S. corporation would.

Judge Moses also highlighted that the defendants had no policies in place that would give it control over data on the personal devices of its employees. Judge Moses further found that the director had cooperated in discovery by turning over his personal phone, laptop, and WeChat account to be searched, and he sat for a deposition, refusing only to provide access to his Gmail account.

Judge Moses stated that even if the plaintiffs had succeeded in demonstrating that the personal Google account was within the defendant's control, she was not persuaded that the director used the account to conduct business for defendant. Judge Moses explained that a single received email (which was promptly forwarded to his work email account to be available for search and collection) is distinguishable from other instances in which courts have ordered a search of their directors' and employees' personal email accounts.

RATTIE V. BALFOUR BEATTY INFRASTRUCTURE, INC

#motion-to-compel; #pcc; #rule34; #search-terms; #text-messages

In **Rattie v. Balfour Beatty Infrastructure, Inc.**, 2023 WL 5507174 (N.D. Cal. Aug. 25, 2023), U.S. Magistrate Judge Lisa J. Cisneros denied the plaintiff's motion to compel the defendant to produce text messages from the personal cell phones of the defendant's "management witnesses."

The plaintiff, a former employee of the defendant, brought this action against the defendant, alleging violations of the California Fair Employment and Housing Act and the California Family Civil Right Act. The plaintiff filed this motion to compel after becoming aware of text messages that were sent by one of the management witnesses and refer to the plaintiff, but were not included in the defendant's production to the plaintiff. That these messages

were not included in the defendant's productions seemed to directly contravene the defendant's repeated assertions that it had collected all the text messages for all the management witnesses, searched them using the agreed-upon search terms, and produced all that were responsive. However, the defendant made clear that its collection, search, and production was limited to the management witness's defendant-provided phones. By contrast, the text messages that the plaintiff claims were missing from the production appear to have come from the management witness's personal phone.

Judge Cisneros began her analysis with a reference to Rule 34 of the FRCP, which only requires production of relevant documents that are in the responding party's possession, custody, or control. Judge Cisneros further observed that while courts are divided on what circumstances render an employee's personal device subject to the possession, custody, and control of its employer, it is generally understood that the party requesting the data must show that the personal devices were used for business purposes. Here, as Judge Cisneros noted, the plaintiff failed to present any evidence indicating that the defendant had any control over its employees' personal cell phones or other personal electronic devices. By contrast, the defendant represented that it issues work phones to its management employees, and that they are expected to use those devices for work-related communications. Judge Cisneros therefore concluded that the plaintiff failed to establish a sufficient factual record to substantiate an order that the defendant must collect, search, and produce from the management witness's personal devices. Relying on this conclusion, Judge Cisneros denied the plaintiff's motion to compel.



Search and Production

As the types, volumes, and locations of ESI generated and stored by organizations continue to grow dramatically, the issue of when, whether, and how to search for and produce those materials is experiencing growth as an area of discovery motions practice. The cases highlight the need to implement and document reasonable procedures and processes around the identification, search, and collection of custodial and non-custodial sources. They also highlight continued motions practice around the form of production pursuant to Rule 34(b)(2)(E) and emphasize that “reasonably usable forms” suffice to satisfy the rule in the absence of a specific request for or agreement upon a particular form.

ALIPOURIAN-FRASCOGNA V. ETIHAD AIRWAYS

#production-format; #native-format; #motion-to-compel;
#forensic-exam; #metadata

In **Alipourian-Frascogna v. Etihad Airways**, 2023 WL 5934897 (N.D. Ill. Sept. 12, 2023), United States Magistrate Judge Sheila Finnegan granted in part, and denied in part, the defendant’s motion to compel discovery regarding the plaintiff’s belated production of audio files.

The plaintiff brought claims against the defendant alleging harassment, retaliation, and discrimination in connection with her employment. The plaintiff specifically alleged that the defendant made employment decisions that favored individuals of Emirati descent. Discovery was otherwise complete save for one outstanding issue. Specifically, more than two years after the case was filed, the plaintiff produced four audio recordings between herself and other defendant employees. The plaintiff’s production was the first time the existence of these recordings was disclosed to the defendant. The plaintiff did not produce native versions of the audio files or metadata about them.

In response, the defendant sought additional information about the recordings. The plaintiff refused to answer these questions because the other employees on the recordings did not consent to being recorded, exposing the plaintiff to possible criminal liability. The defendant then moved to compel the plaintiff to (1) respond to supplemental

discovery requests regarding the audio recordings on an expedited basis; (2) submit any personal devices on which the plaintiff recorded relevant audio files for a forensic examination; (3) immediately produce the audio files in native format with all associated metadata; and (4) confirm that the plaintiff has produced all relevant documents, including audio and video files in her possession, custody, or control.

Judge Finnegan granted the defendant’s motion to compel in part, finding that the audio recordings were relevant to the underlying dispute and ordering the plaintiff to (1) respond to the defendant’s supplemental discovery requests; (2) immediately produce the native audio files, with metadata; and (3) produce an affidavit, via counsel, certifying the completeness of her production. Judge Finnegan also ruled that the plaintiff must answer questions about the recordings under oath and that her Fifth Amendment privilege against self-incrimination did not apply because the plaintiff had not admitted to making the recordings herself.

Judge Finnegan denied the defendant’s request to forensically examine the devices on which the recordings were made. Judge Finnegan noted that ordering a forensic exam “is an extraordinary remedy that is required only if the moving party can actually prove that the responding party has concealed information or lacks the expertise necessary to search and retrieve all relevant data.” Judge Finnegan noted that mere speculation that a

party is withholding relevant discovery is not sufficient to order a forensic examination, rejecting the defendant's assertion that the late revelation of the existence of the recordings existed should suggest the plaintiff was concealing additional evidence. She did, however, allow for the possibility of later ordering a forensic examination if the defendant should believe it still has a basis to request a forensic examination after taking the discovery ordered concerning the origin and circumstances of the recordings.

IN RE BED BATH & BEYOND SECURITIES LITIGATION

#preservation; #social-media

In **In re Bed Bath & Beyond Corp. Securities Litigation**, 2023 WL 4824734 (D.D.C. July 27, 2023), United States District Judge Trevor M. McFadden denied one defendant's motion to dismiss securities fraud claims that investors in Bed, Bath and Beyond stock brought against him. The plaintiffs alleged that one of the defendants engaged in what is commonly known in the investment community as a "pump-and-dump" scheme. Specifically, the plaintiffs claim that one of the defendants bought shares in the company, worked to increase the price of those shares, and then sold them for a profit, thereby destroying their value for other investors who followed his advice to purchase the shares.

Among other tactics, they alleged the defendant influenced an increase in the shares' price by tweeting a "moon" emoji to his hundreds of thousands of Twitter followers. The smiley moon emoji that the defendant tweeted out is known to mean "to the moon" or "take it to the moon," indicating that the defendant believed that the stock price will increase. The defendant sent the tweet a few days after he signaled, via regulatory filing, that he was not planning on selling any stock. However, on the same day as he sent his tweet, he also filed a form with the SEC outlining a potential plan to sell his shares. He ultimately sold the shares, profiting by \$68 million. Many of his followers had invested in the

company, allegedly and partly in reliance on the defendant's tweet. The plaintiffs claimed that the defendant was essentially telling his hundreds of thousands of followers that Bed Bath's stock price was going to go up and that they should buy or hold the stock, causing the stock price to soar, which allowed the defendant to sell his stake at a high price and make a large profit, while his followers suffered significant financial losses. As a result, the plaintiffs filed suit claiming that the tweet was materially misleading. The defendant filed this motion to dismiss.

Judge McFadden provided that in order to survive a motion to dismiss, the moving party must "state a claim to relief that is plausible on its face." Accordingly, Judge McFadden analyzed whether the defendant's tweet, which included a moon emoji, was plausibly misleading. The plaintiff alleged that the tweet was a signal to investors to buy or hold Bed Bath stock, and that it was misleading because the defendant had already soured on Bed Bath and was planning to sell his stake. The defendant argued that the tweet cannot be actionable because emojis have no meaning and are therefore ambiguous and can never be actionable.

Judge McFadden disagreed with the defendant that emojis have no meaning. Judge McFadden reasoned that emojis, like language, can be ambiguous. He also provided that being ambiguous does not make language unactionable or incapable of being correctly interpreted. Citing prior precedent, Judge McFadden found that emojis are symbols, and like language, their meaning can be clarified by the context in which they are being used. Judge McFadden held that emojis may be actionable if they communicate an idea that would otherwise be actionable and that liability will turn on the emoji's particular meaning in context. Judge McFadden denied the motion, determining that plaintiffs had plausibly alleged that the moon emoji had a particular meaning in the context in which it was used and that its meaning was actionable.

EDITOR'S NOTE

This decision admittedly is not about ediscovery. That said, it is interesting to the ediscovery practitioner because it highlights the way that non-traditional forms of communication like emojis can play a role of central relevance to a case, placing service providers and practitioners on notice that their preservation, collection, review, and production plans and tools must carefully and adequately account for these and other non-traditional (e.g., memes) forms of communication. They may not be “language,” but they are still laden with meaning.

DEAL GENIUS, LLC V. O2COOL, LLC

#search; #search-terms; #motion-to-compel;
#proportionality; #email

In **Deal Genius, LLC v. O2Cool, LLC**, 2023 WL 4556759 (N.D. Ill. July 14, 2023), Special Master Phil Favro considered the defendant's request to compel the plaintiff to engage in additional elusion testing and search term expansion. The case involves patent validity and infringement claims related to “neck-worn portable cooling fans.” Earlier, the defendant alleged that the plaintiff had not made fulsome productions of emails for five discovery custodians. Special Master Favro therefore had ordered the parties to develop a stipulated order describing a protocol by which the plaintiff would redo its email search and production using revised search terms. The plaintiff did so and produced 54 additional responsive records. The stipulated Order also required the plaintiff to perform an elusion test—that is, to review a random sample of all documents that were not returned by the search terms used to determine how large the population of documents may be that are relevant to the case but do not contain the terms searched—once its primary search and production pursuant to the Order was completed, and to produce any responsive documents identified during that test. The Order required the parties to then meet and confer “to determine whether [the plaintiff] should run

additional search queries to identify other relevant documents that the [revised] search terms may not have identified.” The plaintiff performed this elusion test and identified two additional responsive documents, which represented a responsiveness rate among the test population of only 0.08%. The parties did not meet and confer timely under the terms of the Order about expanding the search terms (within 7 days of the last production), but eventually did so at the prompting of the Special Master. Following meet and confer, the defendant requested the plaintiff test an additional search string (the “First Modified Search Term”), which the plaintiff did, identifying 28 documents as relevant and producing those to the defendant. The defendant then requested that the plaintiff run a broader version of the first modified search term (the “Second Modified Search Term”). The plaintiff refused, arguing that the broader version was not sufficiently tied to issues relevant in the litigation and that the request was untimely under the Order.

After the defendant moved for an order compelling review and production of the documents, the Special Master requested that the plaintiff run the Second Modified Term, which it did. The search returned 50 documents for review (comprised of only 18 unique documents and 32 duplicates). The Special Master ordered review of the hits on the second term, finding that the scope was reasonable and the burden was proportional. He noted his suspicion that the low rate of relevance in the elusion sample “may be misleading” and questioned whether the sample was inappropriately drawn from documents that were beyond the date scope for discovery in the case. He also ordered the plaintiff to redo its elusion test after including the new search terms, reasoning that none of the 46 documents identified by either Modified Term was within the sample used for the first elusion test, but instead resulted from expansion of the terms. This, he concluded, warranted a second elusion test so that “the Parties [may] consider running additional search

terms to identify relevant information that may have eluded” the revised search terms.

EDITOR’S NOTE

Phil Favro is one of our favorite commentators on the rules and law of ediscovery. Here, he wrestles with the challenging question of “when is ‘enough’ enough?” In this context, he gave life to the parties’ agreement to negotiate additional search terms based on the results of an elusion test; that agreement evidently did not include a threshold percentage for responsive documents, such that a sufficiently small rate of responsiveness in the sample would be taken as proof that the parties had done enough. Without such a threshold, the parties were left to continue negotiating and litigating over search terms based on a rate of responsiveness of less than 1/10th of 1 percent. We raise for discussion whether his analysis of the proportionality factors might have been better focused on process and not raw volume. The standard is not perfection. Entertaining additional rounds of iterative search based on fewer than 50 unique results arguably seems like an exercise designed with perfection—or something close to it—in mind.

IN RE FIRSTENERGY CORP. SECURITIES LITIGATION

#search; #search-terms; #proportionality; #rule45; #burden; #cost-shifting; #rule502; #privilege

In **In re Firstenergy Corp. Securities Litigation**, 2023 WL 2633675 (S.D. Ohio March 24, 2023), United States Magistrate Judge Kimberly A. Jolson considered a joint motion brought by both the plaintiffs and an individual defendant to compel a non-party to perform a supplemental search for materials relevant to the litigation using search terms requested by the movants, and to bear its own costs for the search. In granting the requested relief, Judge Jolson also ordered the movants and the non-party to negotiate additional search terms to use to search for relevant materials among the files of the law firm representing the non-party and

entered a Rule 502(d) Order to protect against waiver of privilege.

The case involved allegations of corruption and bribery involving two nuclear power plants. The primary underlying defendant (FirstEnergy) owned and operated the plants; the non-party was a subsidiary “funded and controlled by” the defendant. Earlier in the case, the movants jointly served a Rule 45 subpoena on the non-party, which had produced documents. The movants subsequently moved to compel the non-party to produce certain documents it had withheld or redacted on the basis of attorney-client privileged. They also moved to compel the production of additional documents, arguing that the non-party’s production had been deficient because the non-party’s search protocol been too narrow and had not encompassed documents created or received by the non-party’s lawyers, whom they alleged to have provided non-legal services to the non-party. Judge Jolson ordered the non-party to supplement its production, which the non-party did in December 2022. The non-party also disclosed its search protocol at that time.

The movants then again raised deficiencies in the production, arguing that the law firm’s documents still had not been produced, and also that the search terms disclosed were not sufficiently broad, failing, for example, to include the name FirstEnergy. The non-party objected that the additional terms the movants demanded it employ would result in “over 1,000 unique additional documents to review, which will impose significant additional costs.” The non-party argued that the Court should only order the search to be performed if it would shift the costs for review and production to the movants pursuant to Rule 45(d)(2)(B)(ii). It also again objected to the search and production of privileged documents in the custody of its lawyers, which it argued would be unduly burdensome and result only in the identification of privileged information it would have to redact or log.

