

Selected eDiscovery and ESI Case Law from 2024

Philip J. Favro, ed.

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¹ Philip J. Favro of Innovative Driven is a respected neutral who serves as a court-appointed special master and mediator. Phil also serves as an expert witness and advisor on ESI and electronic discovery issues. Phil wishes to recognize the following individuals for their contributions to this annotated bibliography of eDiscovery and ESI case law: Thomas Y. Allman, Michael Berman, Ross Gotler, the Honorable Iain Johnston, Lidia Kekis, David Lumia, and Kelly Twigger.

CLOUDS

Harriman v. Smart, No. 1:22-CV-01883-SKC, 2024 WL 3900263 (D. Colo. Aug. 21, 2024). *See* discussion under **Possession, Custody, or Control**.

Kellar v. Union Pacific Railroad Co., No. CV 21-02045, 2024 WL 3818535 (E.D. La. July 26, 2024). *See* discussion under **Ethics** and **Nontraditional Sources of Information**.

Two Canoes LLC v. Addian Inc., No. 2:21-cv-19729-SDW-JRA, 2024 WL 2939178 (D.N.J. Apr. 30, 2024), *report and recommendation adopted*, 2024 WL 3470851 (D.N.J. July 19, 2024). *See* discussion under **Litigation Holds & Preservation, Sanctions—Rule 37(e)**, and **Text Messages & Ephemeral Messages**.

Donofrio v. Ikea US Retail, LLC, No. CV 18-599, 2024 WL 1998094 (E.D. Pa. May 6, 2024). *See* discussion under **Ethics, Litigation Holds & Preservation, Sanctions—Other FRCP Provisions**, and **Sanctions—Rule 37(e)**.

COOPERATION

Ravin Crossbows, LLC v. Hunter's Mfg. Co., Inc., No. 5:23-CV-598, 2024 WL 3253265 (N.D. Ohio July 1, 2024). *See* discussion under **Search**.

In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., No. 22-MD-03047-YGR (PHK), 2024 WL 1786293 (N.D. Cal. Feb. 20, 2024). *See* discussion under **Search**.

Shintech Inc. v. Olin Corp., No. 3:23-CV-00112, 2023 WL 6807006 (S.D. Tex. Oct. 16, 2023). The court ordered the parties to meet and confer regarding their disputes over plaintiff's document requests to defendant Olin Corporation. In so doing, the court expressed dismay that the parties had not met or conferred (other than by exchanging emails) to work through their disagreements over defendant's failure to produce responsive documents to approximately 50 of plaintiff's requests: "Merely exchanging self-serving emails and letters, as the parties have done here, does not constitute a good faith effort. It is apparent from the joint discovery letter submitted by the parties that the lawyers have yet to confer by phone, Zoom, or in-person about [plaintiff's] concerns." To facilitate the meet-and-confer process, the court set a date and time for their conference over Zoom. Given the parties' inability to previously confer over their disputes, the court further facilitated their arrangements: "Because I have no faith that the parties can arrange such a meeting themselves, my case manager will provide a Zoom link for the parties to use. I might even stop in to see if everyone is getting along." *See* discussion under **Rule 34 Requests, Responses, and Productions**.

CRIMINAL LAW

Webb v. United States, No. 19-CF-0391, 2024 WL 3448243 (D.C. July 18, 2024). In this criminal proceeding, appellant (Webb) attacked a person and then posted to his Instagram account a picture of his fist covered with blood and a caption that read, "Got slim blood all on me ... #NoSuckaShit." Comments were later made on the Instagram post, including one by Webb himself, that read, "someone tried to spit on me so I beat hi[m]." Screenshots were taken both of the post and the corresponding comments before Webb deleted the post. At trial, Webb was convicted on charges of assault and tampering with physical evidence. On appeal, Webb challenged his evidence tampering

conviction, arguing that the statute under which he was convicted only criminalized the elimination of physical evidence and not digital evidence such as the Instagram post at issue here. The District of Columbia Court of Appeal rejected this argument, reasoning that the statute (though enacted in 1982) was broad enough to encompass digital evidence such as social media posts. The court also rejected Webb’s argument that deleting the Instagram post was not actionable conduct within the meaning of the statute since “he altered and concealed the post’s digital profile such that the photo of his fist, the time stamp, and the thread of comments were no longer available to view.” While Webb countered this position by asserting that the court still had access to the screenshots and the actual image from Webb’s phone, the court found this notion unpersuasive, as “tampering with physical evidence conviction does not require the defendant to be successful in impairing the evidence’s use.”

DISCOVERY PROCESS

In re StubHub Refund Litig., No. 20-MD-02951-HSG (TSH), 2024 WL 3817068 (N.D. Cal. Aug. 13, 2024). The court issued an order in this putative consumer class action that addressed several open discovery issues, including plaintiffs’ request that defendant identify “non-custodial data sources likely to have relevant information” pursuant to the court-ordered ESI protocol. Plaintiffs additionally sought an order directing defendant to identify a structured data specialist who could discuss “the structure of [defendant’s] databases and the categories of information contained therein that are relevant to the claims and defenses in this case.” Plaintiffs argued that defendant failed to disclose this information pursuant to the ESI protocol and as a result, defendant should be made to comply with this requirement. The court—characterizing plaintiffs’ request for relief as “a complete redo of non-custodial document discovery, and it is not anything less than that or different from that”—denied plaintiffs’ request as being untimely. The court reasoned that a requesting party does not “get to make an objection to the other side’s disclosure and then hold on to that objection forever and ever, and years later ask to start the whole process over from scratch. No way.” The court indicated that plaintiffs had apparently not been diligent in pursuing discovery, observing that in four years defendant had “taken 35 depositions and moved for summary judgment” while plaintiffs had only taken one deposition, “and that deposition wasn’t even their idea.” All of which, according to the court, seemed to substantiate StubHub’s assertion that “Plaintiffs have no interest in litigating their claims on the merits and instead want to weaponize e-discovery to drag out discovery as long as possible.” In other rulings, the court (among other things) ordered defendant to fully respond to two of plaintiffs’ interrogatories and to amend deficient privilege log entries.

