

# Selected eDiscovery and ESI Case Law from 2022-23

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<sup>1</sup> The editor wishes to recognize the following individuals for their invaluable contributions to this annotated bibliography of eDiscovery and ESI case law: Thomas Y. Allman, Michael Berman, the Honorable Noelle Collins, Ross Gotler, the Honorable Iain Johnston, Lidia Kekis, David Lumia, Michelle Newcomer, and Anthony Petruzzi.

## CLOUDS

*Hunters Cap., LLC v. City of Seattle*, No. C20-0983 TSZ, 2023 WL 184208 (W.D. Wash. Jan. 13, 2023). In response to defendants' motion for spoliation sanctions against plaintiffs, the court refused to authorize sanctions against a plaintiff Capitol Hill business owner (Thompson) for failing to preserve relevant text messages found on his phones. Even though Thompson lost his phones while "boating on Lake Washington" and "hiking in the Cascades" after the duty to preserve attached, the court did not find that Thompson had an obligation to "save his text messages to any external source." The court observed that defendants "cited no authority requiring individuals to back up their text messages to iCloud or an equivalent service." See discussion under **Sanctions—Rule 37(e)** and **Text Messages & Ephemeral Messages**.

## COOPERATION

*Boulder Falcon, LLC v. Robert Brown*, No. 2:22-CV-00042, 2023 WL 2662187 (D. Utah Mar. 28, 2023). See discussion under **Ethics**.

*Garrard v. Rust-Oleum Corp.*, No. 20 C 00612, 2023 WL 1475164 (N.D. Ill. Feb. 2, 2023). This is a memorandum opinion and order issued by United States Magistrate Judge Jeffrey Cole in the case of *Allen Garrard v. Rust-Oleum Corporation*. The document addresses a motion filed by the plaintiff to compel discovery from the defendant, which had been the subject of dispute for months. The judge notes that the attorneys for both parties have failed to negotiate in good faith as required by local rules, leaving the court to resolve more than 30 discovery requests. The judge orders the parties to work towards a manageable resolution of their disputes and warns that any remaining disputes will be resolved at the court's discretion.

*ImprimisRx, LLC v. OSRX, Inc.*, No. 21-CV-1305-BAS-DDL, 2022 WL 17824006 (S.D. Cal. Dec. 19, 2022). See discussion under **Discovery Process** and **Search**.

*HDT Bio Corp. v. Emcure Pharms., Ltd.*, No. C22-0334JLR, 2022 WL 16835758 (W.D. Wash. Nov. 9, 2022). See discussion under **Rule 34 Requests and Responses**.

## DATABASES

*Marin v. Apple-Metro, Inc.*, No. No. 12-cv-5274, 2023 WL 2060133 (E.D.N.Y. Feb. 8, 2023). In this Fair Labor Standards Act ("FLSA") case against the owner of Applebee's restaurants, plaintiffs sought pre-class certification discovery from defendants of "certain timekeeping and earnings data . . . going back 16 years for every non-managerial employee at every one of defendants' restaurants." Defendants, who maintained the requested records on a structured database (Rosnet), argued that plaintiffs' request was improper for various reasons, including that it sought irrelevant information, imposed an undue burden under Rule 26(b)(2)(B), and was disproportionate under the circumstances. The court disagreed with defendants, rejected each of their arguments, and ordered them to produce the requested records to plaintiffs. In particular, regarding the issue of undue burden, the court rejected defendants' assertion that it would be too time consuming and costly to produce the requested wage and hour records since "it would require customized efforts" to ameliorate the impact of the various technological changes Rosnet had made to its database over the past 16 years. The court observed that defendants had not introduced any evidence from an expert witness or from Rosnet to substantiate their assertions and had solely relied on attorney argument. In contrast, plaintiffs had

offered expert testimony from their data scientist, who argued that defendants' manhour and cost assertions were "inflated" and that the need for customized efforts was overblown since plaintiffs' search queries could be automated. The court ultimately concluded as follows: "Without a line-item breakdown or any further support from Rosnet or a data expert as to why plaintiffs' suggested cost-saving methods would be inappropriate here, the Court cannot conclude that producing the data would result in an undue burden." In doing so, the court also rejected defendants' reliance on Sedona Principle Six, reasoning that defendants—as the responding parties—had failed to properly "evaluate the procedures" underlying their production position. In addition, the court found that defendants' Rule 26(b)(2)(B) argument was misplaced since the issue of undue burden cannot arise merely from cost, but "must be associated with some technological feature that inhibits accessibility." *See* discussion under **Proportionality**.

*Manassa v. Nat'l Collegiate Athletic Ass'n*, No. 1:20-cv-03172-RLY-MJD, 2023 WL 1765993 (S.D. Ind. Feb. 3, 2023). In this putative class action against defendant National Collegiate Athletic Association ("NCAA") involving claims of historical discrimination against African American student-athletes, plaintiff sought discovery of "penalty data," i.e., information relating to penalties the NCAA imposed on Division One schools during the relevant time period (2005 through the present). The NCAA had produced some of the requested data but had refused to make a complete production, arguing that such a production would be "unduly burdensome and not proportional to the needs of the case." In addition to seeking a fulsome production of the requested penalty data, plaintiff's motion to compel requested that the penalty data be produced "in Excel, CSV, or other computer-readable form, along with the Database information [ ] needed to compile it if produced in raw form." Prior to plaintiff filing his discovery motion, the NCAA had only produced the penalty data—maintained in an Oracle relational database—in PDF. The court granted plaintiff's requested relief, ordering a complete production of the requested penalty data and that the production be made "in Excel, CSV, or another computer-readable format." In doing so, the court rejected defendant's undue burden argument, finding that "the mere fact that thousands of teams' data are involved does not necessarily translate into an undue burden. Defendant has provided no information at all regarding what the actual burden of producing the additional information sought by Plaintiff would be . . . this, alone, dooms Defendant's burden argument." This was particularly the case given that the repository involved—a relational database—was specifically designed "to make large amounts of data accessible and usable." Finally, the court rejected the NCAA's position that its prior PDF productions represented an ordinary course production. Not only was the information stored in a relational database and not as PDF files, the parties previously memorialized in their ESI protocol that they would produce "documents collected from databases or other structured databases in a reasonably useable format," and the court previously ordered that ESI be produced in native format.

*Netherlands Ins. Co. v. HP, Inc.*, --- F. Supp. 3d ---, 2022 WL 18027562 (D. Mass. Dec. 30, 2022). In this product liability suit arising from an office building fire allegedly started by defendant HP's printer, the court denied plaintiffs' motion to compel HP to produce certain records. In discovery, plaintiffs sought litigation records from HP regarding other printer fires that "contain the same components" as the "HP LaserJet 4250n printer" at issue here. The court denied plaintiffs' motion on multiple grounds and, in particular, rejected plaintiffs' argument that HP could "easily produce the requested information." The court found that plaintiffs' request was disproportionate to the needs to the case given that the relevance of the requested litigation records "is unclear at best" and the burden on HP would be substantial to identify which of its printer models had the same components as the HP LaserJet 4250n. While those records were apparently maintained in "a database of all claimed printer fires sorted by printer model," the court observed that the effort to retrieve the responsive materials

would be “much more than pressing a few buttons to generate a database printout.” In addition, the court observed that there would be additional burden on HP to identify and produce records related to each lawsuit over a period of 22 years. Finally, the court held that plaintiffs—like “any member of the public”—could obtain the requested information by conducting research into HP’s litigation history from publicly available sources, and thus “the parties’ relative access to information” proportionality factor did not support plaintiffs’ arguments.

*Oracle Int’l Corp. v. Rimini St., Inc.*, No. 2:14-CV-01699, 2022 WL 16575007 (D. Nev. Nov. 1, 2022). In this copyright and unfair competition suit over aspects of the parties’ software products, plaintiffs filed a motion in limine to prevent defendants from using certain evidence from its “DevTrack relational database” since defendants did not affirmatively produce the evidence in question from the database with Bates numbers. Defendants countered by spotlighting how they provided plaintiffs “live access” to inspect the DevTrack database for responsive information and that it was “impractical” for defendants to both produce and affix Bates numbers to printed excerpts from the database. Moreover, defendants represented that they subsequently “produced Bates-numbered, printed versions of the relevant DevTrack entries” defendants intended to use as trial exhibits after receiving plaintiffs’ motion in limine. Because plaintiffs failed to subsequently respond to defendants’ arguments and neglected to specifically delineate all of the DevTrack evidence they sought to exclude, the court denied their motion without prejudice.