Judge Jolson found there to be “legitimate concerns about deficiencies in [the search] protocol, and the proposed search terms reasonably address those concerns.” For example, she described the failure to search for any variation on the word “FirstEnergy” or the names of several other organizations relevant to the matter as “patently deficient.” She also denied the non-party’s request to shift the cost of redoing its search and production, noting the non-party’s “interest in the outcome of this litigation is greater than that of a usual non-party, and the need for cost mitigation—an appropriate protection for a disinterested non-party—is lesser.” She also observed that “this litigation is of public importance. This is a class action comprising potentially thousands of Plaintiffs who say they were harmed by FirstEnergy’s participation in ‘one of the largest corruption and bribery schemes in U.S. history.’” She concluded, therefore, that the non-party “has an obligation to the public and a particular obligation to potential class members to fairly and fully disclose the non-privileged information within its possession, custody, or control.” She ordered the non-party to use the movants’ proposed additional search terms and to bear the costs of the associated review and production.

Judge Jolson also acknowledged the movants’ and non-party’s competing concerns about searching and producing documents in the possession of the non-party’s lawyers. On the one hand, she observed that the movants had alleged the law firm had provided non-legal services to the non-party, and although the non-party had denied this, it had done so without having performed a search of the firm’s files. She therefore described the non-party’s assertions that only privileged material would be identified as “speculative.” On the other hand, she noted that the search terms proposed by the movants would be overly broad, given that FirstEnergy also was a client of the firm. Judge Jolson ultimately ordered the movants and the non-party to meet and confer to negotiate a search protocol narrowly tailored for the purpose of

searching the lawyers’ files. And she granted the non-party’s motion for entry of a Rule 502(d) order, over the movants’ objections, to facilitate the production of documents from the law firm with minimal redaction.

GARDNER-ALFRED V. FEDERAL RESERVE BANK OF NEW YORK

#search; #search-terms; #proportionality; #sanctions; #rule26; #rule34

In **Gardner-Alfred v. Federal Reserve Bank of New York**, 2023 WL 3495091 (S.D.N.Y. May 17, 2023), U.S. District Judge Lewis J. Liman granted in part, and denied in part, the defendant’s motion for discovery sanctions stemming from the plaintiffs’ failure to run “reasonable” search terms on its documents during discovery.

The underlying litigation is an employment matter where the plaintiffs claimed they were denied religious accommodations in connection with the COVID-19 vaccines. Almost from the start of discovery, the plaintiffs delayed producing documents and information in response to the defendant’s discovery requests. After a contentious history wherein Judge Liman issued multiple orders for the plaintiffs to complete productions on time, the plaintiffs repeatedly failed to meet discovery deadlines. Despite the plaintiffs’ repeated representations that their discovery was substantially complete, a month after the close of the fact discovery deadline, they produced an additional 1,082 pages of documents. This was more than twice what the plaintiffs had produced during the discovery period. After the close of fact discovery, the defendant moved for sanctions. The plaintiffs objected to the motion and essentially placed the blame for their small production on the defendant. Specifically, the plaintiffs claimed the defendant provided no guidance on which search terms to use. They said they had contacted the defendant about this, and the defendant repeatedly told them to “run search terms on its own determination.” As a result, the plaintiffs created their own set of search terms.

Judge Liman had little trouble determining that sanctions were warranted against the plaintiffs. Judge Liman observed, among other things, the plaintiffs' repeated and flagrant disregard for their discovery obligations throughout the case, and their counsel's egregious abuse of the discovery process. Judge Liman made clear that "even absent agreement or discussion about the appropriate terms, [a producing party] still has an independent obligation to craft search terms to fulfill the requirements of Rules 26 and 34" and "conduct a reasonable search." While noting that "courts are generally loath to second guess search terms," Judge Liman found that there was little question here that the plaintiffs' search terms were too narrow and "were not reasonably calculated to lead to production of documents relevant to their claims or Defendant's defenses." For example, Judge Liman noted that in response to a request for documents concerning COVID-19, the plaintiffs produced only "documents with the terms 'covid' or 'covid-19' or 'coronavirus' ... if one of those words was within ten words of either 'immune!' or 'natural' or 'CDC.'"

Judge Liman's award for sanctions included granting the defendant's request for (1) reasonable expenses and attorneys' fees they incurred while dealing with the plaintiffs in discovery; and (2) adverse inference instructions that the plaintiffs withheld relevant documents, as well as what those documents would have shown. However, Judge Liman declined to instruct the jury to draw a particular inference based on the lack of production, explaining that "courts in this circuit have not gone so far as to direct that a jury should draw a certain inference from a party's spoliation or withholding of evidence, instead opting to allow the jury to draw such inferences as it sees fit, from the facts presented."

GARNER V. AMAZON.COM, INC.

#search; #search-terms; #proportionality; #tar; #esi-protocol

In **Garner, et al. v. Amazon.com, Inc.**, 2023 WL 3568055 (W.D. Wash. May 19, 2023), United States District Judge Robert S. Lansik denied Plaintiffs'

motion to compel Amazon to comply with the Court's prior discovery orders. Garner had previously filed a successful motion compelling Amazon to apply 38 search strings Plaintiff had proposed across 36 custodians' electronically stored information ("ESI"). These searches returned approximately two million documents. The underlying dispute relates to information that Amazon's Alexa product may have passively collected and retained.

Given the large number of documents returned by the search, Amazon notified Garner that they intended to use technology-assisted review ("TAR") to review documents for responsiveness and privilege prior to production. Amazon also noted that they would meet and confer with Garner to discuss their TAR process before beginning review. Without meeting and conferring, Garner objected to Amazon's proposal to use TAR, arguing that doing so after the court had already issued an order on search terms and custodians would be "improper and impermissible".

Garner and Amazon had previously entered into an ESI Agreement that the court entered as an order. The ESI Agreement and Order allows Amazon to conduct a responsiveness and privilege review of the documents returned by the search terms. Further, the agreement directs parties "to confer to attempt to reach agreement on ... appropriate computer- or technology-aided methodologies before any such effort is undertaken."

Judge Lansik noted that the use of TAR is a reasonable option for locating or filtering ESI. Judge Lansik further noted that the ESI Order in the case specifically provides that producing parties 1) can review documents for responsiveness and privilege prior to production; and 2) must confer with the opposing party to discuss the use of "TAR."

Garner argued that Amazon's use of TAR on pre-filtered documents returned by search terms was somehow improper because it would further reduce the document universe and not identify potentially

relevant documents. Judge Lansik rejected this argument, holding that Amazon’s proposal to meet and confer with Garner regarding the use of TAR, after applying the Court-ordered search terms, as specifically contemplated by the ESI Order, was not unreasonable and did not exclude Garner from even meeting and conferring with Amazon regarding the use of TAR.

Judge Lansik reasoned that the parties had enough time to confer regarding a TAR protocol. He further highlighted the fact that Courts “generally agree that the producing party is best situated to evaluate the various options for reviewing and producing its own ESI and places the burden on that party to make an initial, detailed proposal about the technology and methodologies it intends to use.” Judge Lansik also repeatedly highlighted the fact that Garner was not objecting to Amazon’s review of documents for responsiveness and privilege, only to its use of TAR to do the same.

EDITOR’S NOTE

This is an important decision in that the judge allowed for the use of TAR even after search terms have been applied. This common-sense decision reconfirms the notion that that producing parties are in the best position to determine how to review documents prior to production and that there is no reason that this authority should be limited to only using TAR or only applying search terms.

IMPRIMISRX, LLC V. OSRX, INC.

#search; #search-terms; #motion-to-compel; #discovery-on-discovery; #email

In **ImprimisRx, LLC v. OSRX, Inc. and Ocular Science, Inc.**, 2022 WL 17824006 (S.D. Cal. Dec. 19, 2022), United States Magistrate Judge David D. Leshner denied the defendants’ motion to compel the plaintiff to disclose the sources, methodology, and search terms used to collect ESI from the plaintiff’s president. The underlying litigation is an intellectual property dispute, involving claims of trademark and copyright infringement. The

defendants brought this motion following the deposition of the plaintiff’s president, where he testified that although he expected to be notified if any documents, emails, or ESI in his possession were collected from him in connection with the case, he was unaware of any such collection. The plaintiff opposed this motion, asserting that it had, in fact, collected its president’s emails; had properly searched for, reviewed, and produced responsive documents; and that the defendants had failed to demonstrate any deficiencies in the plaintiff’s production.

Judge Lershner’s decision to deny the defendants’ motion began with a brief discussion about “discovery on discovery.” Specifically, Judge Lershner observed that “[d]iscovery into another party’s discovery process is disfavored” and “requests for such ‘meta-discovery’ should be closely scrutinized in light of the danger of extending the already costly and time-consuming discovery process ad infinitum.” *Jensen v. BMW of North America, LLC*, 328 F.R.D. 557, 566 (S.D. Cal. 2019). Moreover, as Judge Lershner further noted, “[g]enerally, courts will only permit such discovery where there is some indication that a party’s discovery has been insufficient or deficient.” *Id.* Judge Lershner then explained that when “addressing a request to compel disclosure of search terms employed by an opposing party to identify responsive documents, relevant considerations include (1) whether the request is made prior to the collection and production of responsive documents and (2) if the request for search terms is made after production, whether the party seeking disclosure has identified some deficiency or insufficiency of the responding party’s production. In certain instances, courts have ordered parties to engage in meet and confer efforts, including disclosure of proposed search terms, before the search process begins.”

Here, the defendants brought the instant motion to compel the plaintiff to disclose the sources,

methodology, and search terms used to collect ESI from the plaintiff's president after the plaintiff produced its president's documents. As such, the defendants' motion needed to show a deficiency or insufficiency in the plaintiff's collection, review, and production of its president's documents. However, as Judge Lershner concluded, the defendants failed to meet this requirement. Judge Lershner based this conclusion, in pertinent part, on a finding that the evidence supporting the defendants' motion—the testimony of the plaintiff's president that he was not aware his emails had been collected—did not contradict the plaintiff's assertion that it had, in fact, collected its president's emails and produced responsive and non-privileged emails from that set. In addition, Judge Lershner also relied on the declaration of the plaintiff's IT Director, who stated that “although he did not personally discuss the email collection with [the president], he directly supervised and had knowledge of actions taken by the company's former Network Security Supervisor to collect [the president's] emails, which were discussed with [the] plaintiff's in-house counsel and subsequently transferred to the [p]laintiff's counsel.” Based on the above, Judge Lershner held that the defendants had not shown that the plaintiff's collection and production of its president's emails was “insufficient or deficient” and, therefore, denied the defendants' motion to compel the plaintiff to produce the search terms it used to locate the emails within its collection from its president that were responsive to the defendants' requests for production.

IN RE LOCAL TV ADVERTISING ANTITRUST LITIGATION

#search; #search-terms; #motion-to-compel; #rule26; #scope

In **In re Local TV Advertising Antitrust Litigation**, 2023 WL 5659926 (N.D. Ill. Aug. 31, 2023), United States District Judge Virginia M. Kendall ordered one of the defendants to produce “highly relevant” documents it had refused to produce during discovery. The case involves broad antitrust claims

against local television broadcasters. Prior to filing of the case, in 2017, the U.S. Department of Justice served Civil Investigative Demands on several local broadcasters in the context of their regulatory review of a proposed merger between two such entities. That review found alleged antitrust violations throughout the industry and ultimately culminated in a criminal case against several companies who later were named as defendants in the instant civil action. The plaintiffs in the instant action requested documents “submitted to the DOJ in connection with its” prior investigations. With respect to one defendant (Nexstar Group, which comprised several entities named in the action), the plaintiffs also asked “whether Nexstar provided interrogatory (or written narrative responses) to the DOJ . . . and if so, whether Nexstar will produce these responses in this case.” In response, the defendant responded that two entities (Nexstar Media and Tribune Broadcasting) did not “produce[] any interrogatory responses to the DOJ in connection with” the prior investigations. After several subsequent attempts to clarify the defendant's response, the defendant stated that “Tribune did not serve narrative responses” during the DOJ investigations, but only in the context of the planned merger. Subsequently, another defendant produced to the plaintiffs “white papers” that DOJ had asked it to provide in the context of the prior investigations, after which the plaintiffs asked all defendants to confirm that they had produced such white papers to the extent they, too, had been asked to provide such to DOJ. The Nexstar defendants objected to this request, arguing, essentially, that it had never been asked to produce “white papers,” and in any event, its white papers did not hit on the parties' agreed search terms.

The plaintiffs moved to compel production of the white papers. In response, the defendant argued that the white papers it provided to DOJ were not “narrative responses” as contemplated by the plaintiffs' discovery requests, and that the parties' agreement on search terms “abrogate[d] [its]

obligation to identify and produce relevant documents.” Judge Kendall disagreed with the defendant on both counts. First, she observed that the defendant’s interpretation of “narrative responses” to include only “written responses to DOJ’s CIDs” was “overly narrow . . . particularly considering Plaintiffs’ many attempts to clarify precisely how [the defendant] understood the term.” (emphasis in original). Second, she rejected the defendant’s position that “its discovery obligation extends no further than the parties’ discovery agreement” on search terms. She held that “such agreements do not control whether [the defendant] has met its discovery obligations under the Federal Rules of Civil Procedure,” and ordered the defendant to “supplement its incomplete responses . . . even if it means searching beyond the limited set of documents to which [the defendant] applied the agreed-upon search methodology.” She also ordered the defendant to “pay Plaintiffs’ reasonable expenses and costs, including attorney’s fees,” pursuant to Rule 37(a)(5)(A), finding that its opposition to the plaintiff’s motion was not substantially justified.

EDITOR’S NOTE

Litigators sometimes appear to forget that negotiations over search terms, custodians and date ranges do not define the scope of discovery. The standard for what is discoverable is information relevant and proportional to the case’s needs. Agreements regarding search terms, custodians, and date ranges are not a proxy for responsiveness or relevance. Litigants can conduct responsiveness reviews in advance of production to determine what information is responsive to a discovery request. Similarly, these same agreements cannot be used to shield the production of documents responsive to discrete discovery requests, particularly when specific records are independently sought via a request for production.

MILLS V. STEUBEN FOODS, INC

#production-format; #motion-to-compel; #rule34

In **Mills v. Steuben Foods, Inc.**, 2023 WL 179579 (W.D.N.Y. Jan. 13, 2023), U.S. Magistrate Judge Leslie G. Foschio denied the plaintiff’s motion to compel the defendants to re-produce their document production in a text-searchable format and to produce a production log.

The plaintiff, a former employee of the defendants, filed an action alleging employment discrimination arising from a series of racial slurs certain individual defendants allegedly uttered and/or painted on her car, the defendants’ failure to promote her, and wrongful termination.