In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., No. 22-md-03047-YGR (PHK), 2024 WL 1808607 (N.D. Cal. Apr. 25, 2024). *See* discussion under **Privilege**.

Cynosure, LLC v. Reveal Lasers LLC, No. 22-CV-11176-PBS, 2024 WL 1620951 (D. Mass. Apr. 15, 2024). In connection with motion practice on various written discovery disputes, the parties sought determination on whether plaintiffs could reopen a Rule 30(b)(6) deposition for a corporate designee for certain defendants. Plaintiffs argued, among other things, that counsel for defendants had improperly instructed the corporate designee not to answer certain questions about search terms and discovery process on the basis of work product and attorney-client privilege. As an initial matter, the court held that search terms are not work product, and defendants could not withhold this information from discovery. In addition, the court was dubious about the application of the privilege or work product to discovery issues such as collection and search. Nevertheless, the court was concerned that a Rule 30(b)(6) deposition was not the most effective method for handling discovery process issues

and instead ordered defendants to answer several interrogatories regarding the nature and scope of their collection and search efforts.

ESI EVIDENCE

Dominguez v. Weiser Sec. Servs., Inc., No. CIV-21-653-SLP, 2024 WL 3706499 (W.D. Okla. Aug. 7, 2024). In connection with defendant's motion for summary judgment on plaintiff's Title VII claims, the court excluded certain evidence, including an email exchanged by its employees, that defendant presented to support its motion. The court observed that while the bar for authenticating evidence is fairly low, defendant had failed to substantiate that the email at issue "is what it purports to be." More particularly, the court found that defendant could not satisfy the self-authentication standard under Rule 901(b)(4) based on the email's "distinctive characteristics." While conceding that the "email contains a header, showing details about when and to whom the email was sent, and a signature block" from the sender, the email's "From" line did not display the email address of defendant's employee. In addition, the court highlighted defendant's failure to offer evidence in the form of supporting declarations or deposition testimony "that would bear on the email's authenticity."

Stokes v. New Jersey Manufacturers Ins. Co., No. CV 23-114, 2024 WL 3497884 (E.D. Pa. July 19, 2024). In connection with its order of summary judgment for defendant on plaintiffs' uninsured motorist claim that arose from a vehicle accident involving a semi-truck, the court held that plaintiffs failed to adduce admissible evidence to support their claim. In particular, the court found that the text messages on which plaintiffs relied to demonstrate that the driver of the semi-truck who collided with their vehicle was uninsured were hearsay without exception. In addition, the court expressed doubts about the authenticity of the messages at issue. Plaintiffs argued that the messages, which were allegedly exchanged by one of the plaintiffs and a representative (dispatcher) for the semi-truck driver, demonstrated that the semi-truck driver was uninsured. However, the court rejected this assertion, finding that screenshots of the messages were not what plaintiffs asserted them to be since the screenshots (purportedly taken by one of the plaintiffs, Mr. Stokes) instead reflected that they were taken by the so-called dispatcher. As the court observed, "it is apparent that Mr. Stokes' messages are those noted on the left, in gray shading, whereas the 'dispatcher's' messages are noted on the right, in blue. When asked about this during oral argument, Plaintiffs' counsel explained that Mr. Stokes provided him with screenshots of these messages . . . But had Mr. Stokes taken screenshots from his own cellular phone, the message orientation would be inverted—i.e., his messages would be noted on the right, in blue and the 'dispatcher's' messages would be on the left, in gray. In other words, it is apparent that Mr. Stokes did not take these screenshots, and Plaintiffs' counsel was not sure who did during oral argument."

McCandless Grp., LLC v. Coy Collective, Inc., No. No. 2:21-CV-02069-DOC-KES, 2024 WL 3221742 (C.D. Cal. May 22, 2024). The court denied plaintiff's motion in limine to prevent defendants from offering certain images as evidence at trial. Plaintiff had argued that defendants had not presented evidence from a custodian of records to authenticate the images. In addition, plaintiff asserted that defendants could not self-authenticate the website from which the images were apparently obtained. The court disagreed and instead held that defendants could properly authenticate the images based on admissions by plaintiff in deposition testimony and in an email.

Hossfeld v. Allstate Ins. Co., --- F. Supp. 3d ---, 2024 WL 1328651 (N.D. Ill. Mar. 28, 2024). In connection with the parties' cross-motions for summary judgment, defendant (Allstate) presented certain spreadsheet evidence to support its argument that it did not violate the Telephone Consumer

Protection Act of 1991 (“TCPA”). The spreadsheet reflected plaintiff’s phone number, which Allstate asserted that it received through one of its affiliates (Policy Genius) and which plaintiff voluntarily disclosed. Accordingly, Allstate argued that plaintiff consented to the phone calls at issue and did not have standing to pursue his TCPA claims. The court rejected Allstate’s position, finding the spreadsheet to be inadmissible, and denied Allstate’s motion for summary judgment on the issue of consent. First, the court found the spreadsheet to be inadmissible hearsay evidence. The court observed that the spreadsheet and corresponding witness testimony—which Allstate offered to show how it eventually received the spreadsheet from Policy Genius and other Allstate affiliates—each had to satisfy the hearsay admissibility rules. The court then concluded that Allstate had failed to do so, indicating that these “multiple layers of hearsay, for which no exception or exemption has been established, render the witness’s testimony and the spreadsheet inadmissible.” The court also noted that Allstate did not offer “an evidentiary predicate tracing the hearsay statements in the spreadsheet to their source, i.e., the data and statements that underly them.” Besides hearsay, the court found that Allstate had not properly authenticated the spreadsheet since Allstate’s witnesses did not establish that they had sufficient personal knowledge to substantiate the source of the spreadsheet.