## Discovery Process

*United States ex rel. Long v. Janssen Biotech, Inc.*, No. CV 16-12182-FDS, 2023 WL 2429358 (D. Mass. Mar. 9, 2023). In this qui tam action involving alleged false claims for Medicare reimbursement, the court ordered defendant to disclose to relator certain information regarding how its potential custodians maintained their documents, “i.e. paper format, electronically, or other formats.” While defendant had argued that such information was “forbidden ‘discovery on discovery,’” the court disagreed, opining that “in a large document case such as this one, it is essential information for relator to have when deciding whom to choose as custodians.”

*Fluor Fed. Sols., LLC v. BAE Sys. Ordnance Sys., Inc.*, No. 7:19-CV-698, 2023 WL 1795352 (W.D. Va. Feb. 7, 2023). See discussion under **Sanctions—Other FRCP Provisions**.

*Berry v. Hennepin Cnty.*, No. 20-CV-2189 (WMW/JFD), 2023 WL 1777467 (D. Minn. Feb. 6, 2023). In this civil rights case involving alleged maltreatment of homeless individuals and the destruction of their personal property, plaintiffs served a Rule 30(b)(6) deposition notice to ascertain, among other things, the nature and extent of defendant’s efforts to respond to plaintiffs’ written discovery. In particular, plaintiff sought testimony regarding defendants’ “databases and sources searched; how they were searched; individuals from whom records were requested or manually collected; who conducted the searches; and when the searches were conducted.” In response, the court sustained defendant’s overbreadth and burden objections regarding the topic and held that defendant was not obligated to produce a witness to testify regarding its discovery efforts. The court explained that the deposition topic—designed to obtain details regarding defendant’s “document retention and discovery practices”—was “discovery on discovery,” which is only permitted when “relevant to a claim or defense in the case.” Not only were defendant’s discovery efforts not at issue in the litigation, the court found that defendant already disclosed much of the information plaintiffs were seeking in interrogatory responses.

*ImprimisRx, LLC v. OSRX, Inc.*, No. 21-CV-1305-BAS-DDL, 2022 WL 17824006 (S.D. Cal. Dec. 19, 2022). In this unfair competition lawsuit, the court rejected defendants' request for disclosure of plaintiff's search terms, finding that such "discovery on discovery" was improper since defendants had failed to establish a deficiency with plaintiff's "collection, review, and production of documents." See discussion under **Search**.

*Craigville Tel. Co. v. T-Mobile USA, Inc.*, No. 19 CV 7190, 2022 WL 17740419 (N.D. Ill. Dec. 16, 2022). See discussion under **Non-parties**.

*HDT Bio Corp. v. Emcure Pharms., Ltd.*, No. C22-0334JLR, 2022 WL 16835758 (W.D. Wash. Nov. 9, 2022). See discussion under **Rule 34 Requests and Responses**.

*O'Connor v. Ford Motor Co.*, No. 19 C 5045, 2022 WL 16757593 (N.D. Ill. Oct. 21, 2022). In this putative class action over alleged design defects in defendant Ford Motor Company's F-150 trucks, the court ordered Ford to respond to an interrogatory plaintiffs served requesting the identification of people who helped prepare responses or identify documents in connection with Ford's responses to certain written discovery requests. In doing so, the court rejected Ford's assertion that the interrogatory sought work product or was otherwise "discovery on discovery."

*Jasso v. Wells Fargo Bank, N.A.*, No. 22-CV-0858, 2022 WL 4227332 (D. Nev. Sept. 13, 2022). In this fraud action, plaintiffs argued that defendant Wells Fargo Bank failed to fully comply with a court order requiring the production of relevant, responsive emails. Plaintiffs sought to take a Rule 30(b)(6) deposition to explore inconsistencies between the application of Wells Fargo's email retention policy and the existence of emails that arguably should have been eliminated pursuant to the policy. The email retention policy deleted messages after six months unless a custodian foldered a message, in which case they were kept for a maximum of three years. Based on the demonstrated discrepancies, court found that plaintiff had sufficiently established a basis for "discovery on discovery" and authorized the requested deposition.

*Koppers Performance Chemicals, Inc. v. Travelers Indem. Co.*, --- F. Supp. 3d ---, 2022 WL 16570464 (D.S.C. Oct. 31, 2022). In this declaratory judgment and breach-of-contract action, the court denied defendants' request to depose one of plaintiff's employees regarding "his search for responsive documents," as defendants had failed to present information demonstrating that "such discovery would not be cumulative or why such discovery would be beneficial to this litigation compared to its burden."

## **ESI PROTOCOLS**

*Manassa v. Nat'l Collegiate Athletic Ass'n*, No. 1:20-cv-03172-RLY-MJD, 2023 WL 1765993 (S.D. Ind. Feb. 3, 2023). See discussion under **Databases**.

## **ETHICS**

*Boulder Falcon, LLC v. Robert Brown*, No. 2:22-CV-00042, 2023 WL 2662187 (D. Utah Mar. 28, 2023). In this breach-of-contract action arising from disputes over management and duties regarding a certain aircraft, the court imposed sanctions on defendants' counsel for taking a deposition in bad faith. Defendants' counsel served the deposition notice after believing plaintiff had made an improper "document dump" rather than making a good-faith production under Rule 34. The court ruled that

the document production was not inappropriate at all. Instead, as the court noted, plaintiff's production constituted "approximately 7,000 pages of materials in an electronic, load-file format so that they could be uploaded into discovery review software." Citing *The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition*, 21 SEDONA CONF. J. 263 (2020), the court discussed the nature, purposes, and importance of a load file and observed that defendants' counsel—who did not attempt to upload the documents into an eDiscovery platform—perceived that the production was a "randomized, unorganized, and duplicative mess." The court went on to criticize defendants' counsel for noticing the deposition—whose sole purpose was to "make a record" of plaintiff's purported discovery abuse—and conducting it in an abusive manner. Had defendants' counsel followed the directive of Rule 37(a)(1) and conducted a proper meet and confer, the court concluded that counsel would have readily determined that plaintiff made an appropriate production and not embarked on a path that caused the court to issue sanctions pursuant to Rule 30(d)(2) for "frustrat[ing] the fair examination of the deponent."

*Pable v. Chicago Transit Auth.*, No. 19 CV 7868, 2023 WL 2333414 (N.D. Ill. Mar. 2, 2023). In a report and recommendation to the court regarding plaintiff's spoliation of relevant text messages and other ESI, Magistrate Judge Heather McShain recommended that plaintiff's attorney be sanctioned in the amount of \$53,388 under 28 U.S.C. § 1927 for his "objectively unreasonable and vexatious" conduct regarding his misrepresentations and ensuing actions surrounding the forensic image. Judge McShain determined that plaintiff's counsel falsely represented to defendant that "a complete forensic image" of plaintiff's phone had been made when, in fact, a forensic image had not been carried out at all and because counsel knew that "he never instructed [plaintiff's eDiscovery provider] to generate a complete image of the cell phone." Worse, counsel failed to apprise defendant of this fact, which triggered a yearlong "discovery expedition" in which defendant sought to determine the nature and contents of the forensic image that counsel had never undertaken. *See* discussion under **Sanctions—Rule 37(e)**.

*In re Facebook, Inc. Consumer Priv. User Profile Litig.*, No. 18-MD-02843-VC, 2023 WL 1871107 (N.D. Cal. Feb. 9, 2023). In a Multidistrict Litigation ("MDL") arising from the Cambridge Analytica scandal, the court imposed monetary sanctions in the amount of \$925,078.51 (\$800,217.38 in attorney fees, \$124,861.13 in costs) jointly and severally against defendant and its counsel stemming from various discovery abuses. The court summarized the collective conduct of defendant and its counsel as "a sustained, concerted, bad-faith effort to throw obstacle after obstacle in front of the plaintiffs—all in an attempt to push the plaintiffs into settling the case for less than they would have gotten otherwise." A key aspect of the sanctions order included details regarding defendant's refusal to produce "highly probative evidence" based on what the court considered to be "frivolous legal arguments," i.e., assertions at different times that the evidence was privileged, work product, or irrelevant in the face of court orders to the contrary. Characterizing this conduct as "an effort to gaslight their opponents," the court ultimately opined that sanctions must issue to discourage future litigants and lawyers from engaging in "the systematic, conscious, bad-faith approach" that defendant and its counsel pursued in this lawsuit.