The plaintiff requested all of the defendants’ documents relating to plaintiff. The plaintiff contended that the defendants improperly “dumped” 5,295 documents comprising 111,896 digitized pages of documents on the plaintiff without providing a complete production log or producing the documents in a text-searchable format. The plaintiff did not request that the documents be produced in any particular format.

The defendants responded that they produced the documents in an industry-standard format suitable for upload to the “most commonly used document review platforms” and that the documents were text-searchable by opening them and pressing CTRL-F on a keyboard. The defendants also provided written discovery responses indicating the Bates ranges of documents responsive to each request and subsequently produced a production log indicating where categories of communications appeared in the production.

Judge Foschio denied the plaintiff’s motion to compel, finding that the defendants’ production was “reasonably usable” and that the defendants were not required to produce a production log sorted by Bates number or to produce the documents in a text-searchable format. Judge Foschio reasoned that Federal Rule of Civil Procedure 34(b)(2)(E)(ii) requires that “[i]f a request does not specify a form for producing electronically stored information, a party

must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.” Judge Foschio noted that the plaintiff never argued that the documents were not produced as ordinarily maintained. Judge Foschio also held that the defendants’ subsequent production of a production log made the production reasonably usable, relying on precedent from other jurisdictions that have held that such logs are sufficient responses to discovery requests.

Judge Foschio accordingly denied the plaintiff’s motion to compel and ordered the parties to meet and confer with the assistance of IT professionals in a good-faith effort to resolve any technical issues with respect to searchability.

RUSOFF V. THE HAPPY GROUP

#search; #search-terms; #proportionality; #esi-protocol; #burden

In **Rusoff v. The Happy Group**, 2023 WL 114224 (N.D. Cal. Jan. 5, 2023), United States Magistrate Judge Lisa J. Cisneros granted the plaintiffs’ motion to compel in part and denied it in part, including ordering the parties to use the set of search terms that she had created from the parties’ proposed terms. The underlying litigation is a consumer class action where the plaintiffs allege that the defendant, a company that markets and distributes eggs throughout California and the U.S., was falsely marketing eggs as free-range and pasture-raised to extract premium prices from customers. The case history includes a long-running unresolved discovery dispute between the parties over the contents of their ESI Protocol. At issue here is the plaintiffs’ request to include three (3) additional custodians and a set of nine (9) search terms that would apply to all custodians.

The parties have been negotiating their ESI Protocol since June 2022. Through that process, they reached agreement on six custodians, but could not reach agreement on three additional custodians or search terms. Judge Cisneros framed the question

presented as whether “Plaintiffs’ proposed custodians and searches strings [are] relevant and proportionate to the needs of the case.” Judge Cisneros began by considering the custodians. The plaintiffs sought to include the defendants’ Senior Manager of Marketing, their VP of Sales, and their VP Operations and Supply Chain Director. The plaintiffs asserted that all three are members of teams that played integral, interrelated roles that bore on the defendants’ marketing and labeling of its egg products and, thus, were likely to possess relevant emails. The defendants objected, arguing that collecting data from these three custodians would be duplicative of data already collected and would create an unnecessary and undue burden. Judge Cisneros considered each proposed custodian, taking into account the facts presented, and ultimately determined that two of the three proposed custodians—the Senior Manager of Marketing and the VP of Sales—were both relevant and proportional to the needs of the case. Judge Cisneros further observed that the use of appropriately narrowed search terms and de-duplicating technology would address the defendants’ concerns over duplicative data and undue burden. By contrast, Judge Cisneros determined that the plaintiffs had failed to demonstrate a need for the third proposed custodian. Judge Cisneros therefore granted the plaintiffs’ motion as it related to the first two custodians and denied it for the third.

Judge Cisneros next turned to the search terms. The plaintiffs had proposed nine search strings, arguing that they were directly related to their allegations and were tailored in a way to find documents responsive to their RFPs. The defendants objected and, among other things, argued that the search strings must include the term “pasture,” a key term from the plaintiffs’ false advertising allegation. Judge Cisneros considered, and then rejected, both parties’ proposed terms. Judge Cisneros held that the plaintiffs’ proposed terms were unduly broad and clearly disproportionate to the needs of the

case, and on the opposite end of the spectrum, Judge Cisneros held that the defendants' counterproposal was unreasonably restrictive. Taking into account the parties' unpersuasive positions in their discovery briefs and their failure to reach a compromise, Judge Cisneros stepped in and created a revised set of search terms that were "intended to lead to relevant discovery closely tethered to Plaintiffs' claims." Judge Cisneros first presented the terms in a tentative ruling, modified them slightly based on information and arguments that the parties presented during a two-hour hearing, and then ordered the parties to use that list of terms for their remaining ESI discovery.

SINGLEPOINT DIRECT SOLAR LLC V. SOLAR INTEGRATED ROOFING CORP

#search; #search-terms; #proportionality; #burden; #scope

In **Singlepoint Direct Solar LLC v. Solar Integrated Roofing Corp.**, 2023 WL 2585296 (D. Ariz. March 21, 2023), Senior United States District Judge James A. Teilborg resolved a discovery dispute over search terms in favor of the defendants, finding that while search terms returning over 400,000 documents for review was burdensome, it was not unduly burdensome or disproportional to the needs of the case. Specifically, the plaintiffs agreed to produce 122,607 responsive documents returned by the defendants' proposed search terms but argued that the remaining 287,381 documents returned by the terms were so voluminous that they were objectionable.

The plaintiffs brought the underlying suit alleging that the defendants, among many other sophisticated claims including Lanham Act violations and copyright infringement, misappropriated the plaintiffs' trade secrets. The plaintiffs are seeking more than \$16 million in damages, in addition to unquantified continuing damages, punitive damages, and attorneys' fees and costs. The parties exchanged proposed search terms in July 2022. The plaintiffs subsequently objected to the defendants' proposed terms in September 2022,

January 2023, and March 3, 2023. At the conclusion of this iterative search term negotiation, 28 search terms remained in dispute.

The defendants argued that the plaintiffs' objections were both untimely and boilerplate and should therefore be overruled. Judge Teilborg disagreed. The plaintiffs argued that the number of documents returned by the search terms is too voluminous and therefore not proportional to the needs of the case. The plaintiffs also argued that producing the documents returned by the search terms would be unduly burdensome and that the terms themselves were overbroad. Judge Teilborg disagreed with the plaintiffs and ordered them to produce relevant documents containing search term hits after review.

Judge Teilborg reasoned that the disputed search terms were proportional to the needs of the case because of the breadth and complexity of the plaintiffs' thirteen claims for relief against multiple defendants. Judge Teilborg also noted that the plaintiffs did not provide any evidence demonstrating the discovery defendants seek is irrelevant or unduly burdensome to produce.

Judge Teilborg did agree with the plaintiffs that reviewing all the documents returned by the search terms would be burdensome. However, while finding that the plaintiffs were burdened, Judge Teilborg did not find that burden to be undue. Specifically, Judge Teilborg found that the plaintiffs' burden of document review is not high enough to warrant denying the defendants relevant discovery.

To support their arguments that the defendants' proposed search terms were overbroad, the plaintiffs claimed that the proposed search terms would return some documents that are not relevant to the case. Judge Teilborg disagreed, citing precedent which has held that by running a relevant search term, the responding party does not waive relevance objections to the documents responsive to the search term and is not required to produce

irrelevant documents, even if they are responsive to a search term.

Judge Teilborg applied this precedent in overruling all of the plaintiffs' relevance objections to the search terms themselves. Judge Teilborg also held that the plaintiffs could review all of the documents returned by the search terms and withhold irrelevant documents from production.

EDITOR'S NOTE

This decision illustrates that search terms are generally not a proxy for relevance. By agreeing to run specific search terms, litigants are not obligating themselves to produce all non-privileged documents returned by those terms. Rather, they have the ability to review the documents responsive to the search terms and can withhold from production any documents which are not relevant to a discovery request—a tenet of settled law that is, remarkably, still tested by requesting parties from time to time.

IN RE TASIGNA (NILOTINIB) PRODUCTS LIABILITY LITIGATION

#search; #search-terms; #proportionality; #burden; #social-media

In **In re Tasigna (Nilotinib) Products Liability Litigation**, 2023 WL 6064308 (M.D. Fla. Sept. 18, 2023), United States Magistrate Judge David A. Baker issued decisions on four discovery disputes arising out of the defendant's requests for the plaintiffs' ESI and the plaintiffs' objections thereto. The underlying matter is a product liability MDL where the plaintiffs sued the defendant pharmaceutical company for injuries resulting from the defendant's alleged failure to warn of dangerous and known risks associated with the prescription drug Tasigna.

First, Judge Baker denied the plaintiffs' request that the plaintiffs' social media ESI should be searched using search terms. Judge Baker agreed with the defendant's argument that "search terms cannot be

tailored sufficiently to capture responsive social media postings, particularly given the often casual nature of such discourse," and ordered the plaintiffs to produce their social media ESI in full. Recognizing that this could result in the production of ESI that is either outside the scope of the matter or simply not relevant, Judge Baker advised that this order would be subject to any limits, including timeframes, that the parties had agreed to, and further advised that individual plaintiffs may seek protection from the Court if their circumstances are unusual. In addition, Judge Baker instructed that "[i]f broad areas of the downloads have nothing to do with the matters in this case and there is a way to segregate such material, after the appropriate meet and confer, [the individual plaintiffs] could file a motion for further limitation."

Second, Judge Baker overruled the plaintiffs' objection to the terms that the defendant proposed for searching ESI in the plaintiffs' electronic devices, and ordered the plaintiffs to use the defendant's proposed terms. In their objection, the plaintiffs advised of their plan to conduct manual searches without the use of search terms. To support this decision, Judge Baker stated that "unless [the plaintiffs] are going to undertake to certify that they have reviewed every piece of ESI in the device during the manual search and nothing responsive has been found, the devices should be put through a technical search process to apply search terms in finding the responsive documents."

Third, Judge Baker agreed with the plaintiffs' objection that the estate representatives of deceased plaintiffs do not need to produce anything.

Lastly, Judge Baker denied the plaintiffs' request to limit the defendant's discovery requests to the sixteen categories contemplated by the Plaintiff Fact Sheet ("PFS") Order-Agreement. He held that "[t]he definitions and limits in the PFS Order-Agreement...are not necessarily limiting with the discovery at issue here" and that, as such, "[the

defendant] can proceed with the requests” with the caveat that where an individual and specific class of communications or genuine burden beyond the ordinary, following a meet and confer of the parties, they may request a hearing.” Judge Baker noted that in this instance, the plaintiffs had not made a showing beyond a “broad brush” for the burdensomeness of the discovery sought.

EDITOR’S NOTE

This decision is notable for the significant ediscovery obligation imposed on the plaintiffs. In an MDL, it is usually the defendants who bear extensive (and often expensive) ediscovery obligations, while the obligations imposed on the plaintiffs are minimal. But here, Judge Baker’s decision imposed some significant (and potentially expensive) discovery obligations on the plaintiffs. Indeed, Judge Baker rejected the plaintiffs’ request to use search terms to limit their social media discovery, and instead ordered them to produce their social media ESI “in full.” In addition, Judge Baker also rejected the plaintiffs’ request to conduct manual searches of their electronic devices and ordered that they instead use the defendants’ proposed search terms. This meant that the plaintiffs would need to submit their devices to forensic data collections, a technical search process to apply the proposed search terms, and review that would likely need to take place in a document review platform.

UNITED STATES EX REL. GILL V. CVS HEALTH CORP

#search; #search-terms; #proportionality

In **United States ex rel. Gill v. CVS Health Corp.**, 2023 WL 4106267 (N.D. Ill. June 20, 2023), a False Claims Act litigation, U.S. Magistrate Judge Jeffrey Cole resolved a dispute between the parties regarding search terms and the use of certain search term connectors.

Judge Cole first addressed the Relator’s request for a new search term. The request came after lengthy

negotiations regarding search terms, and was based on the Relator’s realization that some of their initially insisted-upon terms (anti-kickback and antikickback) yielded zero hits. As a result, they wanted the defendant to search using a different term (kickback). The Relator asserted this new term would likely yield highly relevant documents. Judge Cole rejected this request, noting that the relator was essentially requesting a do-over to correct, what, in effect, is a choice it made. Judge Cole stated that the Relator’s request seemed unfair and unreasonable at this stage, and that the Relator would have to be satisfied with its original search terms.

Next, Judge Cole turned to the search term connectors dispute. The Relator had proposed that a particular search term be augmented with the use of “and” as a connector. The defendant countered that “within ten words” was a more appropriate connector. Judge Cole rejected both parties’ respective positions, observing that the Relator’s proposed use of “and” would likely return too many search term hit documents, while the defendant’s use of “within ten words” would likely yield too few documents. Regarding the Relator’s position, Judge Cole reasoned that using “and” as a connector is “the discovery equivalent of playing Hungry Hungry Hippos – little better than grabbing blindly for documents,” and would be disproportionate to the needs of the case. By contrast, Judge Cole opined that the defendant’s “within ten words” proposal was “too narrow,” was as arbitrary as using “within one” or “within two,” and would be appropriate only if the Relator had “a very good idea of what is among the documents [he is] searching.” Judge Cole suggested that “far better would be something like “within paragraph” or “within 100” or “within 200.” Judge Cole then considered what appeared to be the reason for the search term at issue and the types of documents it was intended to capture, concluded that a search term calculated to gather information within a paragraph would be most appropriate, and ordered the defendant to use a “within 200” words connector.

YETI COOLERS V. MERCATALYST, INC.

#production-format; #motion-to-compel; #rule26; #rule34; #email

In **Yeti Coolers v. Mercatalyst, Inc.**, 2023 WL 5336955 (W.D. Tex. Aug. 17, 2023), United States Magistrate Judge Susan Hightower denied the plaintiff's motion to compel a re-production of emails in a format that the plaintiff had not previously specified. The underlying matter involves claims of trademark infringement and dilution, unfair competition, false advertising, and conversion. The plaintiff alleged that thousands of items that it had discontinued and never released, but rather had contracted with another entity to destroy and recycle, ended up in the possession of the defendant, who sold them illegally.