Browne v. Waldo, No. 2:20-CV-196 JD, 2024 WL 726389 (N.D. Ind. Feb. 22, 2024). The court issued several evidentiary rulings, sustaining objections Waldo interposed to various communications that Browne sought to introduce as evidence at the parties’ upcoming trial on Waldo’s counterclaims against Browne. Among other things, the court held that various text messages were not relevant pursuant to Federal Rule of Evidence 401 and any probative value the messages might have “was substantially outweighed by undue prejudice” under Rule 403. The court found that other text messages—exchanged by lawyers arguing over legal issues—were inadmissible hearsay and should also be excluded under Rule 403 since the communications “would undoubtedly confuse the jury and mislead them as to what issues they are meant to decide.” The court excluded additional text messages on authentication grounds, reasoning that Browne had not shown how prior deposition testimony might have authenticated the communications and rejecting Browne’s assertion that she could authenticate text messages under Rule 612, which only applied to refreshing a witness’s recollection.

Peak v. Laborers Union Loc. No. 1, No. 19-CV-3351, 2024 WL 216698 (N.D. Ill. Jan. 19, 2024). The court in this civil rights matter ruled on various objections plaintiff raised to text messages and images that defendants submitted as evidence in support of their motion for summary judgment. Plaintiff objected to the text messages on hearsay and authentication grounds, and the images on the basis of authentication. The court overruled the hearsay objection, finding that the text messages at issue were either exchanged with plaintiff (making them admissible under Federal Rule of Evidence 801(d)(2)(A)) or were being offered to demonstrate the nature and context of plaintiff’s relationships with his co-workers (not to prove the truth of the matters asserted in the communications). Regarding authentication, the court rejected plaintiff’s position on the images, finding that a supporting declaration offered sufficient details to support authentication including “the approximate date, and identity of individuals, and event depicted in each photograph.” As for the text messages, the court overruled plaintiff’s authentication objection to the communications in which he was involved (“[t]o the extent the statement of fact includes text messages [plaintiff] sent to [co-workers], and where [plaintiff] testified about the specific text message during his deposition, the Court finds the objection meritless as those text messages sent by [plaintiff] were authenticated through [plaintiff’s] testimony). However, the court sustained plaintiff’s authentication objection to other text messages that defendants failed to authenticate by written or oral testimony.

ESI PROTOCOLS

Cook v. Meta Platforms, Inc., No. 22-CV-02485-AMO (TSH), 2024 WL 4133811 (N.D. Cal. Sept. 9, 2024). The court spotlighted the importance of complying with the express provisions of court-ordered ESI protocols, particularly those to which the parties stipulated, in its order directing defendant to provide plaintiff with a privilege log that satisfied the protocol's provisions in that matter. Defendant had argued that the protocol's disclosure requirement for all "authors and recipients" of privileged communications was too onerous. The court rejected that argument since that was the express requirement to which defendant stipulated in the protocol and which the court subsequently entered as an order. The court tersely observed that "[s]o, here is the deal with a court order . . . It's an order, so you have to comply with it." The court then counseled that if parties found the provisions of the court-ordered ESI protocol too exacting, "they should move to modify the order with reasonable diligence, explaining why the order has become difficult or impossible for you to comply with." Because defendant had not sought to modify the ordered protocol, the court directed defendant to comply with the order's privilege logging requirements. The court also made clear that its order was without prejudice to defendant seeking an order to modify those requirements.

Orlando Health, Inc. v. HKS Architects, Inc., No. 6:24-CV-693-JA-LHP, 2024 WL 4025379 (M.D. Fla. Sept. 3, 2024). The court refused to enter the parties' confidentiality stipulation as a protective order and also declined to enter the parties' stipulated ESI protocol as an order. The court indicated that it typically honors parties' respective stipulations and that they had not otherwise demonstrated a need to have those stipulations entered as orders.

Edgar v. Teva A Pharmaceutical Industries, Ltd., No. 22-CV-2501-DDC-TJJ, 2024 WL 3677614 (D. Kan. Aug. 5, 2024). See discussion under **Federal Rule of Evidence 502** and **Search**.

Bab v. Sampson Bladen Oil Co., Inc., No. 5:23-CV-00330, 2024 WL 3678337 (E.D.N.C. Aug. 5, 2024). In connection with its determination that defendant's TIFF production with limited metadata fields satisfied Rule 34's "reasonably usable" production requirement, the court observed that the parties had previously submitted a joint report pursuant to Rule 26(f) regarding production specifications. Those production specifications (which the court included in its "Case Management Order") included a general directive to produce ESI in TIFF, with "metadata and searchable, extracted text," along with certain file types such as Excel and PowerPoint in native format. The parties, however, neglected to specify the precise metadata fields they would produce. This ambiguity in the production specifications eventually led to motion practice over the metadata fields defendant included in its production. Plaintiff failed to specify in its document requests the nature or extent of the metadata fields it sought from defendant. See discussion under **Ethics** and **Rule 34 Requests, Responses, and Productions**.

Tremblay v. OpenAI, Inc., No. 23-CV-03223-AMO (RMI), 2024 WL 3638421 (N.D. Cal. July 31, 2024). See discussion under **Search**.