*Manassa v. Nat'l Collegiate Athletic Ass'n*, No. 1:20-cv-03172-RLY-MJD, 2022 WL 2176334 (S.D. Ind. June 16, 2022). In this putative class action against the NCAA involving claims of historical discrimination against African American student-athletes, the NCAA sought to disqualify the law firm (FeganScott) representing plaintiff. The NCAA did so after discovering that its document review vendor (Proteus) had inadvertently engaged a lawyer (Sakthivel) to review its documents for production purposes in the instant litigation while Sakthivel was simultaneously employed by

FeganScott as a staff attorney. In response to the NCAA’s motion, the court found that Sakthivel violated Indiana Rule of Professional Conduct 1.7(a), which forbids concurrent representation of clients directly adverse to each other. While also imputing Sakthivel’s ethical violation to FeganScott, the court ultimately decided not to disqualify FeganScott from representing plaintiff in the *Manassa* litigation. The court found that after FeganScott engaged Sakthivel in September 2020 as a fully remote staff attorney based in California, Sakthivel did not work on the *Manassa* lawsuit while at the firm. This was confirmed by FeganScott technology, which “tracks employee access to client files” and whose “software reports verify that Mr. Sakthivel was entirely isolated from this case.” Moreover, the court determined that Sakthivel did not physically access any files or other information relating to this case through FeganScott since “he worked remotely from California and, in fact, never met a FeganScott employee in person.” The only information Sakthivel obtained relating to *Manassa* came during his time as a Proteus document reviewer for the NCAA, where he “billed 183.7 hours for his review, analysis, and coding of 6,622 NCAA documents relating to this case.” Finally, the court reasoned that its holding was consistent with agency law, which provides that the principal is not liable for the conduct of an agent who acts outside the scope of his employment. In this case, Sakthivel “moonlighted” for Proteus after agreeing he would not accept any other employment while working for FeganScott and either omitted or concealed his FeganScott employment from Proteus. That FeganScott did not ratify Sakthivel’s conduct is confirmed by the firm’s actions upon being apprised of his conduct; it suspended his access to the firm’s information systems, terminated his employment, and immediately thereafter filed an “Attorney Misconduct Complaint” against him with the California State Bar.

## **FEDERAL RULE OF EVIDENCE 502**

*In re Actos Antitrust Litig.*, No. 1:13-CV-09244, 2022 WL 4282294 (S.D.N.Y. Sept. 16, 2022). In this antitrust class action involving allegations that defendant interfered with its competitors’ efforts to market a generic version of its diabetes pharmaceutical, the court held that defendant’s subject-matter waiver of the attorney-client privilege extended beyond the limited scope that defendant argued should apply. Because its “advice of counsel defense is part of its regulatory compliance defense,” the court—applying Federal Rule of Evidence 502(a)—held that “fairness considerations” required that additional information be disclosed to plaintiffs in connection with defendant’s subject-matter waiver. Those documents included communications, along with “documents reflecting communications,” between defendant and its lawyers regarding certain tactical decisions about the listings for the patents on the pharmaceutical at issue. While not requiring defendant to produce “all documents” that plaintiffs demanded, the court ultimately concluded that a broader subject-matter waiver was required to prevent defendant from using “its privilege as both a sword and a shield.”

## **INFORMATION GOVERNANCE**

*In re Google Play Store Antitrust Litig.*, --- F. Supp. 3d ---, 2023 WL 2673109 (N.D. Cal. Mar. 28, 2023). The court in this MDL antitrust action held that Google’s failure to preserve relevant communications its employees exchanged on Google Chats violated Rule 37(e) and satisfied the Rule’s “intent to deprive” requirement. In its ruling, the court observed that Google’s development and use of an ephemeral messaging communication application for standard business purposes was not, by itself, objectionable: “Google was perfectly free to set up an internal IM service with any retention period of its choosing for employees to use for whatever purposes they liked. The overall propriety of Chat is not in issue here.” Where Google went astray was in its failure both to take reasonable steps to preserve relevant Google Chats messages and to disclose its inaction on the Google Chats to plaintiffs



or the court. This was particularly problematic since “Google employees routinely used Chat to discuss substantive business topics, including matters relevant to this antitrust litigation,” even though Google asserted that Google Chats “was primarily a social outlet akin to an electronic break room.” *See* discussion under **Sanctions—Rule 37(e)** and **Text Messages and Ephemeral Messages**.

*ELG Utica Alloys, Inc. v. Niagara Mohawk Power Corp.*, No. 6:16-CV-1523, 2023 WL 2655111 (N.D.N.Y. Mar. 27, 2023). *See* discussion under **Litigation Holds**.

*Adler v. McNeil Consultants, LLC*, --- F. Supp. 3d ---, 2023 WL 2699511 (N.D. Tex. Feb. 15, 2023). *See* discussion under **Litigation Holds and Preservation** and **Sanctions—Rule 37(e)**.

*MGA Ent., Inc. v. Harris*, No. 2:20-CV-11548, 2023 WL 2628225 (C.D. Cal. Jan. 5, 2023). *See* discussion under **Litigation Holds and Preservation** and **Sanctions—Rule 37(e)**.

*Scrap King LLC v. Stericycle, Inc.*, No. 8:18-CV-7-33, 2022 WL 18495259 (M.D. Fla. Dec. 20, 2022). In this breach-of-commercial-contract matter, plaintiff argued that it was entitled to an adverse inference instruction to remediate the harm caused by defendant’s alleged failure to preserve relevant internal emails relating to the formation of the contract at issue. The court, however, refused to impose the requested sanction after concluding that plaintiff failed to demonstrate that relevant emails had been destroyed in bad faith or with intent to deprive pursuant to Rule 37(e). Of particular importance to the court’s holding was that defendant had apparently eliminated the emails in question pursuant to a six-month email retention policy before the duty to preserve attached. The court observed that the email retention policy was both “neutral” in its nature and was instituted several years before the inception of the litigation. *See* discussion under **Litigation Holds and Preservation**.

*LKQ Corp. v. Gen. Motors Co.*, No. 20 C 02753, 2022 WL 14634800 (N.D. Ill. Oct. 25, 2022). In connection with its order denying plaintiffs’ motion for Rule 37(e) sanctions against defendants, the court found that defendants had implemented conflicting information-related policies that affected the preservation of information relevant to plaintiffs’ patent infringement claims relating to the “2017 Cadillac XT5 grille.” Defendants had a document retention policy designed to retain “documents that relate to the development of contracts for the purchase of parts for the life of the part plus six or ten years.” In contrast to the document retention policy, defendants also had a policy requiring that departing employees’ “computer files and emails” be “automatically wipe[d].” Even though defendants failed to justify “how these policies can be reconciled,” the court nonetheless refused to issue sanctions against defendants. The court ultimately rejected plaintiffs’ assertion that defendants’ violation of their document retention policy evinced bad faith since certain documents were eliminated before a duty to preserve attached and others (which were destroyed after a preservation duty triggered) merely showed gross negligence by applying a “routine policy of wiping ex-employees’ emails and files when they leave” defendants’ employ. *See* discussion under **Sanctions—Rule 37(e)**.