In response to the plaintiff's request for production, the defendant produced its emails as a single searchable PDF of approximately 200 pages. The plaintiff moved to compel a re-production as single-page TIFF images, together with the associated metadata load file and text file, so it could load the data into a Relativity database and leverage its various metadata- and text-based functionalities. This was the first time the plaintiff requested this production format. Indeed, the parties admitted that they did not discuss ESI production format during their Rule 26(f) conference. Moreover, the only production format that the plaintiff ever issued to the defendant was a statement in its request for production that electronic and computerized materials "must be produced in an intelligible format." Relying on Rule 34 of the Federal Rules, the defendant argued that because the plaintiff did not specify the form in which the emails were to be produced, Rule 34 required it to produce the emails in either "the form in which they are ordinarily maintained or in a reasonably usable format." The defendant asserted that its PDF production was in a

"reasonably usable form" and, as such, it should not now be required to re-produce its emails in a different format. The defendant also noted that the newly requested format would be nothing more than a convenience for the plaintiff, but would cost the defendant approximately \$1,000.

Judge Hightower agreed with the defendant that its PDF production was "in a reasonably usable format" and, in addition, found that the plaintiff had not articulated any potential relevance of the metadata it seeks. Judge Hightower distinguished this matter from the case upon which the plaintiff relied, *Trmanini v. Ross Stores, Inc.*, 2021 WL 5926128 (W.D. Tex. Dec. 15, 2021). In that case, the court granted a motion to compel production in native format with associated metadata. It based its decision upon a finding that the plaintiff had clearly demonstrated the importance of the ESI to its case. Judge Hightower directly contrasted that decision to this case where the plaintiff failed to make any showing regarding the relevance of the defendant's ESI. Judge Hightower, therefore, denied the plaintiff's motion to compel a re-production of the defendant's email in a new format.

Judge Hightower then went one step further and issued an order regarding future productions by the defendant. Noting that the plaintiff had now specified the form in which it requests production under Rule 34(b)(1)(C), and further noting that the defendant had not identified any specific burden for future productions in this newly requested format beyond the \$1,000 additional expense, Judge Hightower ordered that all of the defendant's future productions should comply with the new format: single-page TIFF images, together with a metadata load file and a text file.



ESI Protocols & Orders

After the 2006 Amendments to the Federal Rules that first addressed the discovery of ESI, the think tanks developed and recommended parties enter into ESI protocols to navigate the uncharted waters of e-discovery. Nearly two decades later, ESI protocols have become not only common-place, but a tactical weapon in litigation, particularly in asymmetrical litigation. Some requesting parties are using such protocols as a means to obtain rights from the producing party that don't otherwise exist under the Federal Rules or the corollary state rules (e.g, the right to select custodians, the right to approve on the use and selection of search terms, means of identification of data sources). These parties are use these protocols to conflate the notion of "cooperation" under Rule 1 with an affirmative obligation of "transparency" But ESI protocols were never designed to grant a party with rights it is not afforded under the Federal Rules. The word "transparency" is not actually found in the Federal Rules. Rather the parties are required to meet in good faith with the hopes of reaching agreements on a wide array of discovery issues to include the scope of discovery, protection format and the protection of privileged information. Where parties are able to cooperate to reach compromises on both side of the table, then such agreements should be documented in an ESI protocol. With this said, the use of prophylactic ESI protocols designed to gain an upper hand by one party before even a meet and confer, are not appropriate and should be rejected. With this said, the case below make it clear that courts will expect parties to attempt to reach agreements (where possible) and, if an agreement is reached and documented in an ESI protocol, the courts are likely to hold the parties' feet to the fire.

LATIN MARKETS BRAZIL, LLC V. MCCARDLE

#esi-protocol; #scope; #motion-to-compel; #text-messages; #instant-messages

In **Latin Markets Brazil, LLC v. McCardle**, 79 Misc. 3d 1224(A) (N.Y. Sup. Ct. July 14, 2023), Justice Robert R. Reed denied the plaintiff's motion to compel the defendants to produce text messages, social media, and LinkedIn messages for a three-month period. The plaintiff brought this action against its former employee defendants, alleging that after ending their employment for the plaintiff, the defendants violated their non-compete agreements by competing with the plaintiff and tortiously interfering with their business relationships. The plaintiff brought claims for misappropriation of trade secrets, breach of contract, unfair competition, tortious interference, breach of fiduciary duty, and conversion.

The plaintiff alleged that its review of defendants' productions indicated that the individual defendants communicated with the plaintiff's clients via text

message and LinkedIn message and moved to compel those communications. The plaintiff argued that the communications it sought were relevant to its case, narrowly tailored to the needs of the case, and temporally limited in nature so as not to constitute a "fishing expedition." The plaintiff also agreed that screenshots of these messages would be sufficient for production and that the defendants need not produce metadata.

The defendants resisted the plaintiff's motion to compel. More than a year before the plaintiff requested these communications, the parties had entered an ESI Stipulation governing discovery in the case. The ESI Stipulation read, in part, that "the following sources of ESI information do not warrant collection, search, review or production: (a) Voicemail, text messages, personal phones or tablets and instant messages." The defendants accordingly argued that the plaintiff's request was untimely, and that the ESI Stipulation should be interpreted like any contract, requiring the court to

adhere to its terms absent fraud, collusion, mistake, or accident.

Justice Reed agreed with the defendants' arguments and denied the plaintiff's motion to compel. Justice Reed reasoned that the plaintiff made no showing of fraud, duress, coercion, or mistake that would cause the court to overturn the stipulation. Accordingly, Justice Reed interpreted the ESI Stipulation as the parties consenting to a voluntary waiver of discoverable voicemails, text messages and instant messages.

EDITOR'S NOTE

While this is a New York state court decision, it is consistent with recent federal court decisions in which courts have increasingly relied upon the parties' own agreements made in ESI protocols and stipulations when deciding discovery disputes. Our analysis of similar decisions demonstrates a clear trend that courts and judges are unlikely to interfere with discovery agreements that the parties have entered into voluntarily.

LKQ CORPORATION V. KIA MOTORS

#esi-protocol; #motion-to-compel; #rule26; #discovery-on-discovery; #search

In **LKQ Corp. v. Kia Motors**, 2023 WL 4365899 (N.D. Ill. July 6, 2023), United States Magistrate Judge Sunil R. Harjani denied the plaintiff's Motion to Compel Compliance with the Court's January 12, 2023 Order and to Provide Discovery Relating to a Potential Spoliation Claim. This summary focuses on the plaintiff's request for discovery relating to the potential spoliation claim, which Judge Harjani identified and analyzed as a request for discovery on discovery, the process by which a party looks behind the curtain to explore its opponent's discovery processes.

The underlying litigation is a patent infringement matter over automotive parts. By January 2023, discovery was in progress, but there was no ESI protocol in place. At that time, the court heard

argument on a motion to order the parties to enter into an ESI protocol. The court denied the motion, observing that the parties should have agreed to a protocol before starting discovery as opposed to once it was in progress, and ordered the parties to file separate ESI disclosures describing their search process concerning custodians, timeframe, methodology of searches, and items produced. After receiving and reviewing the defendant's disclosure, the plaintiff filed the instant motion, seeking, among other things, discovery to determine if documents were missing from the defendant's production because of spoliation.

Before deciding the plaintiff's motion, Judge Harjani first addressed the threshold question, "What is the authority and standard for permitting discovery on discovery"? After a detailed analysis of rules, case law, and *The Sedona Principles, Third Edition*, Judge Harjani concluded that (i) Rule 26(g) of the Federal Rule of Civil Procedure authorizes discovery on discovery as a sanction for a party's alleged failure to conduct a reasonable inquiry in its discovery process; (ii) even so, discovery on discovery should be the exception, not the rule; (iii) before a party will be allowed to conduct discovery on discovery, court authorization should be sought via a motion; (iv) mere speculation about discovery misconduct is insufficient to permit discovery on discovery; (v) rather, the party requesting discovery on discovery bears the burden of providing specific and tangible evidence of a material failure of an opponent's obligation to conduct a reasonable inquiry in the discovery process; and (vi) if the court finds the factual showing is sufficient, it should select the narrowest discovery tool possible to avoid side-tracking the discovery process and to adhere to the principles outlined in Rule 1 of the Federal Rules of Civil Procedure.

Having determined the authority and standard for permitting discovery on discovery, Judge Harjani applied the standard to the plaintiff's request — a request for permission to inquire into why eight

inventors of the patent at issue had no responsive documents and whether the documents were missing due to spoliation. Judge Harjani noted that the plaintiff supported its request with information obtained from deposing six of the eight inventors, but found that evidence fell short of the standard of “specific and tangible evidence of a material failure of [the defendant’s] obligation to conduct a reasonable inquiry in the discovery process.” Indeed, to the contrary, Judge Harjani found that the inventors’ testimony sufficiently explained why they had no documents to produce and, in addition, demonstrated that any missing documents were not the result of bad faith or intentional destruction, but rather were the result of routine policy and procedure, during a time when the defendant was not under any duty to preserve. Additional evidence that bolstered Judge Harjani’s finding included (i) the defendant’s Rule 11 certification affirming it had conducted a reasonable inquiry regarding the eight inventors and their documents; and (ii) the fact that the defendant had copies of the design and development documents stored in a separate database and, importantly, had already produced them. Having concluded that the plaintiff failed to satisfy the burden of proof necessary to support a request for discovery on discovery and, in fact, had offered nothing more than mere speculation about discovery misconduct, Judge Harjani denied the plaintiff’s motion to inquire into the defendant’s discovery process.

IN RE META PIXEL HEALTHCARE LITIGATION

#esi-protocol; #hyperlink-attachments; #email; #metadata; #motion-to-compel

In **In re Meta Pixel Healthcare Litigation**, 2023 WL 4361131 (N.D. Cal. June 2, 2023), United States Magistrate Judge Virginia K. DeMarchi denied the plaintiffs’ motion to compel the defendant to produce non-public documents circulated via hyperlinks embedded in email and to produce metadata about “lesser” emails contained within “inclusive” email threads. The case involves consumer claims that Meta

inappropriately gathered health information about Facebook users through an ad-targeting technology it provided to website operators. Judge DeMarchi was asked to resolve disputes concerning the ESI protocol the parties had otherwise agreed to adopt in the litigation. With respect to hyperlinked, non-public documents, the plaintiffs requested that the defendant produce the linked document where an email “attached” that document by inserting only a link and not by attaching a distinct file (a so-called “modern attachment”). The plaintiff argued that certain “commercially available tools” could collect the linked document and associate it with the source email to form a “family” relationship. Judge Coughenour credited the defendant’s argument that such tools “have no or very limited utility in Meta’s data environments or systems, and even that limited utility ... would disrupt Meta’s standardized workflow for ESI-related discovery processing across all of its platforms and systems.” The benefit of producing all such linked documents would not outweigh the burden of forcing the defendant to disrupt its standard practices in this way, she reasoned, particularly because the parties could “consider reasonable requests for production of hyperlinked documents on a case-by-case basis.”

With respect to the email thread metadata dispute, Judge DeMarchi also denied the plaintiffs’ request. She noted that the defendant acknowledged that it had in prior litigation been required to generate metadata about email messages and attachments included in longer, “inclusive” email threads but not produced on their own (e.g., Date Sent, From, To, CC). Judge DeMarchi credited the testimony of the defendant’s ediscovery consultant, however, who testified “that the production of such metadata is not an industry standard practice, would require significant customized work (as it did in the prior matter), and would add time and complexity to the ESI production process.” She also found the possible relevance of this information to be lacking since the parties contemplated producing inclusive emails that would show the metadata about included messages on their face.

STANDING ORDERS & GEN AI

#gen-ai

It has been just over one year since generative AI first exploded into public life and rocked everyone's world, including the legal world. It spread through 2023 with surreal speed and, by May 2023, the media was abuzz with news of an attorney who used ChatGPT to prepare a brief he filed in a case pending in the Southern District of New York. The brief was full of completely fictitious case law – a product of the tool's hallucinating tendencies, but the attorney failed to verify the brief before filing it. See *Mata v. Avianca, Inc.*, 2023 WL 3698914 (S.D.N.Y. May 26, 2023). Shortly thereafter, Judge Brantley Starr in the Northern District of Texas issued what would become the first on a growing list of Standing Orders and Local Rules directed at the use of AI in court filings.

Judge Starr's Standing Order requires that any party appearing in his court must, together with its notice of appearance, file a certificate attesting that either (1) no portion of any filing will be drafted using generative AI; or (2) any language that was drafted by generative AI was checked for accuracy by a human being, using print reporters or traditional legal databases. Judge Starr explained that the certificates were necessary because, while such tools have an important place in the legal industry, including things like form divorces, they are prone to hallucinations and bias. As of December 2023, judges in at least 20 district and state courts have issued their own standing orders on the use of AI in court filings, and more are expected. Of these standing orders, the majority focus specifically on generative AI and include a certification requirement.

That said, one notable outlier is the standing order from Judge Michael M. Baylson in the Eastern District of Pennsylvania. Judge Baylson's Standing Order mandates disclosure of any AI used – generative or not. The breadth of such an order is concerning because it could require counsel to reveal the use of a wide range of AI tools, including such traditional legal technology as Lexis and Westlaw, eDiscovery technologies, and even such non-legal tools as Grammarly and even auto-correct.

Given the range of already issued standing orders and the likelihood that more are on the way, parties are reminded to make sure they check the courts where their matters are pending for any standing orders and local rules on AI.

IN RE STUBHUB REFUND LITIGATION

#esi-protocol; #hyperlink-attachments; #email; #search-terms

In *In re StubHub Refund Litigation*, 2023 WL 3092972 (N.D. Cal. Apr. 25, 2023), United States District Judge Thomas E. Hixson granted the plaintiffs' motion to compel and ordered the defendant to produce linked documents in conformity with agreed-upon terms in the governing ESI Protocol or, if unable to do so, then to produce for deposition within 14 days after the deadline to complete document production a Rule 30(b)(6) witness with full knowledge of everything the defendant and its vendors did when trying to produce the linked documents as required by the ESI Protocol.

The underlying matter is a putative nationwide class action concerning the defendant's refund policy for events affected by the COVID-19 pandemic. As part of the discovery process, the parties agreed to, and the court ordered, an ESI Protocol. The ESI Protocol provided, in pertinent part, that documents should be produced as complete families, with parent documents immediately followed by their respective children. And it also instructed that families included the well-known paradigm of parent emails and their attachments, as well as email or other documents together with any documents referenced therein via links. However, Judge Hixson found that its agreement to the terms of the ESI Protocol notwithstanding, the defendant failed to comply with this requirement. Indeed, rather than producing in a way that preserved the parent-child relationships, Judge Hixson found the defendant produced "a bunch of emails and a bunch of documents," but provided no way for the plaintiffs to identify which documents were associated with which emails. Moreover, he noted, the defendant was unable to

explain its non-compliance beyond offering various potential reasons: “Maybe the document was moved to a different place; maybe email encryption methods have changed, rendering the links untraceable; loss of personnel; a change in document systems; and the difficulty in versioning the documents.”