In re Insulin Pricing Litig., No. 2:23-md-03080 (BRM) (RLS), 2024 WL 2808083 (D.N.J. May 28, 2024). The parties in this multidistrict litigation submitted for the court's determination various competing provisions for inclusion in a court-ordered ESI protocol. One of the disputed provisions concerned whether the definition of a document family should include the production of hyperlinked documents "such that a producing party must maintain any document 'family' relationship for each hyperlink." Plaintiffs argued that the protocol should require the production of communications and hyperlinked documents in family relationships. Defendants maintained that compliance with such a provision

would be “technologically infeasible” and, in any event, unduly burdensome and disproportionate to the needs of the case. The court ultimately agreed with defendants and adopted its family production provision (which, in the court-ordered ESI protocol dated June 10, 2024 (ECF No. 208), does not appear to include provision for the production of hyperlinked documents in family relationships). In doing so, the court determined that “hyperlinks are not the same as traditional attachments.” In addition, the court found that “commercially available tools” were either “not feasible whatsoever” for creating a family relationship “in the data environments or systems” belonging to defendants or were “unduly burdensome to apply to their respective data environments.” *See* discussion under **Rule 34 Requests, Responses, and Productions**.

In re StubHub Refund Litig., No. 20-MD-02951-HSG (TSH), 2024 WL 2305604 (N.D. Cal. May 20, 2024). In this putative consumer class action involving claims over unpaid refunds, the court resolved the parties’ longstanding dispute over the ESI order’s family production requirement regarding hyperlinked documents. As initially stipulated by the parties and entered by the court, the ESI order required the parties—and, in particular, defendant—to produce hyperlinked information from “internal document sources” (i.e., cloud repositories such as SharePoint, Google Drive, etc.) “as separate, attached documents” in family relationships with emails referencing those documents. Further clarifying the issue, the ESI protocol specifically defined “child” documents to include “hyperlinks to internal or nonpublic documents,” along with traditional attachments. Given these circumstances, the court previously ordered defendant in 2023 to comply with the ESI order’s family production requirement or alternatively seek an order modifying that provision. *See In re StubHub Refund Litig.*, No. 20-MD-02951-HSG-TSH, 2023 WL 3092972 (N.D. Cal. Apr. 25, 2023). In the instant discovery order, the court granted defendant’s motion to modify the ESI order’s family production requirement regarding hyperlinked documents. In particular, the court found that defendant “demonstrated good cause to remove the requirement that hyperlinked documents should be produced as if they were attachments to emails” because “the hyperlink requirement is technologically impossible to fulfill most of the time.” The court reached this conclusion after finding that defendant undertook substantial effort to comply with the original family production provision, which included “spen[ding] hundreds of hours trying to find linked documents” with the assistance of its ESI service provider. The court additionally rejected plaintiffs’ arguments that it should retain the ESI order’s original family production provision. First, the court dismissed plaintiffs’ position that defendant could have made family productions with hyperlinked documents if it had “searched for hyperlinked documents in native email files.” While adopting such a course might have yielded a slightly greater percentage of hyperlinked documents produced in family relationships, the court determined that the provision would still be “impossible to comply with most of the time” given that “many of the hyperlinks do not work anymore.” Second, the court disagreed with plaintiffs’ assertion that defendant could develop a computer program to handle family productions with hyperlinked documents. On the contrary, the court observed that both parties had agreed regarding “the non-existence of any commercially available software that can implement the hyperlink requirement in the ESI Order.” That no such program exists, the court concluded, “tip[ped] strongly in [defendant’s] favor.” Finally, the court indicated that it would allow—pursuant to defendant’s offer—plaintiffs to “provide a list of up to 400 additional hyperlinked documents that StubHub will devote all reasonable resources to manually retrieve and produce as a child to a parent email.” The court also denied plaintiffs’ motion for sanctions against defendant. *See* discussion under **Sanctions—Other FRCP Provisions**.

In re Uber Techs., Inc., Passenger Sexual Assault Litig., No. 23-md-03084-CRB (LJC), 2024 WL 1772832 (N.D. Cal. Apr. 23, 2024). In this multidistrict litigation, the parties sought court intervention to