*Jabil Inc. v. Gen. Elec. Co.*, No. 1:19-CV-02260-LMM, 2022 WL 18459549 (N.D. Ga. Oct. 13, 2022). In this breach-of-contract litigation, defendant sought to exclude plaintiff’s data inventory evidence as a sanction under Rule 37(e). Defendant argued that such a measure was appropriate given the harm defendant allegedly incurred when plaintiff failed to preserve relevant purchase authorization records (forecast records). The court rejected defendant’s motion in limine, finding (among other things) that the forecast records were deleted years in advance of this lawsuit pursuant to plaintiff’s two-year document retention policy, and that plaintiff had not reasonably anticipated litigation with defendant before the documents were eliminated as required by the retention policy. As support for its position,

the court cited the 2015 Advisory Committee note to Rule 37(e) for the proposition that “‘the routine, good-faith operation of an electronic information system’ [is] ‘a relevant factor’ in the Court’s analysis of ‘whether a party failed to take reasonable steps to preserve lost information.’” The court also contrasted the instant litigation with *Alabama Aircraft Indus., Inc. v. Boeing Co.*, No. 20-11141, 2022 WL 433457 (11th Cir. Feb. 14, 2022), in which the Eleventh Circuit affirmed a spoliation sanctions finding against a defendant that deleted key evidence before the onset of litigation given that defendant expected “‘an ugly, lengthy legal battle.’”

*Jasso v. Wells Fargo Bank, N.A.*, No. 22-CV-0858, 2022 WL 4227332 (D. Nev. Sept. 13, 2022). *See* discussion under **Discovery Process**.

## LITIGATION HOLDS AND PRESERVATION

*In re Google Play Store Antitrust Litig.*, No. 20-CV-05761-JD (N.D. Cal. Mar. 28, 2023), ECF No. 469. *See* discussion under **Sanctions—Rule 37(e)** and **Text Messages and Ephemeral Messages**.

*ELG Utica Alloys, Inc. v. Niagara Mohawk Power Corp.*, No. 6:16-CV-1523, 2023 WL 2655111 (N.D.N.Y. Mar. 27, 2023). In this litigation in which the court granted defendants’ motion for summary judgment on plaintiff’s Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) claims, the court also granted defendants’ motion for spoliation sanctions relating to plaintiff’s destruction of relevant paper records. The court found that plaintiff’s failure to issue a litigation hold requiring the preservation of those records, combined with the violation of its “unwritten or informal document retention policy to never destroy documents,” constituted gross negligence. The court declined to issue a specific sanction given its summary judgment ruling and pending the parties’ submission of a status report regarding how they proposed to handle plaintiff’s remaining state law claims.

*Adler v. McNeil Consultants, LLC*, --- F. Supp. 3d ---, 2023 WL 2699511 (N.D. Tex. Feb. 15, 2023). In response to plaintiffs’ Rule 37(e) sanctions motion against defendants in this trademark infringement dispute, defendants argued that the duty to preserve relevant call recordings, Slack messages, and emails did not arise until plaintiffs served discovery requests targeting such information. The court rejected this position, finding that plaintiffs’ complaint expressly delineated the relevance of such information and that it was incumbent on defendants—once served with the pleadings—to take preservation measures accordingly. Moreover, the court explained that plaintiffs, as the moving party, did not need to send defendants a preservation demand letter for the duty to preserve to attach. Instead, defendants should have begun preserving relevant information once they reasonably anticipated litigation. The court imposed Rule 37(e)(1) sanctions on defendants. *See* discussion under **Sanctions—Rule 37(e)**.

*MGA Ent., Inc. v. Harris*, No. 2:20-CV-11548, 2023 WL 2628225 (C.D. Cal. Jan. 5, 2023). In this trademark and trade-dress infringement matter involving allegations that plaintiff spoliated market research evidence and images of the allegedly infringing products, the court held that defendants could present evidence and argument to the jury regarding plaintiff’s “failure to institute a litigation hold and lack of systematic practices of collecting records.” Plaintiff conceded that it did not implement a litigation hold but took the position that a hold was unnecessary given its “policy of preserving emails and documents” and the configuration of its “server” to ensure that it “‘never automatically deleted emails.’” The court rejected this assertion, reasoning that plaintiff’s preservation obligations extended beyond emails to “text messages, digital reference photographs, physical reference photographs, or

any documents” regarding the claims and defenses. The failure to issue a litigation hold, combined with plaintiff’s narrow approach to identifying relevant information, led the court to conclude that plaintiff’s “conduct was at least negligent.” Nevertheless, the court declined to issue an adverse inference instruction against plaintiff and instead held that defendants failed to conclusively demonstrate that plaintiff destroyed—either intentionally or with bad faith—the lost evidence. *See* discussion under **Sanctions—Rule 37(e)**.

*Scrap King LLC v. Stericycle, Inc.*, No. 8:18-CV7-33, 2022 WL 18495259 (M.D. Fla. Dec. 20, 2022). In this breach-of-commercial-contract matter, the court rejected plaintiff’s request for an adverse inference instruction to remediate the harm caused by defendant’s alleged failure to preserve relevant internal emails relating to the formation of the contract at issue. Plaintiff had argued that defendant’s duty to preserve relevant information triggered years before plaintiff filed the instant lawsuit, a position the court rejected. Instead, relying on *The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & the Process*, 20 SEDONA CONF. J. 341 (2019), the court ultimately concluded that defendant’s duty to preserve attached the day it was served with plaintiff’s complaint. Given that the relevant emails at issue had long since been eliminated pursuant to defendant’s six-month document retention policy, the court found that sanctions would not be appropriate. *See* discussion under **Information Governance**.

*Jabil Inc. v. Gen. Elec. Co.*, No. 1:19-CV-02260-LMM, 2022 WL 18459549 (N.D. Ga. Oct. 13, 2022). *See* discussion under **Information Governance**.

## **NON-PARTIES**

*Craigville Tel. Co. v. T-Mobile USA, Inc.*, No. 19 CV 7190, 2022 WL 17740419 (N.D. Ill. Dec. 16, 2022). In this putative class action involving phone line connectivity issues, the court held that plaintiffs’ subpoena to non-party Ericsson, Inc. was overly broad and disproportionate to the needs of the case, and that Ericsson would not be obligated to redo its response to the subpoena nor have a representative sit for a Rule 30(b)(6) deposition regarding its recordkeeping practices. The court expressed concerns about the scope of plaintiffs’ subpoena, which the court perceived to be a “precursor” to actual litigation against Ericsson and whose requests exceeded the scope of their pleaded claims. In addition, the court was reluctant to go down “‘rabbit hole of discovery on discovery,’” particularly given the “outsized burden” this would place on Ericsson “given its status as a non-party.”

*Wilbur-Ellis Co. LLC v. Gompert*, No. 8:21-CV-340, 2022 WL 17736773 (D. Neb. Dec. 16, 2022). In this trade secret misappropriation matter, plaintiff sought authorization to serve a Rule 45 subpoena on defendants’ current employer and thereby obtain various categories of information, including trade secret materials defendants may have taken when they left plaintiff’s employ. Defendants objected to the issuance of plaintiffs’ subpoena, and the court directed plaintiffs to first take party discovery before proceeding with discovery on the non-party current employer of defendants. Several months afterwards, plaintiff filed a motion to overrule defendants’ objections, arguing that sought-after information was relevant and that defendants had stonewalled producing the information in discovery. The court denied plaintiff’s motion and found that the requested information was essentially beyond the scope of discovery under Rule 26(b)(1). The court reasoned that plaintiff had failed to identify with “reasonable particularity” the trade secrets it alleged that defendants misappropriated when they left plaintiff’s employ to join their new company and which the court previously ordered plaintiff to identify. The trade secrets that plaintiff identified in its court-ordered disclosure were “generic

categories, with corresponding generic definitions,” with “everything Defendants encountered in their positions at Wilbur-Ellis [being] a trade secret.” Nor did the court accept plaintiff’s argument that its production of over 6,000 documents demonstrated that it had specifically identified its trade secrets with particularity. Instead, the court observed that “this statistic emphasizes Plaintiff’s lack of specificity in identifying the trade secrets at issue, rather than its commitment to robust discovery.”

## **NOT REASONABLY ACCESSIBLE ESI**

*Marin v. Apple-Metro, Inc.*, No. 12-cv-5274, 2023 WL 2060133 (E.D.N.Y. Feb. 8, 2023). *See* discussion under **Databases** and **Proportionality**.