Noting that the defendant’s document production was in violation of the ESI Protocol, it hadn’t done everything that it could, it hadn’t moved for relief from the protocol, and it hadn’t settled on a clear explanation, Judge Hixson concluded that the best option was to grant the plaintiff’s motion and hold

the defendant to the terms of the ESI Protocol. Judge Hixson added that if the defendant is unable to comply, then within 14 days after the deadline to complete document production, the defendant must provide a Rule 30(b)(6) witness with full knowledge of everything the defendant and its vendors did in an attempt to produce linked documents as attachments, after which the plaintiffs could decide if they have a grounds for a sanctions motion or not. Finally, Judge Hixson stated that this order was without prejudice to the defendant moving to modify the ESI Protocol.



Privilege & Waiver

Privilege review, production, and side litigation is one of the largest cost components of discovery. To that end, the Federal Rules Committee is taking another look at whether it is time to address this issue, including by holding hearings and [inviting public comment about changes to Rules 26\(f\) and 16\(b\)](#). The cases below deal with the equally thorny intersection of privilege and preservation—in particular, whether parties’ legal hold notices and memoranda may be protected from disclosure during discovery.

KALISH V. MORGAN STANLEY & CO.

#privilege; #work-product; #motion-to-compel; #waiver

In **Kalish v. Morgan Stanley & Co., LLC**, 2023 WL 8018928 (N.D. Ohio Nov. 20, 2023), United States District Judge Bridget Meehan Brennan denied the plaintiff’s motion to vacate a FINRA arbitration award in favor of the defendant, finding that the arbitration panel did not refuse to hear crucial evidence.

While the plaintiff was employed by the defendant, he applied for a Portfolio Loan Account (“PLA”) from the defendant on behalf of himself and his spouse. The PLA required the signatures of both the plaintiff and his spouse. The plaintiff and his spouse subsequently divorced, and his spouse later claimed that she learned of the loan for the first time when she received a letter seeking to remove her from the PLA and that she believed that the plaintiff had forged her signature. The defendant terminated the plaintiff’s employment after his spouse filed a FINRA statement of claims, which prompted “several” subsequent investigations by the defendant and FINRA. The plaintiff then brought a lawsuit seeking damages for defamation and intentional interference with contract, which was forced to arbitration pursuant to FINRA bylaws. After the arbitration panel found in favor of the defendant, the plaintiff moved the District Court to vacate the arbitration award, partly on the grounds that “the arbitrators refused to hear crucial evidence contained in the documents [the defendant] withheld,” thereby denying him a fair hearing.

Specifically, in response to the plaintiff’s requests for production in the arbitration proceeding, the

defendant had asserted attorney-client and work product privileges “regarding documents from the investigations into the alleged forgery of [the plaintiff’s wife’s] signature on the original PLA documents” because “the investigations . . . which led to [the plaintiff’s] termination were done at the direction of counsel and included counsel.” The plaintiff challenged the defendant’s assertion of privilege over these documents during the arbitration, arguing that the defendant’s decision to terminate him “was a business decision not covered by the attorney-client privilege.” He also argued that the defendant was using the attorney-client privilege “as both a sword and a shield by relying upon the investigations and selectively releasing information, while simultaneously withholding all documents related to the same investigations.” The arbitration panel granted the plaintiff’s motion in part, ordering the defendant to produce certain interview notes from the investigation. Still, the plaintiff claimed that because the defendant was not required to produce all documents, his counsel had been unable to effectively cross-examine key witnesses who testified about the investigation, dooming his claim.

In response to the instant motion to vacate, the defendant argued that the arbitration panel correctly applied the law regarding waiver of privilege. It also countered the plaintiff’s argument that it was using the attorney-client privilege as a sword and shield by noting that documents and information relating to the decision to terminate the plaintiff were distinct from documents related to its forgery investigation.

Judge Brennan agreed with the defendant and denied the plaintiff’s motion to vacate. Specifically,

she observed that the plaintiff was denied a fair hearing only if he can show “the arbitrator had no reasonable basis for his decision.” She noted that “the Supreme Court, the Sixth Circuit, and the Ohio Supreme Court have each independently applied attorney-client privilege and work product protections to internal corporate investigations.” She found “there is a legally plausible line of argument that supports” the panel’s finding of privilege over the withheld documents and, accordingly, denied the motion to vacate the panel’s award.

MAYORGA V. RONALDO

#privilege; #privilege-logs; #waiver

In **Mayorga v. Ronaldo**, 2023 WL 8047781 (9th Cir. Nov. 21, 2023), a panel of the United States Court of Appeals for the Ninth Circuit (Judges Johnnie B. Rawlinson and John B. Owens, and United States District Judge for the Northern District of Texas, Sidney A. Fitzwater (sitting by designation)) affirmed the decision of United States District Court for the District of Nevada Judge Jennifer A. Dorsey that dismissed the plaintiff’s case for case-terminating sanctions.

The underlying dispute involved a prior settlement over a sexual assault claim brought by the plaintiff against the defendant (soccer star Cristiano Ronaldo). Despite the settlement’s confidentiality provisions, the plaintiff’s attorney used documents obtained through a cyber hack of the defendant’s former lawyers to bring new claims against the defendant. Some of the leaked documents were protected by the attorney-client privilege and explicitly marked as such. The district court found that the plaintiff’s attorney acted in bad faith by using confidential and privileged documents to bring her claims and accordingly issued terminating sanctions, dismissing the case.

The plaintiff appealed, arguing that the defendant 1) waived privilege by putting the documents “at issue,” 2) failed to adequately safeguard the documents from disclosure, 3) waived privilege by declining to

authenticate the documents, 4) waived privilege, per se, by failing to produce a privilege log, and 5) waived privilege by disclosing the documents to the police. The appellate panel rejected every one of these arguments and affirmed the district court’s decision.

First, the Court noted that the defendant “did not place the documents ‘at issue’ such that he impliedly waived the privilege ‘by expressly or impliedly injecting his attorney’s advice into the case.’” The documents were obtained via improper means and then leaked. Second, the Court dispensed with the plaintiff’s argument that the defendant did not properly safeguard the documents, finding that “[b] the leak, his attorneys employed cybersecurity tools to protect their files. After the leak, he immediately and continuously objected to use of the documents, including in this litigation.” Third, the judges rejected the plaintiff’s argument that the defendant could not claim privilege over documents he refuses to authenticate, noting that the plaintiff cited no authority for this position. The judges also ruled that the defendant did not waive privilege by disclosing the documents to the police, noting that “in determining whether waiver by voluntary disclosure has occurred, the circumstances surrounding the disclosure are to be considered.” The court reasoned that the defendant had mistakenly produced the documents as opposed to voluntarily disclosing them.

Notably, the judges observed that “[t]here is no per se waiver rule when a privilege log is not produced.” Instead, waiver is determined on “a case-by-case” basis “in the context of a holistic reasonableness analysis.” The court noted that the defendant explicitly asserted privilege over the documents by clearly identifying which documents were privileged and why, albeit not in the form of a “log.” The Court found that it was “significant” that the plaintiff possessed the documents, such that she was “well-equipped to assess the claim of privilege even without a privilege log.”

EDITOR'S NOTE

This decision is notable because in practice, parties typically agree to produce a privilege log contemporaneously or soon after claiming privilege over inadvertently produced documents. However, this decision implies that a party clawing back a document may not necessarily need to produce a "privilege log" for the receiving party to validate its claim(s) of privilege, depending on the "holistic" circumstances of the production and claw-back request and how much information it provides about the privileged documents, regardless of the specific form of the disclosure.

PRATT CORRUGATED HOLDINGS, INC. V. PORTER PIZZA BOX OF FLORIDA INC.

#privilege; #clawback; #waiver; #Rule502

In **Pratt Corrugated Holdings, Inc. v. Porter Pizza Box of Florida Inc.**, 2023 WL 8005307 (W.D. Ga. Nov. 17, 2023), United States District Judge Amy Totenberg denied the plaintiff's motion to exclude email correspondence evidence on the basis that the evidence constitutes attorney-client privileged communications.

In support of its motion, the plaintiff in this breach of contract case argued that email correspondence between a senior paralegal in the plaintiff's legal department and a sales director in the plaintiff's Southern Corrugating Division constituted privileged attorney-client communications. The defendant argued that the email correspondence was not protected by the attorney-client privilege because the senior paralegal is not a lawyer and therefore could not provide legal advice. Judge Totenberg disagreed, citing that "[c]ommunications by non-attorneys are ... protected by privilege if those non-attorneys are employed to assist the lawyer in the rendition of professional legal services." Judge Totenberg ruled that the email correspondence fell within the attorney-client privilege.

In response, the defendant argued that even if the email correspondence was protected by the attorney-client privilege, the plaintiff waived the privilege because it waited more than four years to assert the privilege. In support, the defendant noted that the plaintiff was given notice that the emails had been produced when the defendant cited the emails in a September 2019 summary judgment reply brief. The defendant further noted that the plaintiff then failed to object on privilege grounds to the production of the emails, and instead merely argued that the email citations were improper.

In arriving at her decision, Judge Totenberg relied on the parties' Stipulated Protective Order, which states, in part, that "any inadvertent or mistaken production of Litigation Materials shall be without prejudice to any claim that such material is subject to the attorney-client privilege... or any other privilege or protection from disclosure, and shall not operate to waive such privilege or protection from disclosure." The defendant responded by arguing that the protective order only protects inadvertent or mistaken productions of privileged documents. The defendant further argued that the documents in question were intentionally produced. The defendant argued that the plaintiff had notice of the emails being produced when the defendant cited to them in its summary judgment reply brief. Despite this knowledge, the plaintiff did not object or claw back the emails over the next four years.

Judge Totenberg agreed with the defendant's arguments and ruled that the attorney-client privilege had been waived. Judge Totenberg noted that the defendant's handling of the emails was "troubling," and stated that "had Pratt promptly raised an objection and clawed back the documents upon learning of their disclosure, the Court would have likely upheld their privileged status." Ultimately, however, Judge Totenberg ruled in favor of the defendant, asserting that "given that [the plaintiff] opted not to rectify the disclosure or invoke the privilege for four years, the Court must conclude that

the privilege protecting the email chain... has been waived.”

EDITOR’S NOTE

This decision is a sober reminder that irrespective of the terms of any 502(d), claw-back or protective order, it is imperative that parties promptly take the necessary steps to claw back privileged information upon learning of its disclosure.

RICHARDS V. KALLISH

#privilege; #privilege-logs; #waiver

In **Richards v. Kallish**, 2023 WL 8111831 (S.D.N.Y. Nov. 22, 2023), United States Magistrate Judge Victoria Reznik granted in part, and denied in part, the defendants’ motion for a protective order to assert attorney-client privilege over communications with their patent counsel.

The parties disputed whether the defendants could assert attorney-client privilege over their communications with patent counsel and whether broader discovery of patent counsel’s communications is warranted in a dispute over inventorship of a biodegradable diaper. The plaintiff alleges that the defendant arranged to promote and organize a new company (“Everyone’s Earth”) for their mutual benefit to develop and patent the plaintiff’s invention of biodegradable diapers. Because the plaintiff worked with patent counsel, she contends she had an implied attorney-client relationship with counsel.

First, the plaintiff asserted that she has a right to discover all patent-related communications, given she had an implied attorney-client relationship with patent counsel, making her a joint client with the defendants. Judge Reznik found she was not a joint client, and the privilege belonged solely to the defendants. In reaching her conclusion, Judge Reznik stated that the plaintiff’s communications with patent counsel did not waive the privilege because when an entity such as Everyone’s Earth communicates through agents with counsel, the resulting privilege belongs to the entity— not the

agent. Similarly, when a principal includes an agent in a communication, the agent’s knowledge of the communication does not destroy the privilege because the agent acts on the principal’s behalf.

The plaintiff also argued that the defendants waived their privilege by: (1) disclosing patent-related communications to her and others, (2) placing the attorney-client relationship directly at issue, and (3) selectively disclosing some communications but not others. These arguments were unconvincing because, according to Judge Reznik, the privilege “must include all persons who act as the attorney’s agents,” and the plaintiff possessed “information needed by patent counsel to render legal services.” Likewise, disclosing privileged communications to third-party agents (i.e., paralegals or administrative staff) does not defeat the privilege because help from these agents is indispensable to a lawyer, and communications are often “committed to them by the attorney or by the client.” Second, there is no at-issue waiver because the plaintiff cannot unilaterally create an implied waiver when the defendants have not placed the communications with counsel at issue. Last, the defendants’ disclosure of some communications does not result in a waiver because the plaintiff was an agent, there were no fairness considerations at play since the defendants did not appear to be “using attorney-client privilege as a shield and a sword,” and the defendants disclosed the communications extrajudicially.

Accordingly, the Court prohibited the defendants from limiting the plaintiff’s reliance or use of privileged communications involving counsel that were intentionally disclosed to her not in the course of litigation.

Finally, Judge Reznik addressed the plaintiff’s contention that the crime-fraud exception applies. The Court found the exception did not apply because the plaintiff relied solely on speculation given the plaintiff provided “no basis for the court to know or understand” how documents not submitted to the Court can establish probable cause “to believe that a crime or fraud has been attempted or

committed and that the communications were in furtherance thereof.” Judge Reznik opted for an “*in camera* review of the documents to determine whether the crime-fraud exception applies,” given that the plaintiff presented evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception.

ROY V. FEDEX GROUND PACKAGE SYSTEMS

#work-product; #waiver; #motion-to-compel

In **Roy v. FedEx Ground Package Systems**, 2023 WL 7116755 (D. Mass. Oct. 27, 2023), U.S. Magistrate Judge Robertson denied the plaintiffs’ motion to compel the defendant’s production of documents on the grounds of privilege. The underlying litigation is a Fair Labor Standards Act claim against the defendant for unpaid time. The plaintiffs included independent services providers (“ISPs”) who contracted with the defendant to pick up and deliver packages. Per its agreements with the ISPs, the defendant’s Legal Compliance and Ethics Group (“LCG”) would assess the ISPs’ compliance with their agreed-to obligations, summarize the assessments in Compliance Investigation Reports (“CIRs”), and then use the CIRs as a basis for producing compliance notices to the ISPs.

Earlier in the case, and pursuant to court order, the defendant produced CIRs and related documents created before June 2019, but withheld the CIRs and related documents created after June 2019. In this motion to compel, the plaintiffs seek the production of the post-June 2019 CIRs and associated documents.