resolve their disputes over proposed provisions for an ESI protocol. Among other things, the parties disagreed about the scope of the protocol's family production provision and the nature and extent of defendant's (Uber) obligation to produce hyperlinked documents in family relationships. As also memorialized in an earlier order (*In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, No. MDL 3084 CRB, 2024 WL 3491760 (N.D. Cal. Mar. 15, 2024)), plaintiffs argued that the definition of "attachment" for purposes of the ESI protocol should be construed "broadly" and include (among other things) both traditional attachments and hyperlinked documents maintained in cloud storage. Under this broad definition of attachment, plaintiffs maintained that Uber should be required to produce in family relationships the hyperlinked documents sent contemporaneously with emails. In contrast, Uber asserted that the definition of "attachment" should be limited to traditional attachments and argued that "a hyperlinked document, such as a cloud-based document in Google Drive, is not an 'attachment.'" Despite this definition, Uber indicated that it would make a reasonable and proportional undertaking to produce emails and hyperlinked documents family relationships. Yet Uber also argued that it should not be required to do so for all emails and hyperlinked documents given "technological limitations inherent in the processing of emails containing embedded links." Plaintiffs disagreed with Uber's position on the issue of technical limitations, asserting that Uber either could use off-the-shelf technologies or design a customized computer program to produce the contemporaneous versions of hyperlinked documents with the emails in which they were referenced. After extensive briefing on the issues, the court adopted a provision for the ESI protocol that incorporated aspects from the parties' proposals and addressed their respective arguments. In connection with its decision on the issues, the court acknowledged Uber's concerns about the technical limitations with making family productions involving hyperlinked documents and opined that such "evidence is not readily available for production in the same manner that traditional email attachments could be produced." Nevertheless, the court emphasized the importance of parties having access to such information, particularly contemporaneous versions of hyperlinked documents, because that evidence "can support an inference regarding 'who knew what, when.'" To address these competing considerations, the court ordered that the definition of "attachment" include (among other things) both traditional attachments and hyperlinked documents. Yet the court tempered Uber's family production obligation and clarified that "[t]his definition does not obligate Uber to produce the contemporaneous version of Google Drive documents referenced by URL or hyperlinks if no existing technology makes it feasible to do so." Next, the court adopted a modified version of plaintiff's proposed family production provision for cloud-stored documents. While Uber would be required to produce hyperlinked documents in family relationships with corresponding emails, the court moderated that obligation for contemporaneous hyperlinked documents by indicating that Uber would only do so "to the extent feasible on an automated, scalable basis with existing technology." Plaintiffs would not be left without a remedy on this issue, however, as the court included a further provision allowing plaintiffs to request that Uber manually identify and produce in family relationships "up to 200 hyperlinks for which they seek the contemporaneous referenced document." The court suggested that such a limit was a not a hard cap or guarantee; the parties could seek modifications based on considerations of reasonableness, proportionality, and reasonable accessibility. This could include a request from plaintiffs for "additional contemporaneous documents" or a request from Uber for "relief from the production of certain versions or other obligations under the ESI protocol based on undue burden or costs, overbreadth or disproportionality." Finally, the court granted plaintiffs' request to include two additional metadata fields that were related to issue of producing hyperlinked documents in family relationships. The court reasoned that those fields—which would identify hyperlinked documents missing from Uber's production and hyperlinked documents that were not contemporaneously sent with emails—"appear helpful to streamline review of Uber's productions." However, the court rejected plaintiffs' demand for a third metadata field (seeking the "email address

associated with a custodian’s responsive documents”), finding that such a demand was unsubstantiated and that plaintiffs, as a practical matter, would already have access to that information. *See* discussion under **Information Governance** and **Sedona Conference Publications**.

In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., No. 22-MD-03047-YGR (PHK), 2024 WL 1786293 (N.D. Cal. Feb. 20, 2024). In this multidistrict litigation, the parties sought judicial determination over disputed proposed provisions for the ESI protocol. Among other things, the parties disagreed whether hyperlinked documents should be produced in family relationships with emails that reference those documents. Plaintiffs argued that the protocol’s family production provision should include hyperlinked documents and that defendants could accomplish family productions involving this information through the native technological features with their respective communications platforms. In particular, plaintiffs asserted that defendants Google, Snap, and TikTok could use their Google Workspace environment to facilitate family productions of hyperlinked documents while defendant Meta could do so through its Microsoft 365 platform. In response, defendants argued that the protocol should not include hyperlinked documents and maintained that the technology platforms at issue “are incapable of backlinking documents with emails.” Defendants proposed that plaintiffs be allowed to seek family productions of up to 500 hyperlinked documents. In its resolution of this dispute, the court generally adopted defendants’ position, declined to include hyperlinked documents in the scope of the family production provision, but held that plaintiffs could submit a reasonable number of requests for family productions involving hyperlinked documents (the court did not impose the strict numerical limit of 500 documents that defendants proposed). The court observed that the manual process of submitting requests to defendants for family productions of hyperlinked documents would be preferable to requiring an automated retrieval and production process “since an automated search system raises questions of reliability and validation, which the Parties dispute.” *See* discussion under **Rule 34 Requests, Responses, and Productions** and **Search**.

ETHICS

Domus BWW Funding, LLC v. Arch Ins. Co., No. 2:23-CV-00094-JDW, 2024 WL 3761737 (E.D. Pa. Aug. 12, 2024). In this litigation involving disputes over insurance coverage, the court criticized counsel for defendant Arch Insurance Company (“Arch”) for his approach to handling ESI discovery. The court indicated that counsel did not take appropriate follow up to ensure that relevant ESI was collected and produced in a timely manner. Among other things, counsel “assumed that there was nothing gathered because there was nothing present. So there was no need to follow up.” The court characterized counsel’s attitude toward ESI discovery as “somewhere between dismissive and disingenuous” and opined that it “strains credulity to think that, in this day and age and in a case involving corporate parties, anyone could blithely expect ESI searches not to yield valuable information in discovery.” The court was also concerned that counsel did not notify adversaries that Arch would not make a complete production of ESI by an agreed-upon deadline. The court found this “approach [to be] troubling. As a simple matter of professionalism, [counsel] (who told me he was the person on the defense team handling Arch’s ESI collection) should have been more involved in the collection of ESI . . . He should have followed up sooner when Arch did not provide the ESI review set, and he should have communicated with [plaintiffs’] counsel about the status of the ESI.” *See* discussion under **Sanctions—Other Provisions** and **Sanctions—Rule 37(e)**.

Pable v. Chicago Transit Authority, No. 19 CV 7868, 2024 WL 3688708 (N.D. Ill. Aug. 7, 2024). *See* discussion under **Sanctions—Rule 37(e)**.

Bab v. Sampson Bladen Oil Co., Inc. d/b/a Han-Dee Hugo's, No. 5:23-CV-00330, 2024 WL 3678337 (E.D.N.C. Aug. 5, 2024). In connection with its determination that defendant's TIFF production with limited metadata fields satisfied Rule 34's "reasonably usable" production requirement, the court reflected on plaintiff's counsel's lack of familiarity with ESI and its impact on her advocacy regarding plaintiff's request for additional metadata fields in motion practice. Among other things, plaintiff's lawyer "could not articulate how the search process worked," could not articulate "which metadata fields would be most helpful," and "conceded that she did not know exactly which metadata fields are most important." Furthermore, in response to plaintiff's argument that a lack of metadata impacted her ability to view defendant's production on her ESI platform, the court observed that plaintiff's counsel did not know how the platform even worked: "During the hearing [plaintiff's] counsel admitted that she has not used the system . . . And she contradicted her vendor's claims about the production's searchability." See discussion under **ESI Protocols** and **Rule 34 Requests, Responses, and Productions**.