## **PROPORTIONALITY**

*Marin v. Apple-Metro, Inc.*, No. 12-cv-5274, 2023 WL 2060133 (E.D.N.Y. Feb. 8, 2023). In this Fair Labor Standards Act (“FLSA”) matter in which plaintiffs sought pre-class certification discovery of “certain timekeeping and earnings data . . . going back 16 years for every non-managerial employee at every one of defendants’ restaurants,” the court held that the request for such information was proportional under the circumstances and ordered its production from defendants. As an initial matter, the court found the requested records were highly relevant, both to the probable class certification motion and to the “claims of the 1,100 opt-ins [anticipated members of the class].” Without discussing the individual Rule 26(b)(1) proportionality factors, the court next determined that the requested information was proportional given that it would include “the employee’s name, their position, their shift periods, pay rate, declared tips, and sales.” The proportionality of the request was also evident, the court opined, from defendants’ inability to offer a legitimate compromise on the disputed issues and their rejection of “all of plaintiffs’ various cost saving suggestions.” Of particular note was defendants’ concession that it would be more costly for them to limit their production to the 1,100 opt-in plaintiffs since “developing queries and workflows for a defined population would actually increase the level of effort and costs for reporting” from their structured database. As the court observed, “[n]ot only have defendants failed to suggest an alternative means of obtaining the necessary information here, but it would be inefficient and a greater waste of resources for defendants to produce the data again at a later time if plaintiffs ultimately succeed in their class certification motion.” *See* discussion under **Databases**.

*Manassa v. Nat’l Collegiate Athletic Ass’n*, No. 1:20-cv-03172-RLY-MJD, 2023 WL 1765993 (S.D. Ind. Feb. 3, 2023). *See* discussion under **Databases**.

*Netherlands Ins. Co. v. HP, Inc.*, --- F. Supp. 3d ---, 2022 WL 18027562 (D. Mass. Dec. 30, 2022). *See* discussion under **Databases**.

## **RULE 34 REQUESTS AND RESPONSES**

*Boulder Falcon, LLC v. Robert Brown*, No. 2:22-CV-00042, 2023 WL 2662187 (D. Utah Mar. 28, 2023). *See* discussion under **Ethics**.

*Fluor Fed. Sols., LLC v. BAE Sys. Ordnance Sys., Inc.*, No. 7:19-CV-698, 2023 WL 1795352 (W.D. Va. Feb. 7, 2023). *See* discussion under **Sanctions—Other FRCP Provisions**.

*Wilbur-Ellis Co. LLC v. Gompert*, No. 8:21-CV-340, 2022 WL 17736773 (D. Neb. Dec. 16, 2022). *See* discussion under **Non-parties**.

*HDT Bio Corp. v. Emcure Pharms., Ltd.*, No. C22-0334JLR, 2022 WL 16835758 (W.D. Wash. Nov. 9, 2022). In this trade secret misappropriation case, the court ordered defendant to redo its search for relevant documents in response to one of plaintiff's document requests (No. 11). The court directed defendant to provide an affidavit "explaining its search methodology" determining that defendant submitted an "inaccurate and deficient" response and rejecting defendant's contention that plaintiff's requested relief was impermissible "discovery on discovery." Nevertheless, the court found the request—unbounded by time and subject matter—to be overly broad and ordered the parties to meet and confer in order to appropriately circumscribe its scope.

## **SANCTIONS—OTHER FRCP PROVISIONS**

*Boulder Falcon, LLC v. Robert Brown*, No. 2:22-CV-00042, 2023 WL 2662187 (D. Utah Mar. 28, 2023). *See* discussion under **Ethics**.

*In re Facebook, Inc. Consumer Priv. User Profile Litig.*, No. 18-MD-02843-VC, 2023 WL 1871107 (N.D. Cal. Feb. 9, 2023). *See* discussion under **Ethics**.

*Fluor Fed. Sols., LLC v. BAE Sys. Ordnance Sys., Inc.*, No. 7:19-CV-698, 2023 WL 1795352 (W.D. Va. Feb. 7, 2023). In this "complex construction case" involving massive productions of documents and numerous discovery disputes, plaintiff sought sanctions against defendant arising from the additional discovery efforts plaintiff argues it was forced to undertake after defendant made a tardy production of 79,000 documents. The tardy production occurred after defendant's electronic discovery provider "mistakenly de-duplicated documents against its entire database, instead of using the specific environment with documents to be produced; thereby incorrectly excluding the documents from production as 'duplicates.'" This error "caused an under-disclosure of a significant number of [relevant] documents" and resulted in plaintiff re-deposing five witnesses. Accordingly, plaintiff sought to recover the attorney fees and costs it incurred in connection with re-deposing the witnesses respectively under Rule 16(f)(1)(C) (for defendant's alleged failure to comply with the court's scheduling order) and Rule 37(c)(1) (for defendant's alleged failure to provide the documents earlier in discovery). In response, the court denied plaintiff's motion, finding that defendant did not violate the court's scheduling order and plaintiff was not ultimately prejudiced by the tardy production of documents. Despite the issue of vendor error, the court reasoned that defendant took appropriate steps to remediate any harm by both notifying plaintiff and the court of the underproduction of documents and then making a speedy production of the 79,000 documents. Sanctioning defendant under this circumstance, reasoned the court, would "only serve to discourage parties from disclosing and addressing discovery errors in the future."

## **SANCTIONS—RULE 37(e)**

*In re Google Play Store Antitrust Litig.*, --- F. Supp. 3d ---, 2023 WL 2673109 (N.D. Cal. Mar. 28, 2023). In this antitrust MDL in which various parties claim Google engages in anticompetitive practices relating to its Google Play Store, the court imposed Rule 37(e)(2) sanctions against Google for failing to preserve relevant internal communications exchanged by its employees on Google Chats. After a two-day evidentiary hearing, the court found that Google failed to take reasonable steps to preserve relevant Google Chats messages by not actively eliminating the ephemerality (which Google characterizes as "history off") feature associated with Google Chats that generally allows those

messages to be permanently eliminated after 24 hours. Instead, Google instructed its employees on legal hold to keep relevant Google Chats messages and relied on them to individually determine whether their messages touched on relevant topics and then take measures to retain relevant messages. The court determined that such a practice was insufficient given that certain employees on legal hold did not know whether particular messages were in fact relevant to the litigation. Moreover, Google otherwise failed to take follow-up steps that would ensure those messages were actually preserved. In finding that Google's conduct satisfied the intentionality requirement of Rule 37(e)(2), the court distinguished Google's preservation practices relating to Google Chats from those relating to relevant emails, which Google "automatically preserve[d]" and ensured that employees could not otherwise circumvent. The court also criticized Google for failing to disclose to plaintiffs (or the court) its preservation practices regarding Google Chats, along with its failure to offer an explanation regarding the purposes of those practices. For remedies, the court declined to issue terminating sanctions, awarded plaintiffs their reasonable attorney fees and costs, and delayed ordering any further sanctions until the close of fact discovery. *See* discussion under **Information Governance** and **Text Messages and Ephemeral Messages**.

*Pable v. Chicago Transit Auth.*, No. 19 CV 7868, 2023 WL 2333414 (N.D. Ill. Mar. 2, 2023). In this whistleblower action brought by a former Chicago Transit Authority (CTA) employee, Magistrate Judge Heather McShain issued a report and recommendation to the court that it dismiss with prejudice plaintiff's lawsuit pursuant to Rule 37(e)(2) for spoliating relevant text messages and other ESI on his mobile phone. Regarding the text message spoliation, Judge McShain held that plaintiff intentionally deleted two categories of relevant messages he exchanged with his supervisor (Haynes) over the encrypted and ephemeral messaging application Signal. Judge McShain found that plaintiff affirmatively deleted the first category of messages during a prelitigation meeting with Haynes and *after* plaintiff had contacted two law firms about pursuing legal action against CTA. That the deletion of those messages was intentional and calculated to deprive CTA of relevant evidence was evinced by several false statements plaintiff offered under oath during two separate depositions. Among other things, plaintiff first blamed the deletion of those messages on Haynes (which Signal's chief operating officer refuted in sworn written testimony) and then attributed the deletion to the method by which he purportedly configured Signal to retain only the last 50 messages he exchanged (an assertion that plaintiff never substantiated). Judge McShain next determined that plaintiff deleted a second category of messages that plaintiff exchanged with Haynes *during* the litigation. Those messages—which reflected litigation strategy and tactics—were eliminated because plaintiff activated Signal's disappearing messages feature. That plaintiff did so nearly a year after the duty to preserve attached and nearly six months after he initiated his administrative action for whistleblower relief "supports a reasonable inference that [plaintiff] intended that these messages would be destroyed shortly after they had been sent" and "is powerful circumstantial evidence that [plaintiff] acted with the intent to deprive the CTA of access to these messages." Quoting *The Sedona Conference Primer on Social Media*, 20 SEDONA CONF. J. 1, 90-91 (2019), Judge McShain noted that "use of ephemeral messaging for relevant communications after a duty to preserve has arisen may be particularly problematic, as it would have the potential to deprive adversaries and the court of relevant evidence." Finally, Judge McShain held that plaintiff *and* his counsel intentionally spoliated relevant evidence on plaintiff's phone when counsel falsely represented that "a complete forensic image" of plaintiff's phone had been made when, in fact, a forensic image had never been consummated. While CTA later obtained a forensic image of plaintiff's phone, relevant Signal messages and other ESI had long since been eliminated. In addition to terminating sanctions, Judge McShain recommended that an award of reasonable attorney fees and costs issue against plaintiff under Rule 37(e)(1). Finally, Judge McShain recommended that plaintiff's attorney be sanctioned in the amount of \$53,388 under 28 U.S.C. § 1927 for his "objectively