The defendant opposed the motion, maintaining that the post-June 2019 documents were protected by the work product doctrine and the attorney-client privilege. Specifically, the defendant explained that the LCG prepared them in response to a June 2019 request from its in-house Litigation Group to provide information for the purpose of defending against the plaintiffs’ claims. Per this request, the LCG increased the number of assessments it performed and,

although the CIR format and content remained unchanged, the notices to the ISPs did not include the legal advice, legal analyses, opinions, and mental impressions that were included in the pre-June 2019 notices. The plaintiffs argue that the documents were not prepared for purposes of litigation, but rather, were prepared in the ordinary course of the defendant’s business, just like the pre-2019 CIRs and related documents. The plaintiffs further argued that if the work product doctrine applied, the defendant waived its protection because the purportedly protected information was also in the pre-June 2019 notices that the defendant issued to the ISPs.

Judge Robertson’s analysis relied on the well-established definition of the attorney work product doctrine, which provides that it “protects (1) documents or other things, (2) prepared in anticipation of litigation, (3) by or for a party or a party’s representative.” Judge Robertson noted that “prepared in anticipation of litigation” applies “if a document can be fairly said to have been prepared or obtained *because of* the litigation.” Applying this standard, Judge Robertson determined that the subject documents were clearly prepared because of the litigation and, as such, the attorney work product protection applied. Moreover, Judge Robertson observed that the defendant’s earlier CIRs – which were prepared for business purposes – did not bar the application of the work product protection to the post-June 2019 documents, which were clearly prepared at the direction of counsel for purposes of defending the litigation. Finally, Judge Robertson rejected the plaintiffs’ waiver argument. Judge Robertson observed that waiver applies “when the documents are used in a manner contrary to the doctrine’s purpose, such as where disclosure is made to an adversary,” and here, the disclosure was not to an adversary, but rather, was to a contracting partner. Having concluded that the documents at issue were protected by the attorney work product doctrine, Judge Robertson denied the plaintiff’s motion to compel.

SICKELS V. MCDONOUGH

#privilege; #work-product; #waiver

In **Sickels v. McDonough**, 2023 WL 7406161 (E.D. Mo. Nov. 9, 2023), United States District Judge John A. Ross found that the plaintiff waived attorney-client and work product privileges over her communications with her attorneys made using her employer's email system.

The plaintiff was an employee of the Department of Veteran Affairs and brought this action for employment discrimination. During discovery, the plaintiff requested that the defendant produce email communications and other ESI related to her claims. The defendant located emails and documents potentially subject to a claim of privilege running to the plaintiff, including communications between the plaintiff and her attorneys or their agents. The defendant's attorneys sequestered the documents and notified the plaintiff of their existence, but the parties ultimately did not reach agreement on whether the defendant should be shielded from viewing or using the documents because they were privileged. The defendant moved the court for a "Ruling on Waiver of Attorney-Client Privilege and/or Work Product Privilege." The plaintiff did not file an opposition to the motion.

Judge Ross ruled for the defendant. Importantly, the plaintiff did not oppose the motion, but Judge Ross found that the defendant regardless had the better of the argument. The defendant's policies governing use of its electronic systems specifically stated that employees do not have an expectation of privacy when using "any Government office equipment at any time, including accessing the World Wide Web or using E-mail." Judge Ross noted that the plaintiff was forced to acknowledge this policy every time she accessed her employer's computer systems, and that she received training that reinforced this understanding every year she was employed. Judge Ross found that the communications between the plaintiff and her attorneys were not privileged, because the proponent of privilege over a

communication "must reasonably expect that the communications would remain private." This, Judge Ross ruled, the plaintiff could not do even if she had opposed the motion, given her evident understanding that communications made through her work email were not private. Similarly, Judge Ross found that neither the emails nor their attachments were protected by the work product doctrine. That protection, Judge Ross found, requires the proponent to show the materials "were prepared in the anticipation of litigation"—a showing that the plaintiff did not make for lack of her response to the motion. Judge Ross therefore found that any privileges applicable to the materials had been waived.

UNITED STATES V. CAPTIVE ALTERNATIVES, LLC

#privilege; #work-product; #clawback; #waiver; #Rule502

In **United States v. Captive Alternatives, LLC**, 2023 WL 5573954 (M.D. Fla. Aug. 29, 2023), United States Magistrate Judge Christopher P. Tuite denied the defendant's Motion for Non-Waiver and Clawback Orders. As part of an IRS investigation, the IRS served the defendant with an administrative summons seeking disclosure of "twenty-nine categories of records, plus subparts" for the past ten years. The defendant failed to respond, and the IRS petitioned the court to enforce the summons. After a hearing on the matter, Judge Tuite issued a report and recommendation that the District Judge compel the defendant to produce the documents. The parties then filed a joint motion requesting that the District Judge adopt the report and recommendation. The parties also told the Court that they were "discussing whether an order pursuant to Federal Rule of Evidence 502(d) may be appropriate." Ultimately, the parties could not reach an agreement and the defendant filed its own motion requesting that the Court enter a Rule 502(d) order providing for the non-waiver and "claw back" of any privileged materials that the defendant produces to the IRS. The defendant supported its proposed order by emphasizing the substantial

expenses it would incur if it were required to review each of the 1.1 million documents prior to their production.

The Court began by noting that “the IRS has broad and expansive authority to investigate and to issue administrative summons.” While the judiciary is tasked with enforcing these summonses, its discretion is limited, and its only inquiry is “whether the IRS issued a summons in good faith.” Still, the Court noted, enforcement proceedings are subject to traditional privileges and a respondent asserting a claim of attorney-client privilege must generally declare it “on a question-by-question and document-by-document basis.” Moving on to discuss the defendant’s motion, the Court explained that a “‘claw back’ arrangement ... allow[s] the return of documents that a party belatedly determines are protected by the attorney-client privilege or [the] work product doctrine.” Rule 502 “authorizes a court to enter an order directing that attorney client or work product protections are not waived by disclosure connected with the pending litigation...” Thus, once a court issues a Rule 502(d) order, the producing party can “claw back” privileged documents that it had previously produced.

The Court denied the defendants’ motion for several reasons. First, the enforcement proceeding was “summary in nature and [did] not involve discovery as that term is understood in civil litigation.” This kind of action is different from the kinds of matters where courts traditionally enter Rule 502(d) orders. Second, issuing the claw-back order would unfairly shift the burden to the IRS to identify potentially privileged documents and then give notice to the defendant that the produced documents may contain protected information. This would also hinder the IRS’s investigation by providing the defendant with “insight into the particulars of the IRS’s inquiry.” It is also inefficient, as “the IRS agents investigating [the defendant] are not trained to evaluate whether a communication is subject to the attorney client privilege.” Finally, the Court noted that the order placed no temporal restriction on when the

defendant could designate a document as privileged, meaning the defendant “could theoretically challenge the IRS’s use of the materials years after their production.”

UNITED STATES V. GOOGLE LLC

#privilege; #motion-to-compel; #instant-messages; #preservation

In **United States v. Google LLC**, 20-cv-03010-APM (D.D.C. June 28, 2023), United States District Judge Amit P. Mehta considered plaintiffs’ motion to compel the production of document hold memoranda on the grounds that the defendant waived the privilege protecting such documents. The plaintiffs alleged that the defendant spoliated evidence by failing to preserve relevant Google Chat messages. In defending this allegation, the defendant invoked the litigation hold notice and subsequent reminder memoranda it had sent to employees who might possess information potentially relevant to the claims in the suit, which “explicitly instructed” employees (1) “to not use messaging apps going forward, including Google Chat, to discuss topics covered by the legal hold” and (2) to ensure “that the messages were preserved” if they did use chats to discuss relevant matters. Certain plaintiffs—specifically, the U.S. Department of Justice and the State of Colorado—moved to compel production these hold memoranda. Specifically, they argued that the defendant relied upon and placed at issue in the litigation the contents of the hold memoranda, even while shielding them from production on the basis of privilege, so that even if the memoranda were privileged, that privilege had been waived.

On the initial question of whether the memoranda were privileged in the first place, Judge Mehta agreed with the defendant. He rejected the plaintiff’s argument that the hold memoranda were merely “forceful instructions about what employees must do, rather than advice about what they might do,” concluding that the hold memoranda contained actual legal advice that was subject to the privilege.

Judge Mehta then turned to the plaintiff’s argument that the defendant waived objections to discovery of its litigation hold procedures by arguing that it took “reasonable steps to preserve relevant documents.” The plaintiffs contended that the defendant put at issue “the detail of its legal hold with regard to ‘chats specifically,’ the contents of its legal hold, and the instructions given to custodians.” Judge Mehta noted that “[u]nder the common-law doctrine of implied waiver, the attorney-client privilege is waived when the client places otherwise privileged matters in controversy,” in order to “prevent an abuse of the privilege, that is, to prevent the confidentiality protected by the privilege from being used as a tool for manipulation of the truth-seeking process.”

Under this standard, Judge Mehta found the defendant had placed portions of the hold memoranda at issue when it argued that it took reasonable steps to preserve evidence by “issuing written preservation notices to document custodians,” “explicitly instructing its employees on legal hold to not use message apps going forward, including Google Chat, to discuss topics covered by the legal hold — and additionally instructing them, if they did still use such apps, to ensure that the messages were preserved.” He concluded that the plaintiffs were entitled to see these instructions and that the defendant could not “be allowed, after disclosing as much as it pleases, to withhold the remainder.” Judge Mehta rejected the defendant’s argument it had not waived the privilege because it had discussed the hold memoranda “only to respond to Plaintiffs’ inquiries about its preservation practices and the briefing on this motion.” He found that an essential component of the defendant’s defense against sanctions was that it had acted in good faith by instructing its employees how to use and preserve potentially relevant Google Chats. He held that Google could not now “shield those instructions from Plaintiffs when it has put them directly at issue.”

Judge Mehta agreed with the defendant, however, that the scope of waiver here was narrower than what the plaintiffs sought. He noted that, under Federal Rule of Evidence 502(a), “voluntary disclosure in a federal proceeding ... generally results in a waiver only of the communication or information disclosed.” Accordingly, he found the defendant waived only the specific portions of the hold memoranda that discussed “instructions to custodians about the preservation and use of Google Chats,” and not any entire hold notices or memoranda, the remainder of which he ordered the defendant to redact.

UNITED STATES EX REL. FISCHER V. COMMUNITY HEALTH NETWORK, INC

#privilege; #motion-to-compel; #preservation; #email

In **United States ex rel. Fischer v. Community Health Network, Inc.**, 2023 WL 4761664 (S.D. Ind. July 26, 2023), United States Magistrate Judge M. Kendra Klump granted in part and denied in part the relator’s motion to compel production of documents and testimony related to the defendant’s document preservation practices. The case involves qui tam alleges that the defendant violated the federal False Claims Act and discharged the relator in violation of whistleblower protection laws. During discovery, the relator raised concerns about the defendant’s steps to preserve documents for the case and won the right to perform several depositions focused on preservation from the District Judge. Following those depositions, the relator moved to compel the production of the defendant’s litigation hold notices for the case, as well as for additional testimony “about litigation holds, including their contents, dissemination, effects and related litigation hold processes and procedures.”

Judge Klump recounted that the defendant had issued verbal hold warnings, a written legal hold notification, and an “IT hold” to prevent the automated deletion of certain data. She noted that the defendant had already produced a list of employees who had received each of those

communications, and their respective dates, but had refused to turn over its written communications on the basis of privilege. Despite the relator’s arguments to the contrary, Judge Klump found that the defendant “had made an adequate, if barebones, showing that privilege extends to the content of its legal hold notices.” Judge Klump noted that the hold notices “were drafted by outside counsel and provided to [defendant’s] General Counsel for input and dissemination after discussion with outside counsel,” and that they “provide information and advice about document preservation obligations and about what information must be preserved,” such that they “are properly shielded by the attorney-client and work-product privileges.”

Judge Klump next turned the relator’s argument that the hold notices should be produced regardless of privilege because he has alleged the defendant spoliated ESI it should have preserved—specifically, that email accounts had been deleted for 11 former employees pursuant to automated deletion policies at a time when the defendant was under a duty to preserve for the case. While Judge Klump acknowledged that some courts have permitted a movant to pierce privilege over legal hold notices where there has been a credible showing of possible spoliation (and that such a showing had been made here), she found that the relief the relator sought would not be appropriate in this case. She noted that for each former employee, the problem was that they had not been issued any hold notice or placed on IT hold, so that the language of the hold notices they did not receive would not assist the relator in pursuing curative measures for the defendant’s spoliation. Instead, Judge Klump ordered the defendant to provide a 30(b)(6) witness to testify “regarding the scope (but not content) of verbal holds as well as any litigation hold processes or procedures” but cautioned that “[a]ny such testimony shall be confined to factual inquiries . . . as opposed to inquiries likely to touch on [the defendant]’s legal strategy.”

WOLVERINE WORLD WIDE, INC. V. THE AMERICAN INSURANCE CO.

#privilege; #work-product; #privilege-log; #categorical-log; #waiver

In **Wolverine World Wide, Inc. v. The American Insurance Co., et al.**, 2023 WL 8680346 (W.D. Mich. Nov. 20, 2023), Special Master Paula Manderfield granted the plaintiff’s motion to compel, or in the alternative, *in camera* review of the defendants’ documents withheld from production and included on a categorical privilege log.

The underlying dispute involves insurance claims brought by the plaintiff alleging that the defendant insurance companies breached their duty to defend the plaintiff from claims that the plaintiff caused environmental and tort damage in the form of water contamination between 1971 and 1986.

The plaintiff moved to compel the production or *in camera* review of 1,400 documents that one of the defendants included on a categorical privilege log with a single categorical privilege log entry. The plaintiff asked the court to find that the defendant has waived privilege as to these 1,400 documents, or, in the alternative, for the court to conduct an *in camera* review of the documents. The log entry described email communications, reports, notes, draft letters and pleadings between counsel and claims adjusters and were related to the subject matter of the plaintiff’s claims and all dated after the plaintiff had filed suit. Further, four of the defendant’s own witnesses testified that the defendant was withholding claims notes from January 2, 2019 to the present and all “Evaluations” and “Claim Reports.” These documents were withheld, in pertinent part, on the basis of the attorney-client privilege and work product protections from disclosure.