Kellar v. Union Pacific Railroad Co., No. CV 21-02045, 2024 WL 3818535 (E.D. La. July 26, 2024). In this employment-related dispute where the magistrate judge found that plaintiff intentionally eliminated relevant information from his phone, the magistrate judge also determined that plaintiff's counsel "breached their duty to preserve" relevant ESI stored on plaintiff's phone and in a cloud account. While plaintiff's lawyers were "new to navigating e-discovery," they nonetheless had an obligation to help their client preserve relevant evidence, including relevant data now lost from his phone and cloud account. Despite failing to help the client take reasonable steps like making a forensic image of the phone before its data was lost, the court did not find plaintiff's lawyers responsible for the spoliation. The court observed on multiple occasions that the attorneys advised plaintiff orally to preserve all relevant information, and plaintiff acknowledged that his lawyers had done so. See discussion under **Nontraditional Sources of Information**.

Donofrio v. Ikea US Retail, LLC, No. CV 18-599, 2024 WL 1998094 (E.D. Pa. May 6, 2024). In this Age Discrimination in Employment ("ADEA") class action, the court imposed sanctions against defendant (IKEA) for failing to preserve relevant emails from four key custodians and to produce responsive ESI in compliance with a discovery order. In its sanctions order, the court criticized IKEA for delaying approximately 11 months before disclosing that it failed to preserve relevant emails from the four custodians at issue. The court deemed IKEA's lack of candor to be "offensive" and observed that IKEA's acknowledgement to plaintiffs was accompanied by a "misrepresentation" that despite the loss of the custodians' emails, IKEA was not under a duty to preserve them before they were eliminated. IKEA's associate general counsel testified this position was part of "the litigation strategy we were working on with [outside counsel]." The court found such actions to be prejudicial to plaintiffs and factored this conduct into its award of attorney's fees under Rule 37(e)(1). See discussion under **Litigation Holds and Preservation, Sanctions—Other FRCP Provisions, and Sanctions—Rule 37(e)**.

FEDERAL RULE OF EVIDENCE 502

Edgar v. Teva A Pharmaceutical Industries, Ltd., No. 22-CV-2501-DDC-TJJ, 2024 WL 3677614 (D. Kan. Aug. 5, 2024). The court sided with defendants in resolving a dispute dealing with the nature and scope of the non-waiver provision for a protective order. Plaintiffs' proposed provision for the non-waiver order was limited to "inadvertent or mistaken productions," while defendants' proposed provision was broader and styled as "inadvertent or otherwise." Plaintiffs argued that limiting the non-waiver order to inadvertent productions was consistent with Federal Rule of Evidence 502(b) and

would thwart defendants from being able to claim privilege over communications defendants “intentionally produced in the EpiPen MDL” to prevent the use of those documents in the instant litigation. Defendants maintained that their “inadvertent or otherwise” language was consistent with Rule 502(d) and would eliminate motion practice over the issue of inadvertent disclosure. Defendants additionally asserted that the parties would have “ample protections . . . to challenge an assertion of privilege if they believe such a challenge is warranted.” The court ultimately held that the “inadvertent or otherwise” wording would “avoid disputes over whether the parties’ disclosure was inadvertent.” For disputes over clawed-back documents from other cases, the court invited motion practice to determine the propriety of “the assertion of privilege for the specific documents at issue.”

United States ex rel. Omni Healthcare, Inc. v. MD Spine Sols. LLC, --- F. Supp. 3d ---, 2024 WL 2883365 (D. Mass. June 7, 2024). In this relator-initiated False Claims Act litigation, the government (during its investigation phase while the matter remained under seal) proposed a plan for handling privilege in the context of defendants’ document productions, which defendants rejected. The parties did not obtain a nonwaiver order under Federal Rule of Evidence 502(d). Instead, defendants included a statement within each production cover letter asserting no intent of privilege waiver and reserving their right to claw back any privileged materials inadvertently produced. While reviewing defendants’ final production set, the government alerted defendants to twelve potentially privileged documents. Defendants reviewed and clawed back the documents at issue but did not re-review at that time the balance of the production or any prior productions for inadvertently produced privileged documents. While the government settled its claims with defendants, relator continued litigating against defendants and obtained, from the government, defendants’ productions pursuant to their Common Interest Agreement. Defendants were not aware of this until relator used some of the produced documents as deposition exhibits. In response, defendants conducted a full re-review of their productions and attempted to claw back several hundred inadvertently produced privileged documents. Relator moved to compel production, arguing that defendants had waived privilege. While citing to Federal Rule of Evidence 502(b) as the governing legal standard, the court nonetheless applied a five-factor test on implied waiver pursuant to existing district precedent that predated Rule 502(b). The five factors included: “(1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the [responding] party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice.” Examining defendants’ actions under this analysis, the court held that defendants impliedly waived privilege and ordered the production of 613 documents. In particular, the court criticized defendants’ process for screening privileged information—wholly reliant on the party and “without counsel’s involvement”—and concluded that it was “hardly a reasonable precaution from the production.” The court also rejected defendants’ purported reservation of rights in their cover letter to the government as staving off any waiver, reasoning that “it strains logic to suggest that a provision that is meant to ameliorate the impact of an inadvertent disclosure is a ‘precaution[] taken to prevent inadvertent disclosure.’” The court additionally found that defendants unreasonably delayed (two years and seven months) taking additional steps to explore their production for inadvertently produced privileged materials. This was especially the case since the government had previously identified inadvertently produced privileged materials, and “a reasonable reader would find it at least plausible that further review of the productions might uncover additional potentially privileged documents, a conclusion that is reinforced by the subsequent revelation that there were over 600 other privileged documents lurking in the production.”