unreasonable and vexatious” conduct regarding his misrepresentations and ensuing actions surrounding the forensic image. *See* discussion under **Ethics**.

*Winecup Gamble, Inc. v. Ranch*, No. 3:17-CV-00163, 2023 WL 2308416 (D. Nev. Mar. 1, 2023). In this action involving claims for \$5 million in earnest money, defendant sought terminating sanctions multiple times under Rule 37(e)(2). In earlier motion practice, the trial court entered a terminating sanctions order against plaintiff after finding that a key witness destroyed relevant emails and other ESI. The U.S. Court of Appeals for the Ninth Circuit subsequently vacated that ruling given that there was no evidence of an “intent to deprive” and considering that plaintiff supplemented its production of relevant ESI from other custodians. *See Winecup Gamble, Inc. v. Gordon Ranch, LP*, No. 3:17-CV-00163, 2020 WL 3840420 (D. Nev. July 8, 2020), *rev’d in part, vacated in part*, 850 F. App’x 573 (9th Cir. 2021). On remand, the district court denied defendant’s renewed motion for sanctions after concluding that plaintiff had “not identified any responsive emails that were not produced, or even any materials hinting at the existence of possible responsive emails that were not produced.”

*Adler v. McNeil Consultants, LLC*, --- F. Supp. 3d ---, 2023 WL 2699511 (N.D. Tex. Feb. 15, 2023). The court imposed Rule 37(e)(1) sanctions on defendants in this trademark dispute after plaintiffs demonstrated that defendants failed to preserve relevant call recordings, slack messages, and emails. Regarding the first two categories of lost data, the court observed that defendants had a 13-month policy governing the retention of call recordings, which they failed to suspend until over two years after their duty to preserve attached. The court next determined that defendants were using a free Slack account, and that messages would only be retained for nine days unless defendants upgraded to a “paid subscription” (which they never did). Given defendants’ failure to implement a timely litigation hold, their failure to modify pertinent auto-deletion procedures affecting the preservation of relevant calling records and Slack messages, and the corresponding prejudice plaintiffs incurred, the court found that plaintiffs satisfied Rule 37(e)(1). The court awarded plaintiffs’ their reasonable attorney fees and costs, authorized plaintiffs to present evidence to the jury regarding defendants’ ESI spoliation, and will issue a conforming instruction to the jury. The court did not find evidence of an intent to deprive, opining that defendants’ conduct—while at times negligent, reckless, and even willful—did not constitute bad faith, which would satisfy Rule 37(e)(2)’s intent to deprive requirement. *See* discussion under **Litigation Holds and Preservation**.

*Globus Med., Inc. v. Jamison*, No. 2:22-CV-282, 2023 WL 2127410 (E.D. Va. Feb. 10, 2023). *See* discussion under **Text Messages & Ephemeral Messages**.

*Hunters Cap., LLC v. City of Seattle*, No. C20-0983 TSZ, 2023 WL 184208 (W.D. Wash. Jan. 13, 2023). In this action arising from harm plaintiffs suffered after the City of Seattle allegedly encouraged protesters to take over Seattle’s Capitol Hill neighborhood during the summer of 2020, the court imposed Rule 37(e) sanctions against defendants (the City of Seattle and several high ranking officials, including its mayor, police chief, and fire chief) and one of the plaintiffs for spoliating relevant text messages. Regarding defendants, the court found they lost tens of thousands of relevant text messages. While defendants did recover over 161,000 of those lost messages from other city custodians, they were unable to salvage any text messages the mayor, police chief, and fire chief exchanged as a stand-alone group, and this despite defendants acknowledging that these officials “communicated directly with each other via text message” during the relevant time period. Moreover, the court found defendants failed to take reasonable steps to preserve the lost messages since the city issued tardy litigation hold notices to (among others) the mayor, police chief, and fire chief and did not even take follow-up steps to collect those messages until several months after the action commenced. The court

concluded that defendants' actions and omissions that compromised the preservation of their relevant messages constituted an intent to deprive and merited the issuance of a permissive adverse inference sanction. In addition, the court authorized plaintiffs to present evidence and argument to the jury regarding defendants' spoliation and awarded fees and costs against defendants. Regarding the plaintiffs, the court declined to impose any sanctions except on a single Capitol Hill business owner whose deletion of relevant text messages would have unfairly forced defendants "to rely on 'incomplete and spotty' evidence at trial" regarding that plaintiff's claims for nearly \$3 million. With respect to that plaintiff, the court (pursuant to Rule 37(e)(1)) authorized defendants to present evidence and argument to the jury regarding its lost messages and awarded defendants their attorneys' fees and costs. The court otherwise denied defendants' request for sanctions because defendants did not establish that relevant messages were lost or that plaintiffs had failed to take reasonable steps to preserve relevant messages. *See* discussion under **Clouds** and **Text Messages & Ephemeral Messages**.

*Ace Am. Ins. Co. v. First Call Envtl. LLC*, 5:21-CV-02331, 2023 WL 137456 (E.D. Pa. Jan. 9, 2023). In an action for negligence and breach of contract, plaintiff Bulk Chemicals alleged that defendant improperly and inadequately cleaned and remediated hazardous substances on its property, which, in turn, caused a fire the following day. Defendant, as per company policy, required its employees to complete "Daily Tailgate Safety Meeting" documents, or "Tailgate Documents," which would describe any known hazards, and to upload electronic images of the documents to its internet-based project management application, Basecamp. During discovery, defendant neither produced the Tailgate Documents for the project nor provided any justification or information as to their whereabouts. Plaintiff and its insurers moved for spoliation sanctions in the form of a mandatory adverse inference instruction. The court applied Third Circuit precedent, which predated the 2015 amendments to the Federal Rules of Civil Procedure. The court did not conduct an analysis of Rule 37(e) even though the Tailgate Documents should have been available in electronic form within Basecamp. The court found that spoliation analysis factors weighed in favor of sanctions and thus, under its discretionary authority, granted the plaintiff's motion.

*MGA Ent., Inc. v. Harris*, No. 2:20-CV-11548, 2023 WL 2628225 (C.D. Cal. Jan. 5, 2023). This trademark and trade-dress infringement matter involves allegations that plaintiff spoliated market research evidence, along with images of allegedly infringing products. In response to defendants' request for an adverse inference sanction against plaintiff pursuant to the court's inherent authority, the court denied defendants' motion. While not precisely delineating whether its ruling was premised on its inherent authority or on Rule 37(e), the court concluded that defendants failed to conclusively demonstrate that plaintiff destroyed—either intentionally or with bad faith—the lost evidence. Nevertheless, the court did indicate that it would allow defendants to present evidence and argument to the jury regarding plaintiff's "failure to institute a litigation hold and lack of systematic practices of collecting records." *See* discussion under **Litigation Holds** and **Preservation**.