Special Master Manderfield observed that FRCP 26(b)(5) “requires a party who withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material to: (i) expressly make the

claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed – and to do so in a manner that, without revealing information itself that is privileged or protected, will enable other parties to assess the claim.” Special Master Manderfield noted that Rule 26(b)(5) does not specify the information that must be included in a privilege log. However, citing precedent, Special Master Manderfield concluded that “although a categorical log may be permissible in some jurisdictions and in some cases, within the Sixth Circuit, the courts rely on a privilege log to determine the veracity of a claim of privilege.” Accordingly, she held that to properly assert privilege, a log must include for each document the date, author, subject matter, recipients, and an explanation as to why the document is privileged and should not be produced in discovery.

Under this standard, Special Master Manderfield found the defendant’s log to be deficient because it did not include document-level details about the withheld documents. Special Master Manderfield stated that “there is now way for the opponent to test the veracity of privilege for over 1,400 documents with so little information provided.” Accordingly, Special Master Manderfield ordered that the defendant had waived privilege over all of the categorically logged documents and ordered it to produce them in unredacted form. She permitted as the only exception documents that are communications to or from an attorney, which she

ordered the defendant to produce for review *in camera*.

EDITOR’S NOTE

This decision is, at least in part, a cautionary tale for litigants interested in relying on categorical privilege logs to alleviate the burden of logging substantial volumes of documents. Few courts (and we hasten to remind that this decision was authored by a Special Master and no doubt will be reviewed by a magistrate or district judge) have outright rejected the validity of categorical logs, particularly where a large volume of privileged documents was at issue. The record in the case does not make it clear whether the parties previously agreed on the use of categorical privilege logs or why the defendant presumed to use such a log in the first place (the log in question actually was the second categorical log served, challenged, and found to be deficient). Regardless, we believe waiver to be a harsh result for a litigant trying in good faith to satisfy Rule 26(b)(5), even if the categorical log was deficient in some details. It is always a best practice for litigants to obtain agreement or express judicial approval to produce a categorical privilege log, and the details/metadata required, in advance so that privilege is not waived because the entries on the categorical log are later found to be deficient. At the same time, this decision is a lesson—a categorical log is not a “get-out-of-logging free card.”



Forensic Examinations

Courts increasingly analyze requests to compel the surrender and forensic examination of electronic devices through the lens of the proportionality factors of Rule 26(b)(1)(B). The following cases demonstrate that a movant seeking such an order faces a high bar to show its necessity and fairness.

AINSTEIN AI V. ADAC PLASTICS, INC.

#forensic-exam; #rule34; #preservation

In **Ainstein AI v. ADAC Plastics, Inc.**, 2023 WL 3568661 (D. Kan. May 19, 2023), United States Magistrate Judge Teresa James granted in part, and denied in part the plaintiffs' motion for expedited discovery for a forensic examination of the computers, storage devices, and personal cell phones of three employees of the defendant and one of its subcontractors. The underlying litigation is an intellectual property dispute involving radar-based sensing solutions for use in the international automotive marketplace, and included allegations of misappropriation of trade secrets and improper use of the misappropriated data. The plaintiff moved for expedited discovery in the form of forensic imaging under FRCP 34, asserting it was necessary to preserve evidence of the defendant's misappropriation and use of the plaintiff's trade secret files. The defendant denied the plaintiff's allegations of misappropriation and improper use and objected to the plaintiff's motion for expedited discovery, arguing that the plaintiff had failed to demonstrate why expedited discovery was necessary and, in addition, that the plaintiff had failed to demonstrate that forensic imaging was warranted.

Judge James first addressed the threshold request for expedited discovery and found that the plaintiff had demonstrated good cause for same. The potential deletion or overwriting of crucial data, coupled with the admitted downloading of trade secrets, warranted swift action to ensure evidence preservation. Moreover, Judge James found that the plaintiff's request, limited in scope to specific individuals and a defined timeframe, was reasonable and proportional to the dispute.

Having established the need for expedited discovery, Judge James turned to the type of examination requested—forensic imaging under Rule 34. The plaintiff contended this was the only way to determine whether the downloaded files had been used or modified. The defendant countered that forensic imaging was highly intrusive, was not a guaranteed right under Rule 34, and should only be employed under exceptional circumstances, such as troubling discrepancies regarding a party's data preservation, collection, and production. Balancing the need for thorough discovery with respect for privacy, Judge James sided with the plaintiff. Specifically, recognizing the unique concerns posed by trade secrets – where traditional methods of discovery might be insufficient – Judge James sanctioned the forensic examination of the defendant's computers and storage devices. She observed that these devices held the potential to reveal important information about file access, modification, and deletion, all of which were directly to the alleged misappropriation. However, Judge James's decision specifically excluded personal cell phones. She deemed the request overly broad and intrusive, citing the lack of evidence regarding work-related use, possession by the defendant, and the potential presence of a vast amount of irrelevant personal information. Additionally, as Judge James observed, the plaintiff failed to provide sufficient legal justification or an explanation for the need to examine the cell phones. Judge James therefore granted the plaintiff's motion as it related to expedited discovery of the defendant's computers and storage devices, but denied the motion as it related to the cell phones.

KOSMICKI INVESTMENT SERVICES LLC V. DURAN

#forensic-exam; #rule26; #rule34; #motion-to-compel;
#privacy; #search; #esi-protocol

In **Kosmicki Investment Services LLC v. Duran**, 2023 WL 4899541 (D. Colo. Aug. 1, 2023), United States Magistrate Judge Susan Prose granted the plaintiff's motion to compel the defendant to produce his personal laptop for examination. The plaintiff brought claims under the Computer Fraud and Abuse Act alleging the defendant engaged in unauthorized access to the plaintiff's computer systems after his termination and stored highly confidential files on personal storage devices.

In a related state court action, the plaintiff allegedly learned that the defendant had accessed confidential financial information housed within the plaintiff's systems and servers after he had been terminated. In the instant federal court action that arose from these findings, the plaintiff previously had filed a motion to compel production of a hard drive (the "Seagate Drive"), which had been found by a Special Master to contain information that is "properly characterized as the property of [the plaintiff]." The defendant unsuccessfully argued that the items on the Seagate Drive were protected by claims of privilege and/or work-product protection.

The plaintiff filed the present motion to compel production of the defendant's personal laptop for examination to determine whether it, too, contained the plaintiff's proprietary data. The plaintiff argued that the "laptop contains documents and information that the Special Master has ordered to be returned to the Company." The defendant had previously admitted that the laptop was "used in conjunction with the Seagate Drive" and that the Seagate Drive "was connected to [his] laptop computer on multiple occasions." During initial disclosures, the defendant even informed the plaintiff that his counsel would "have a forensic report completed regarding the laptop and Seagate drive, for production to the Plaintiff." The defendant having failed to do so, the plaintiff filed this motion.

In response, the defendant argued that (1) the plaintiff failed to point to specific documents on the Seagate Drive that were inappropriately obtained and/or retained by the defendant that could be located on the laptop; (2) the defendant (in his view) is bound to win summary judgment; and (3) the laptop contains the defendant's personal and business information that are not at issue and the defendant would be unduly burdened if he could not access it.

Judge Prose ruled that the review of the laptop requested by the plaintiff "is both relevant and proportional to the needs of the case." First, she found that the defendant's first and second arguments were "inconsequential to the relevance analysis." The plaintiff was "not obliged, at this stage of the case, to specifically identify . . . all documents that he may have improperly taken from [the plaintiff]." Furthermore, whether the defendant had a right to retain particular documents had no bearing on the standard for a motion under Rule 26(b)(1), which Judge Prose characterized as "whether there is any possibility that the information sought may be relevant". Therefore, Judge Prose "declin[e]d" to conflate the discovery question at issue here with a pre-determination of the merits of the underlying claims" and held that "[t]he contents of the laptop [were] unquestionably relevant here." She also found that the defendant raised no objection that the review would be disproportional to the needs of the case, and likewise noted to basis of her own.

Sympathetic to the fact that the laptop contains personal information, and that surrendering it would be an inconvenience, Judge Prose "direct[ed] the implementation of an ESI protocol that [would] allow for the imaging of [the defendant's] laptop as quickly as possible and with as little inconvenience to [the defendant] as possible."

EDITOR'S NOTE

This decision is one of the rare instances where a Court has ordered a forensic examination of a personal device. Notably, Judge Prose prioritized

Rule 26(b)(1) standards of relevancy and proportionality in ordering that the defendant's laptop be produced for inspection, whereas most courts balance the utility of the requested examination with inherent privacy concerns of providing personal devices for forensic inspection.

Judge Prose was sensitive to the defendant's privacy rights implicated by her order and required the implementation of a protocol to govern the exam and minimize intrusion and inconvenience. Moreover, Judge Prose's order to allow an inspection pursuant to an agreed-upon protocol came only after the plaintiff had successfully demonstrated that the defendant had its confidential information on an external hard drive that was admittedly connected to a personal laptop from which the defendant refused to produce information.

We generally expect courts to balance inherent privacy concerns against the need for discovery prior to ordering forensic examinations of personal devices. We perceive here that it may have been significant that the defendant had already been shown to be in possession of the plaintiff's confidential information and had reneged on an offer to produce a "forensic report" of the laptop. This said, we query whether a less intrusive remedy could have sufficed, such as ordering the defendant to produce said report as he had initially agreed.

PARTNERS INSIGHT, LLC V. GILL

#forensic-exam; #motion-to-compel; #privacy; #privilege; #email; #search-terms

In **Partners Insight, LLC, et al. v. Jennifer and Steven Gill and Eytastic, LLC**, 2023 WL 2864375 (M.D. Fla. Apr. 10, 2023), United States Magistrate Judge Kyle C. Dudek denied the plaintiffs' motion to compel a forensic examination of the individual defendants' personal electronic devices.

The plaintiffs brought the underlying suit alleging that their former employees, the defendants, had misappropriated trade secrets after terminating their employment with the plaintiffs in April 2022.

Specifically, the plaintiffs alleged that the individual defendants violated their employment and non-compete agreements by starting two competing businesses, also named as defendants. The defendants objected to the extent the devices did not contain "confidential business information, proprietary information, or trade secrets." The plaintiffs then filed this motion to compel.

Judge Dudek provided that when "determining whether a forensic examination is warranted, the Court must weigh the utility of the proposed examination against inherent privacy concerns." Judge Dudek also noted that prior to ordering a forensic examination, the court should also consider if the party whose information is being requested has searched for the information, withheld it from production, or complied with previous discovery requests. Judge Dudek also stated that "mere speculation that electronic discovery exists is insufficient to permit a forensic examination of a party's personal computer or cellphone." Finally, Judge Dudek also relied upon the *Middle District of Florida's Discovery Handbook*, which provides that "forensic image backups of computers should only be sought in exceptional circumstances which warrant the burden and cost," and that "a request to image an opponent's computer should include a proposal for the protection of privacy rights, protection of privileged information, and the need to separate our and ignore non-relevant information."

Judge Dudek determined that the plaintiffs' proposal did not effectively protect privacy rights or privileged information. Moreover, Judge Dudek denied the plaintiffs' motion as premature. The plaintiffs sought a forensic examination to determine if the defendants had downloaded confidential information onto a storage device or sent confidential information via email. However, the plaintiffs sought the forensic examination prior to voluntarily requesting that the defendants produce that information, effectively short-circuiting the

discovery process. Accordingly, Judge Dudek denied the plaintiffs' motion as premature.

Judge Dudek also notably identified other issues with the plaintiffs' requested relief. Specifically, Judge Dudek highlighted the fact that the plaintiffs did not identify an expert who would conduct the imaging. Judge Dudek also took issue with the plaintiffs asking the defendants to formulate search terms to run across their devices to identify

documents and information the plaintiffs seek. Finally, Judge Dudek stated that the plaintiffs' motion did not provide any facts warranting a forensic examination. Rather, the plaintiffs alleged "upon information and belief" that the defendants transferred confidential files, which Judge Dudek characterized as "mere speculation."



Cross-Border Discovery

For international litigants in U.S. courts, the prospect of producing documents in domestic discovery raises the specter of complicated, expensive, and potentially onerous steps to comply with the privacy and sovereign data laws of the sending jurisdiction. With the recent advent of the US-EU Data Privacy Framework (page 84), it remains to be seen whether this third attempt at an EU-US transfer mechanism will survive and take seed. At the same time, we increasingly observe issues related to the People's Republic of China, where a complex web of new and updated laws and regulations have created obstacles to the transfer of data to the United States for litigation and regulatory purpose. Other countries, such as France, are also re-invigorating their own blocking statutes, insisting on the use of Hague Convention or other procedural mechanisms to preserve their foreign sovereignty.

CHINA'S REGULATIONS ON CROSS-BORDER TRANSFERS OF PERSONAL INFORMATION NOW IN EFFECT

#cross-border; #china; #pipl; #privacy

In February 2023, the Cybersecurity Administration of China (CAC) issued the *Measures for the Standard Contract for Outbound Cross-Border Transfer of Personal Information* (the Measures) which became effective on June 1, 2023. It will be important for global companies to comply with these Measures. Currently, the CAC is one of the most active enforcement agencies in China. Furthermore, the penalties can be substantial, including serious business disruption and fines of the greater of RMB 50 million (~USD 7 million) or 5% of the prior year's revenue.

The Measures provide guidance and procedures for the adoption of Standard Contractual Clauses (SCCs) to allow for cross-border transfers of personal information and provide a six-month grace period to execute the SCCs and file for recording with the provincial-level CAC. Companies that obtain personal information from China should take advantage of this window to bring their practices into compliance.

As background, the PRC Personal Information Protection Law (PIPL) requires personal information processors to implement one of the following three data transfer mechanisms before conducting cross-

border transfers of personal information outside of China:

1. Complete a Security Assessment by the CAC;
2. Complete a Security Certification by a certification institution designated by the CAC; or
3. Adopt SCCs.

A Security Assessment is required in the following four enumerated circumstances:

1. The company is a critical information infrastructure operator (CIIO);
2. The company has processed the personal information of more than one million individuals;
3. Since January 1 of the previous year, the company has transferred the personal information of more than 100,000 individuals; or
4. Since January 1 of the previous year, the company has transferred the sensitive personal information of more than 10,000 individuals.

If a Security Assessment is not required, then companies will typically decide to adopt SCCs for their cross-border transfers of personal information. The SCC procedure has its own complexities. First, it is necessary for the company to first complete a Personal Information Protection Impact Assessment (PIPIA), which will include an audit and reporting.

In addition, the SCC needs to be filed with the provincial-level CAC for recordation along with other documents, including the PIPIA. While the procedure is described as a filing for recording, it should be understood to be a review or approval. For example, the Measures suggest that the CAC may request modifications and a new PIPIA to be conducted and an SCC to be executed. Thus, it is critical to have experience with the CAC and understand its particular interpretation or preferences for the documentation.