INFORMATION GOVERNANCE

Dupraz v. Does 1-10, --- F. Supp. 3d ---, 2024 WL 1644227 (N.D. Cal. 2024). *See* discussion under **Nonparties**.

Domus BWW Funding, LLC v. Arch Ins. Co., No. 2:23-CV-00094-JDW, 2024 WL 3761737 (E.D. Pa. Aug. 12, 2024). *See* discussion under **Sanctions—Rule 37(e)**.

In re Uber Techs., Inc., Passenger Sexual Assault Litig., No. 23-md-03084-CRB (LJC), 2024 WL 1772832 (N.D. Cal. Apr. 23, 2024). In connection with its order directing that Uber produce certain hyperlinked documents in family relationships (*see* discussion under **ESI Protocols** and **Sedona Conference Publications**), the court observed that its order was influenced in part by Uber's decision to select Google Workspace as its information storage and communication platform. The court opined that Uber had been on notice since 2018 that Google Workspace had certain limitations with making family productions involving hyperlinked documents. *See Shennick v. Twitter*, No. 4:16-cv-05314, 2018 WL 5735176 (N.D. Cal. Sept. 17, 2018). While sympathetic regarding the burdens that such productions would impose on Uber, the court declared that “the potential limitations and pitfalls with respect to production of hyperlinked documents from Google Vault have been widely known for many years, yet Uber has elected to transfer and retain its electronic data using this service.”

LITIGATION HOLDS & PRESERVATION

United States v. Google LLC, --- F. Supp. 3d ---, 2024 WL 3647498 (D.D.C. 2024). *See* discussion under **Sanctions—Rule 37(e)**.

Two Canoes LLC v. Addian Inc., No. 2:21-cv-19729-SDW-JRA, 2024 WL 2939178 (D.N.J. Apr. 30, 2024), *report and recommendation adopted*, 2024 WL 3470851 (D.N.J. July 19, 2024). The court in this litigation (“Two Canoes Litigation”) found that defendant (Addian) failed to preserve relevant WeChat messages after the duty to preserve triggered. While Addian was not impleaded into the Two Canoes Litigation until January 7, 2022, the court held that Addian's duty to preserve triggered when 3M initiated a separate lawsuit against Addian on November 5, 2020 (“3M Litigation”). Because “the 3M Litigation arose out of the same course of conduct as this litigation”—“selling of allegedly counterfeited 3M N-95 masks”—and the lawsuits overlapped by a few months, the court found that Addian's preservation obligation continued unabated into the Two Canoes Litigation. Addian apparently argued that the lawsuits did not overlap, as it settled the 3M Litigation in June 2021. The court rejected this argument, explaining that the June 2021 settlement did not extinguish Addian's preservation obligation since the 3M Litigation did not “officially end” until February 28, 2022. The court noted that between June 2021 and February 2022, the 3M Litigation court kept “continuing jurisdiction . . . to enforce the consent agreement, settlement agreement, and permanent injunction.” Moreover, the court noted that the eventual parties to the Two Canoes Litigation were threatening to take legal action—including against Addian—both during and before this interregnum. Under these circumstances, Addian could hardly expect its duty to preserve relevant ESI such as the WeChat messages to end. *See* discussion under **Sanctions—Rule 37(e)** and **Text Messages & Ephemeral Messages**.

Donofrio v. Ikea US Retail, LLC, No. CV 18-599, 2024 WL 1998094 (E.D. Pa. May 6, 2024). In this ADEA class action, the court imposed sanctions against defendant (IKEA) for failing to preserve relevant emails from four key custodians and to produce responsive ESI in compliance with a

discovery order. Regarding its failure to preserve relevant ESI, IKEA's initial litigation hold did not encompass the four custodians at issue despite the relevance of those custodians' emails. The first custodian (Olafsson) left the company in March 2018. Olafsson's Microsoft 365 mailbox was then deleted 30 days later pursuant to IKEA's "standard practice with respect to employees who are not on litigation hold [i.e.] delete their mailboxes approximately 30 days after those employees' termination of employment with IKEA." In September 2018, plaintiffs raised possible spoliation issues with IKEA due to production deficiencies. In response, IKEA specifically identified the four custodians at issue, and its associate general counsel flagged these and other custodians for placement on legal hold (IKEA still was unaware that it had already eliminated Olafsson's emails). Nevertheless, the IKEA employee designated for handling the implementation of the holds "dropped the ball" and failed to do so. Moreover, neither IKEA's in-house counsel nor its outside counsel took follow-up steps to ensure the emails for the custodians at issue were placed on hold. As a result, the other three custodians' Microsoft 365 mailboxes with relevant emails were deleted approximately 30 days after they respectively left the company in May 2019, July 2020, and January 2021. IKEA asserted that it did not become aware of the loss of these custodians' relevant emails until May 2022 and did not reveal the spoliation to plaintiffs until 11 months later in April 2023. The court held that IKEA was "grossly negligent" in failing to preserve the four custodians' emails and issued an award of attorney's fees pursuant to Rule 37(e)(1) to remediate the prejudice plaintiffs incurred. *See* discussion under **Ethics, Sanctions—Other FRCP Provisions, and Sanctions—Rule 37(e)**.