*Scrap King LLC v. Stericycle, Inc.*, No. 8:18-CV7-33, 2022 WL 18495259 (M.D. Fla. Dec. 20, 2022). *See* discussion under **Information Governance** and **Litigation Holds**.

*LKQ Corp. v. Gen. Motors Co.*, No. 20 C 02753, 2022 WL 14634800 (N.D. Ill. Oct. 25, 2022). In this patent infringement litigation, plaintiffs sought an adverse inference instruction under Rule 37(e)(2) to remediate the harm arising from defendants' alleged failure to preserve relevant design and development documents and related ESI. In support of their motion regarding the "Opel development and design documents," plaintiffs pointed to defendants' failure to preserve records



pursuant to their “internal document retention policy” and that “the violation of this policy automatically creates a presumption that the evidence was adverse.” The court rejected this assertion, finding instead that the violation of a document retention policy is “only a relevant consideration where litigation is already anticipated.” In this instance, plaintiffs did not offer evidence suggesting defendants destroyed the documents after a duty to preserve attached. Indeed, as the court reasoned, “[a]t the time the documents were lost or destroyed—likely in 2017—this lawsuit could not have been anticipated.” Regarding the lost records relating to the “2017 Cadillac XT5 grille,” the court found that defendants were grossly negligent in failing to preserve that information, but such a finding was insufficient to justify the issuance of an adverse inference sanction. While defendants had acted unreasonably by failing to issue a litigation hold to preserve the documents at issue and despite conflicting information policies that perhaps led to their destruction, the court ultimately found that defendants did not act in bad faith. The court did indicate that lesser sanctions might be appropriate if plaintiffs could establish that they have been prejudiced by the loss of the relevant documents. *See* discussion under **Information Governance**.

*Dish Network L.L.C. v. Jadoo TV, Inc.*, No. 20-CV-01891-CRB (LB), 2022 WL 11270394 (N.D. Cal. Oct. 19, 2022). *See* discussion under **Workplace Collaboration Tools**.

*Jabil Inc. v. Gen. Elec. Co.*, No. 1:19-CV-02260-LMM, 2022 WL 18459549 (N.D. Ga. Oct. 13, 2022). *See* discussion under **Information Governance**.

## SEARCH

*Kairam v. W. Side GI, LLC*, No. 1:18-cv-01005 (AT) (SDA), (S.D.N.Y. Feb. 24, 2023). The parties brought their search-term dispute before the court, seeking a determination of the propriety of plaintiff’s search terms. Relying on Sedona Principle Four, which states that “[d]iscovery requests for electronically stored information should be as specific as possible,” the court observed that plaintiff’s search terms should in like manner “be tailored to the needs of the case and designed to capture that which is relevant without burdening parties with excessive, irrelevant data.” With these principles in mind, the court determined that plaintiff’s search terms were “non-specific and not proportional to the needs of the case, particularly considering the high hit counts.” By way of example, the court noted that four particular search terms corresponding to the names of doctors who worked for defendant—and without any other limitations—yielded the following hit counts: 15,913, 22,102, 17,996 and 22,193. The court eventually resolved the parties’ dispute by supplying defendant with 30 of its own search terms and ordering that defendant run those terms (along with the terms on which the parties had previously agreed) against the universe of potentially responsive information.

*Murray v. LeBlanc*, No. CV 21-592-JWD-RLB, 2023 WL 2028927 (M.D. La. Feb. 15, 2023). Plaintiffs’ motion to compel in this civil rights action sought relevant ESI from at least 15 separate document requests, with defendants conceding they have an obligation to produce relevant, responsive information. In response, however, defendants argued that plaintiffs were obligated to provide them with search terms, and that the terms plaintiffs had supplied defendants were “vague” and not offered in good faith (“Plaintiffs . . . appear to have ‘set traps for Defendants with vague terms’”). The court rejected defendants’ position and emphasized that defendants have an obligation “to conduct a diligent search for responsive documents and ESI.” Relying on Sedona Principle Six, the court found that defendants must conduct their search for responsive information even if the requesting party

does not supply the responding party with search terms and ordered defendants to conduct such a search.

*Fortis Advisors, LLC v. Dematic Corp.*, No. N18C-12-104 AML CCLD, 2022 WL 18359410 (Del. Super. Ct. Dec. 29, 2022). *See* discussion under **Workplace Collaboration Tools**.

*ImprimisRx, LLC v. OSRX, Inc.*, No. 21-CV-1305-BAS-DDL, 2022 WL 17824006 (S.D. Cal. Dec. 19, 2022). In this case involving a motion to compel production of search terms in a civil case between two companies, defendants requested an order to compel plaintiff to disclose the sources, methodology, and search terms used to collect emails and other documents from plaintiff's president. Plaintiff opposed the motion, arguing that it properly considered defendants' document requests, and that defendants failed to identify any particular deficiency in the plaintiff's document production. The court noted that the parties did not engage in a fulsome meet and confer regarding search terms at the outset of the case, as required by the ESI Checklist for the Rule 26(f) Conference, which is designed to promote collaborative dialogue and facilitate efficient collection and production of ESI discovery. The court ordered the parties to meet and confer regarding search terms and expected that they would agree on appropriate search terms to narrow their disputes and avoid future motions. The court also considered defendants' request to compel disclosure of search terms and concluded that such "discovery on discovery" is disfavored and should only be permitted if the requesting party identifies some deficiency or insufficiency of the responding party's production. *See* discussion under **Discovery Process**.

*HDT Bio Corp. v. Emcure Pharms., Ltd.*, No. C22-0334JLR, 2022 WL 16835758 (W.D. Wash. Nov. 9, 2022). *See* discussion under **Rule 34 Requests and Responses**.

*Deal Genius, LLC v. O2 Cool, LLC*, No. 21 C 2046, 2022 WL 17418933, (N.D. Ill. Oct. 24, 2022). *See* discussion under **Workplace Collaboration Tools**.

## **SEDONA CONFERENCE PUBLICATIONS**

*Boulder Falcon, LLC v. Robert Brown*, No. 2:22-CV-00042, 2023 WL 2662187 (D. Utah Mar. 28, 2023). *See* discussion under **Ethics**.

*Kairam v. W. Side GI, LLC*, No. 1:18-cv-01005 (AT) (SDA), (S.D.N.Y. Feb. 24, 2023). *See* discussion under **Search**.

*Murray v. LeBlanc*, No. CV 21-592-JWD-RLB, 2023 WL 2028927 (M.D. La. Feb. 15, 2023). *See* discussion under **Search**.

*Marin v. Apple-Metro, Inc.*, No. No. 12-cv-5274, 2023 WL 2060133 (E.D.N.Y. Feb. 8, 2023). *See* discussion under **Ethics** and **Proportionality**.

*Pable v. Chicago Transit Auth.*, No. 19 CV 7868, 2023 WL 2333414 (N.D. Ill. Mar. 2, 2023). *See* discussion under **Text Messages & Ephemeral Messages**.

*Scrap King LLC v. Stericycle, Inc.*, No. 8:18-CV7-33, 2022 WL 18495259 (M.D. Fla. Dec. 20, 2022). *See* discussion under **Information Governance** and **Litigation Holds**.

*Am. Consol. Indus., Inc. v. Blasingim*, No. 1:19-CV-137, 2022 WL 17687491 (N.D. Ohio Dec. 15, 2022). In this complex trade secret case involving various discovery disputes, the court cited Sedona Principle Six for the proposition that the party responding to discovery must properly supervise its discovery vendor and—in connection with that process—ensure that “its directions to the vendor are complete and accurate.” Against this backdrop, the court criticized a defendant (Liberty Steel) for failing to effectively “coordinate with its ESI vendor to ensure application of the correct search terms,” which “required ‘do-over’ discovery, and kept a significant volume of responsive information from Plaintiffs.”

## TEXT MESSAGES & EPHEMERAL MESSAGES

*In re Google Play Store Antitrust Litig.*, --- F. Supp. 3d ---, 2023 WL 2673109 (N.D. Cal. Mar. 28, 2023). The court in this MDL antitrust action held that Google’s failure to preserve relevant communications its employees exchanged on Google Chats violated Rule 37(e) and satisfied the Rule’s “intent to deprive” requirement. Unlike relevant emails (which Google preserved), the court found that Google failed to take reasonable steps to preserve relevant Google Chats messages by not actively eliminating the ephemerality feature associated with Google Chats that generally allows those messages to be permanently deleted after 24 hours. *See* discussion under **Information Governance and Sanctions—Rule 37(e)**.