† Special thanks to Sheryl Falk, Jacob Harding, and Dora You for this analysis.

EUROPEAN COMMISSION AUTHORIZES E.U.-U.S. DATA PRIVACY FRAMEWORK

#cross-border; #gdpr; #privacy

On July 10, 2023, the European Commission adopted the adequacy decision for **the EU-US Data Privacy Framework (DPF)**. This decision sets the stage for the free flow of personal data from the EU and three EEA countries (Iceland, Liechtenstein, and Norway) to organizations in the US that are certified under the DPF, without having to rely on any other data transfer mechanism under the General Data Protection Regulation (GDPR), such as Binding Corporate Rules or Standard Contractual Clauses.

Soon after this decision, on July 17, 2023, the United Kingdom Extension to the EU-US DPF (aka “the UK-US Data Bridge”) and the Swiss-US DPF Principles also took effect. The UK issued its own adequacy decision on the Data Bridge on October 4, and the Data Bridge took effect to permit transfers beginning on October 12.

Organizations in the U.S. may become eligible for certification under the DPF by submitting to supervision by the Federal Trade Commission (FTC) or the Department of Transportation (DOT). Importantly, only organizations that fall within the regulatory jurisdiction of one of those organizations

may be certified under the DPF at this time. The European Commission’s adequacy decision cited banks, insurance companies, and certain non-profit organizations as examples of organizations that do not fall under the jurisdiction of the FTC or DOT. A list of certified organizations is maintained by the International Trade Administration (ITA) of the US Department of Commerce (DOC); entities in the EEA, UK, or Switzerland can reasonably rely on DPF certification for any organization on the list. Transfers to organizations in non-approved countries, or to US organizations that are not DPF-certified (or eligible to be certified) must continue to be made pursuant to existing legal mechanisms.

Organizations that previously were self-certified under the EU-US Privacy Shield Framework may rely on that prior certification and need not make a new self-certification submission as long as they updated their privacy policies to comply with the DPF by October 10, 2023. However, organizations that were self-certified under Privacy Shield but do not wish to participate in the DPF must take steps to withdraw their prior certification.

Although organizations eligible to participate in the EU-US DPF will be permitted to self-certify for participation in the Swiss-US DPF Principles, neither Switzerland has not yet issued its own adequacy decision on the DPF. Accordingly, organizations that are currently certified to transfer personal data from the EU to the US under the DPF may not yet transfer personal data from Switzerland and must continue to rely on other legal mechanisms.

HAZELDEN BETTY FORD FOUNDATION V. MY WAY BETTY FORD KLINIK GMBH

#cross-border; #comity; #gdpr; #privacy; #motion-to-compel; #30(b)(6)

In **Hazelden Betty Ford Foundation v. My Way Betty Ford Klinik GmbH**, 2023 WL 6318164 (D. Minn. Sept. 28, 2023), United States District Judge John R. Tunheim ordered foreign defendants to comply with

a United States Magistrate Judge’s decision granting the U.S.-based plaintiffs’ requests for deposition testimony and relevant documents. The case involves a cross-border trademark infringement dispute between two addiction treatment companies. The American plaintiffs moved to compel (1) depositions of defendants’ Germany-based officers, directors, and managing agents, and (2) production of documents regarding U.S. patients. The Magistrate Judge granted both motions, leading to the defendants’ appeal. On appeal to Judge Tunheim, the defendants argued, *inter alia*, that the depositions should not have to occur in the United States, and that the Magistrate Judge erred in ordering the production of data from patient records located in Germany.

Judge Tunheim disagreed with the defendants on both positions. With respect to the location for the depositions, Judge Tunheim found “it was not clear error for the Magistrate Judge to conclude that the depositions ... should occur in Minnesota.” He noted the Magistrate Judge correctly balanced the issues of burden and comity pursuant to the factors set out in *Societe Nationale Industrielle Aerospatiale v. U.D. Dist. C. for S. Dist. of Iowa*, 482 U.S. 522, 529 (1987), and found that “comity weighs in favor of the depositions occurring in the United States” rather than Germany. Further, Judge Tunheim found that the Magistrate Judge also correctly found that German law prohibiting employers from compelling employees to “testify before a US court” does not require the depositions to be taken in Germany, because the 7th Circuit previously has held that the German statute does not apply to “officers, directors, or managing agents under” FRCP 30(b)(6) (citing *In re Petition of Boehringer Ingelheim Pharmaceuticals, Inc.*, 745 F.3d 216, 219 (7th Cir. 2014)), as federal courts are empowered to compel the deposition of such principals “in the forum district even if the deponent is a foreign citizen and resident.”

Additionally, Judge Tunheim found the Magistrate Judge correctly ruled that the defendants must

produce patient records *if necessary*. Affirming the Magistrate Judge’s order, Judge Tunheim emphasized that the defendants need only produce records “sufficient to identify the number of people from or who reside in the United States that the [defendant] has communicated with regarding . . . or to whom the [defendant] has provided addiction treatment services.” Accordingly, the order did not require the defendant to produce patient records if other documents, such as invoices, “are the most reasonably reliable means to identify the number of people from or residing in the United States.” Judge Tunheim also agreed with the Magistrate Judge’s conclusion that the EU General Data Protection Regulation (“GDPR”) did not prohibit the defendant from producing patient data. The defendant, Judge Tunheim noted, “[did] not refute the Magistrate Judge’s conclusion that GDPR permits the processing and transfer of ‘data concerning health’ when it ‘is necessary for the establishment, exercise or defense of legal claims’”; rather, the defendant argued only that the production of patient data is not “necessary” in the context of this litigation. The Magistrate Judge, and Judge Tunheim, disagreed, finding that the plaintiff “must show that the [defendant] treated, communicated with, and received revenue from patients who are from or reside in the United States to succeed on their claims.” Accordingly, evidence to that effect “‘would go to the heart’ of the issue of whether there has been a substantial impact on United States commerce,” satisfying the GDPR.

MOTOROLA SOLUTIONS, INC. V. HYTERA COMMUNICATIONS CORP.

#cross-border; #comity; #china; #motion-to-compel; #csl; #dsl

In **Motorola Solutions, Inc. v. Hytera Communications Corp. Ltd.**, 2023 WL 5956992 (N.D. Ill., Sept. 12, 2023), United States Magistrate Judge Jeffrey I. Cummings denied the defendant’s motion for extension of time to produce source code related to its products.

The underlying litigation is one for patent infringement. Earlier in the case, the Court ordered the defendant to produce source code for the products at issue. When the production was due, the defendant filed the instant motion, asserting that the Chinese government had not yet authorized the production and seeking an indefinite extension of time while it awaited the necessary permission. Recognizing that this motion raised the question of whether Chinese law blocked the defendant's production of source code, Judge Cummings ordered the parties to brief the issue. After reviewing the parties' submissions, Judge Cummings determined that the Federal Rules of Civil Procedure – and not Chinese law – governed discovery in the litigation and, as such, denied the defendant's motion for an extension of time.

Judge Cummings began his analysis by reciting the two-step process that courts must apply when deciding whether a foreign law blocks the production of discoverable material in U.S. proceedings: “[f]irst, the party seeking to block discovery – here, [the defendant] – must show that foreign law actually bars the production at issue.” Second, if the court determines that the foreign law in question blocks production of the discovery, the Court must perform a comity analysis, weighing the interests of the U.S. and those of the foreign state. To perform this analysis, courts must balance the following five factors drawn from the Supreme Court’s decision in *Societe Nationale Industrielle Aerospatiale v. U.D. Dist. C. for S. Dist. of Iowa*, 482 U.S. 522, 529 (1987): “(1) the importance to the investigation or litigation of the requested information; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine the important interests of the state where the information is located.” In addition, some courts also

consider two more factors: “[6] the hardship of compliance on the party or witness from whom discovery is sought; and [7] the good faith of the party resisting discovery.”

Applying this two-step analysis, Judge Cummings first concluded that the defendant sufficiently showed that Chinese law—specifically, Article 37 of the China Cybersecurity Law—actually blocked the subject production absent express permission from Chinese authorities. He based this conclusion on the plain language of Article 37 and the defendant’s supporting evidence, including an alert from a Chinese authority on the Risk of Outbound Data Transfer and a declaration from a Chinese expert on cybersecurity and data security laws which indicated “‘source code in respect of [the technology at issue] constitutes critical data affecting national security’ within the meaning of . . . Chinese data laws, including the CSL.” Regarding the second step, Judge Cummings analyzed the comity factors and determined that they weighed in favor of requiring the production. Notably, he found the information to be central to the claims in the case and unavailable from an alternative source, and he held that “the United States’s interest in protecting its intellectual property outweighs China’s interest in preventing its corporations from violating its data security laws.” Judge Cummings also found that two “optional” factors sometimes considered by courts also weighed in favor of production—especially “the hardship of compliance on the party or witness from whom the discovery is sought” vis-à-vis “sanctions or criminal penalties a foreign defendant may suffer in its own country for complying with a discovery request.” Judge Cummings noted that although the defendant cited the potential of fines and recent cases of heavy fines by issued by Chinese authorities, those cases involved different laws and different contexts—“[the defendant] has not provided any evidence of a Chinese individual or company being penalized for production of document or data for use in U.S. litigation.” On balance, Judge Cummings found that comity

required the defendant to comply with the discovery schedule, denied its motion for extension of time, and ordered it to produce its source code within two weeks.

EDITOR'S NOTE

*This decision highlights a tough reality for businesses engaged in U.S. litigation that control relevant data in the PRC. Where the balance of Aerospatiale factors weighs in favor of production, U.S. courts generally are not sympathetic to the potential penalties a litigant may invoke as an impediment to compliance with the court's order. Those potential penalties are slightly more hypothetical, future risks where more familiar international statutes like GDPR are concerned. Here, Hytera was already in the process of seeking approval from Chinese authorities—an approval process Judge Cummings acknowledged was legitimately required by Chinese law. His ruling therefore placed Hytera between the metaphorical rock of producing the source code before local review and approval was completed (with the risk that approval would not be granted), and the hard place of facing sanctions from Judge Cummings for their non-compliance. Perhaps the weakest link in Hytera's defense involved this very point, as it did not supply Judge Cummings with evidence that similar entities facing similar circumstances have been fined or prosecuted. We view that as a practice tip for practitioners facing similar circumstances, which will only be more common following China's expansion of its preapproval regime to encompass data governed by the PIPL (see **China's Regulations On Cross-Border Transfers of Personal Information Now In Effect**, page 83).*

OWEN V. ELASTOS FOUNDATION

#cross-border; #comity; #china; #pipl; #privacy; #motion-to-compel

In **Owen, et al. v. Elastos Foundation, et al.**, 343 F.R.D. 268 (S.D.N.Y. Jan. 11, 2023), United States

Magistrate Judge Barbara Moses granted the plaintiffs' motion to compel the production of documents that the defendants had withheld in reliance on the Personal Information Protection Law of the People's Republic of China ("PIPL").

The defendants' primary offices are in China, while its custodians and their data are in both China and the U.S. The defendants initially agreed to collect and produce documents from 19 custodians, but later asserted that the PIPL forbids such actions for any custodian residing in China absent the custodian's written consent. The defendants received consent from 10 of the 19, and they had collected and produced the data for those custodians. For the remaining nine custodians, the defendants reported that the custodians either failed to provide consent or consented to the search of only some, but not all, of their data sources. The defendants argued they could not comply with their discovery obligations without risking "significant penalties" under the PIPL.

In response, the plaintiffs submitted this motion to compel the production of data from the remaining custodians. While Judge Moses disagreed with some of the plaintiffs' arguments, she ultimately concluded that the PIPL does not block the discovery that the plaintiffs seek and granted the motion.

Judge Moses first addressed the plaintiffs' claim that the PIPL does not bar the discovery sought because the business communications at issue do not constitute "personal information," and the defendant company is not acting as a "personal information processor," as those terms are used in PIPL, art. 4. Judge Moses disagreed and held that PIPL's scope includes business communications and, moreover, that the defendants were, in fact, a "personal information processor." Judge Moses noted that these PIPL terms were similar to their counterparts under the EU GDPR, and that her conclusion was consistent with how U.S. courts have interpreted the GDPR. After making this threshold determination,

Judge Moses turned to whether, absent custodial consent, PIPL excused the defendants from fulfilling their discovery obligations with respect to the custodial data at issue, including email and electronic documents stored on a Tencent server located in China and email and electronic documents stored on Google servers located in the U.S. Here, Judge Moses agreed with the plaintiffs that PIPL did not bar the discovery sought, regardless of the presence or absence of consent.

For the data located within China, Judge Moses acknowledged that PIPL is clearly intended to place constraints on those who handle personal information located within China, but also recognized that consent is not an absolute requirement before such information can be processed. She noted, rather, that consent is only one of 13 exceptions set forth in PIPL art. 13. To support their motion to compel, the plaintiffs cited the third and seventh exceptions, which permit the processing of personal information if “the processing is necessary for the performance of statutory duties or obligations” or under “other circumstances provided by laws or administrative regulations.” PIPL art. 13 § 3, 7. The defendants

argued that these exceptions only apply when another Chinese law or regulation requires or permits the processing. Judge Moses rejected that interpretation, noting that nothing in the language of the PIPL supported it and that other federal courts have also rejected it (citing *Cadence Design Sys. Inc. v. Syntronic AB*, 2022 WL 2290593 (N.D. Cal. June 24, 2022)).

Finally, Judge Moses observed that because she found no true conflict between Chinese law and the requirements of the Federal Rules of Civil Procedure, there was no need for a comity analysis to determine the weight to be given the PIPL. Even so, Judge Moses observed that had a comity analysis been required, it would not change her conclusion that the defendants must produce all of the responsive documents in their possession, custody, and control – including those in the defendants’ U.S. and China servers – with or without the consent of each individual custodian. To support this decision, Judge Moses then performed a full comity analysis and concluded that a weighing of all the comity factors balances in favor of production.



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CLOUD MIGRATION	INVESTIGATIONS	THIRD-PARTY SUBPOENA RESPONSE PROGRAM	DEFENSIBLE DELETION	SOCIAL MEDIA / EPHEMERAL COMMUNICATIONS
Transition data to Cloud-based solutions and providers to ensure data integrity and continuity	Uniquely suited to assist clients and teams in internal investigations	Design and implement process for response to third-party subpoenas	Manage elimination of electronic information that is redundant or outdated in a manner consistent with legal and regulatory hold obligations	Understand whether and how to adopt newer forms of social media and ephemeral communications in alignment with legal and IG obligations

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We would be very pleased to speak with you to explore how we can help your organization achieve its legal and business goals. Let us be your solution!

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