

Judge Albright Issues Discovery Order Requiring Fintiv to Answer to Missing Emails in Discovery Dispute With Apple

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On December 21, 2022, Judge Albright resolved a discovery dispute between Fintiv and Apple, ordering Fintiv to provide Apple with answers in writing as to why emails were missing for 10 out of the 11 custodians Apple identified for production from Fintiv.

The order resolved three discovery issues relating to the scope of discovery and confidentiality. Judge Albright first ruled that Fintiv and Apple each may identify 12 custodians and 11 search terms for email discovery—settling on a much smaller scope than Fintiv’s requested 44 custodians and 40 search terms. He further noted that a sustained objection to one or more of those custodians or terms would reduce the number of total custodians and terms accordingly. Resolving the second issue, Judge Albright ordered Apple to re-produce two documents labeled with a “confidential” designation.

Finally, Judge Albright addressed the third issue: missing emails for 10 out of the 11 custodians identified by Apple for email production. Apple argued that the disappearance of the emails raised significant spoliation issues, and Fintiv responded that no spoliation had taken place and no emails had been deleted. The court ultimately ordered Fintiv to provide a response to Apple in writing as to the following questions: (a) why Fintiv did not have emails for 10 out of the 11 custodians that Apple had identified for email production from Fintiv; (b) what happened to the emails for these custodians during the relevant time period; (c) when the custodians’ emails were deleted and by whom; and (d) whether any of the custodians were under any preservation obligations at the time of deletion, and if not, why not. Fintiv’s written response was due on December 23, 2022.

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