*Pable v. Chicago Transit Auth.*, No. 19 CV 7868, 2023 WL 2333414 (N.D. Ill. Mar. 2, 2023). *See* discussion under **Sanctions—Rule 37(e)**.

*Globus Med., Inc. v. Jamison*, No. 2:22-CV-282, 2023 WL 2127410 (E.D. Va. Feb. 10, 2023). In this action involving claims that defendants breached noncompete, nonsolicitation, and nondisclosure agreements, plaintiff argued that it was entitled to an adverse inference against seven individual defendants at an upcoming preliminary injunction hearing over their use of the encrypted and ephemeral messaging application Signal. In particular, plaintiff asserted that defendants used Signal “to erase communications with each other about various hospitals and doctors” in violation of their agreements. In response, defendants indicated they used Signal for an 11-day period “to better protect patient privacy in their communications,” and they immediately stopped using the application on the advice of counsel after receiving plaintiff’s cease and desist letter. After weighing the parties’ respective arguments, the court held plaintiff failed to establish by a preponderance of the evidence the prefatory elements under Rule 37(e) that would entitle plaintiff to obtain an adverse inference sanction against defendants. For five of the defendants, the court observed that plaintiff could not even establish that relevant ESI had been lost since they did not enable Signal’s disappearing messages feature and had produced 178 pages of text messages. For the other two defendants who activated Signal’s disappearing messages function, the court concluded that plaintiff had failed to show that text messages (to the extent they were even missing) could not be replaced through additional discovery. Moreover, whether or not relevant text messages had been spoliated was merely speculation since plaintiff failed to question the other two defendants at their depositions regarding their communication practices and whether they communicated on Signal with each other.

*Hunters Cap., LLC v. City of Seattle*, No. C20-0983 TSZ, 2023 WL 184208 (W.D. Wash. Jan. 13, 2023). This litigation—which arose over damage plaintiffs suffered after the City of Seattle allegedly encouraged protesters to take over Seattle’s Capitol Hill neighborhood during the summer of 2020— involves text message spoliation by defendants (the City of Seattle and several high ranking officials, including its mayor, police chief, and fire chief) and plaintiffs (Capitol Hill business and property

owners). For their part, defendants failed to preserve tens of thousands of relevant text messages after the duty to preserve attached. The mayor deleted 5,746 messages after plaintiffs' complaint was filed but *before* she received a litigation hold notice from the city approximately one month later. Most of those messages were lost after the mayor enabled the 30-day automated disposition feature on her city-issued iPhone. The police chief deleted 27,138 messages from her phone after the action commenced, most of them manually and with the (mistaken) understanding that "the City was automatically saving all of the text messages on her City-owned phone." As for the fire chief, all of his messages predating October 8, 2020 (two and one-half months after the litigation began) were lost after he reset his iPhone because he supposedly forgot his numeric passcode. The court found defendants' spoliation satisfied Rule 37(e)(2)'s intent-to-deprive standard, agreed to issue a permissive adverse inference against defendants, authorized plaintiffs to present evidence and argument to the jury regarding the spoliation, and awarded fees and costs against defendants. In contrast, the court awarded sanctions against only one plaintiff, whose failure to preserve relevant text messages after the duty to preserve attached would unduly harm defendants in preparing for trial. Regarding the other plaintiffs, the court denied defendants' motion because they did not establish that relevant messages were lost or that plaintiffs had failed to take reasonable steps to preserve relevant messages. For example, defendants failed to establish that one of the plaintiffs (the owner of Richmark Label) had deleted any relevant texts. Nor did defendants show that six plaintiffs' use of the Signal messaging application resulted in the loss of relevant evidence since they produced almost 9,000 Signal messages and asserted that they did not enable the application's disappearing messages feature. For two other plaintiffs (Biller and Thompson), defendants did not demonstrate that they failed to take reasonable steps, because Biller's phone "was no longer functioning properly" after being placed "in a drawer," and Thompson lost his phones while "boating on Lake Washington" and "hiking in the Cascades." *See* discussion under **Clouds and Sanctions—Rule 37(e)**.

## **WORKPLACE COLLABORATION TOOLS**

*Adler v. McNeil Consultants, LLC*, --- F. Supp. 3d ---, 2023 WL 2699511 (N.D. Tex. Feb. 15, 2023). *See* discussion under **Sanctions—Rule 37(e)** and **Litigation Holds and Preservation**.

*Ace Am. Ins. Co. v. First Call Envtl. LLC*, 5:21-CV-02331, 2023 WL 137456 (E.D. Pa. Jan. 9, 2023). *See* discussion under **Sanctions—Rule 37(e)**.

*Fortis Advisors, LLC v. Dematic Corp.*, No. N18C-12-104 AML CCLD, 2022 WL 18359410 (Del. Super. Ct. Dec. 29, 2022). The court imposed preclusion sanctions against defendant in this litigation—which involve disputes over plaintiff's achievement of revenue targets memorialized in a merger agreement—after it failed to disclose relevant information from the Confluence and Jira platforms. In discovery, plaintiff served document requests seeking information relating to the integration of the parties' respective technologies under the merger agreement. Such information—which was directly relevant to plaintiff's claims—was, as it turns out, available from defendant's Confluence environment, which "laid out a 'higher-level plan' for specific software development projects," and Jira, which "provided a more granular view of each task associated with that project." Nevertheless, defendant did not disclose the existence of this information until three months before trial when one of its witnesses offered testimony regarding the nature and purposes of Confluence and Jira. While previously and repeatedly representing that it had made fulsome productions of relevant information, defendant now asserted that it had no obligation to produce relevant records from Confluence or Jira "given other records" it previously produced. The court rejected this assertion, reasoning that defendant could not arrogate to itself the right to determine what records it would and would not

produce in discovery: “More fundamentally, it is entirely inconsistent with accepted discovery practice for the producing party to unilaterally decide that a subset of responsive documents is sufficient production while remaining silent about the documents it is withholding on that basis.”

*Deal Genius, LLC v. O2 Cool, LLC*, No. 21 C 2046, 2022 WL 17418933, (N.D. Ill. Oct. 24, 2022). In this patent infringement litigation, the parties had multiple disputes over plaintiff’s production of relevant emails in response to defendant’s search terms. The result of those disputes led to the appointment of a special master, who—after working with the parties to resolve their disputes—determined that plaintiff conducted its searches for relevant emails on its Microsoft 365 (“M365”) platform. The special master opined that searches conducted on M365 may not satisfy the Rule 26(g)(1) reasonable inquiry standard given certain technological limitations associated with that platform “that may not allow a responding party to generate reliable search results—as would typically be possible with an electronic discovery platform that has a fully indexed database and an advanced search engine.” To ameliorate the concerns of defendant and to better ensure a defensible production, the special master brokered a stipulation between the parties (entered as an order) that directed plaintiff to conduct searches for relevant emails on an eDiscovery platform after collecting emails from its M365 environment during the relevant time period from the five designated email custodians.

*Dish Network L.L.C. v. Jadoo TV, Inc.*, No. 20-CV-01891-CRB (LB), 2022 WL 11270394 (N.D. Cal. Oct. 19, 2022). In this copyright infringement action, plaintiff successfully moved for sanctions against defendants for failing to preserve relevant emails. Among other things, plaintiffs demonstrated that defendant failed “to use ‘Google Workspace or eDiscovery tools to preserve’ the emails” at issue. In its order, the court found that defendant was negligent or grossly negligent in failing to preserve the relevant emails, but held that plaintiff had not established the requisite intent to obtain an order of default judgment or a mandatory adverse inference instruction. As a curative measure under Rule 37(e)(1), the court ordered that “the jury . . . be given a permissive instruction—consistent with California’s CACI 204—to determine whether the destruction was intentional and whether the emails were unfavorable to the defendant.” CACI—California Civil Jury Instructions—204 provides as follows: “You may consider whether one party intentionally concealed or destroyed evidence. If you decide that a party did so, you may decide that the evidence would have been unfavorable to that party.”