In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., No. 22-md-03047-YGR (PHK), 2024 WL 1808607 (N.D. Cal. Apr. 25, 2024). *See* discussion under **Privilege**.

NONPARTIES

Samsung Elecs. Co. v. Microchip Tech. Inc., No. 1:24-MC-00269 (GHW) (SDA), 2024 WL 3907250 (S.D.N.Y. Aug. 23, 2024). In connection with a patent dispute being litigated in the Eastern District of Texas (*Polaris PowerLED Technologies, LLC v. Samsung Electronics Co., Ltd.*, No. 2:22-CV-00469 (JRG)), defendants (Samsung) served document and deposition subpoenas on a nonparty (Microchip) seeking documents and testimony to substantiate Samsung's "Marking Defense" in the underlying litigation. After Microchip produced certain documents and extensive meet-and-confer efforts, Samsung filed a motion to compel compliance with its subpoenas in the Southern District of New York. For purposes of its document subpoena, the court found that Samsung met its initial burden to establish the relevance of the requested documents. Microchip, however, failed to demonstrate that compliance with the remaining aspects of the subpoena at issue would impose an undue burden. While Microchip maintained that it would be too difficult to identify responsive documents given "turnover" in the company's legal department and challenges of finding documents about "old products of an acquired company," the court determined that these assertions did not create an undue burden in this instance. The court noted that Microchip still had the ability to work with one of its departed lawyers. Moreover, the court reasoned that difficulty alone in trying to identify responsive records "is not enough to show that the burden is undue." While ordering Microchip to produce several categories of responsive documents to Samsung, the court mostly denied Samsung's motion to enforce its subpoena to depose a Microchip witness. Invoking proportionality standards, the court concluded that Microchip needed to produce a witness only for the purpose of authenticating documents from its production or other "publicly available Microchip documents identified by Samsung." Given the limited scope of the deposition, the court encouraged the parties to stipulate to the authenticity of the documents at issue by declaration or affidavit and obviate the need for the deposition in its entirety.

Dupraz v. Does 1-10, --- F. Supp. 3d ---, 2024 WL 1644227 (N.D. Cal. 2024). In this litigation involving hacked Instagram accounts, the court quashed a subpoena that sought deposition testimony from nonparty Meta regarding searches Meta performed in response to an earlier records subpoena. In the records subpoena, plaintiffs demanded information regarding a Doe Instagram account. Nevertheless, Meta was unable to identify the account and instead provided plaintiffs with a “certificate of absence of business records.” Executed by a custodian of records, the certificate indicated that Meta “had conducted a diligent and reasonable search for responsive records and that their search had not revealed any records for the Doe Account.” Dissatisfied with Meta’s response, plaintiffs served the deposition subpoena at issue, along with another subpoena for records, this time seeking documents relating to a specific Instagram account (@leonard.jp.ch). Once again, Meta was unable to identify responsive records and instead offered to turn over another certificate regarding the absence of business records, along with a representation that “the results of Meta’s search was consistent with its publicly stated deletion policy, which provides that data is generally deleted within 90 days after an Instagram account is deactivated.” Plaintiffs thereafter asserted that Meta was “not diligent enough” in its searches, and that Meta was not acting in good faith. In response to Meta’s motion to quash, the court held that Meta had discharged its discovery obligations as a nonparty, and that plaintiffs had not substantiated their argument that Meta’s representations were not credible: “But that is not how discovery works. Meta provided certificates attesting to the inability to locate information regarding the accounts, which satisfies its discovery obligation.” The court also issued a protective order against plaintiffs, proscribing them from making further efforts to obtain the requested Instagram information from Meta.

NONTRADITIONAL SOURCES OF ESI

Kellar v. Union Pacific Railroad Co., No. CV 21-02045, 2024 WL 3818535 (E.D. La. July 26, 2024). In this employment dispute arising from personal injuries plaintiff sustained during a single vehicle accident, the magistrate judge recommended that the court issue an adverse inference instruction against plaintiff and award defendant its attorney’s fees pursuant to Rule 37(e) after concluding that plaintiff intentionally destroyed information on his phone and in a cloud account. A material issue regarding the disposition of plaintiff’s claims was whether he was using his phone at the time of the accident. Plaintiff argued that defendant was responsible for the accident because it overworked plaintiff. In contrast, defendant maintained that plaintiff was using his phone at the time of the accident and was solely responsible for the crash and resulting injuries. Defendant sought discovery from plaintiff’s phone to substantiate its defense, but plaintiff deleted the information just prior to filing his lawsuit. A forensic examination of the phone revealed the existence of Google geolocation data and other Google information, which the examiner obtained through Google Takeout. With the geolocation data, the forensic examiner plotted points on a map that showed the location of plaintiff’s vehicle in the minutes prior to and then at the accident site. Additional Google Takeout data revealed that the phone plaintiff had in his vehicle, just before and during the accident, was tilted, suggesting it was being used at that time. In its motion for spoliation sanctions, defendant argued that plaintiff intentionally eliminated data from his phone. Defendant asserted that “the geolocation and device activity . . . explain the reason for Phone’s titling . . . if [defendant] had access to the missing cellphone data it could conclusively show that [plaintiff] did not fall asleep at the wheel and was distracted by his Phone at the time of the incident.” The magistrate judge agreed, finding that plaintiff intentionally deleted his phone’s data and recommended that sanctions issue accordingly. The court likewise held that plaintiff failed to take reasonable steps to preserve relevant ESI stored with plaintiff’s mobile phone provider. The provider, which had a 24-month retention policy, eliminated relevant data pursuant to that policy. As the court observed, there was “no evidence that either Kellar or his counsel

attempted to preserve the Cloud data,” thereby foreclosing any opportunity for defendant to obtain that information by a subpoena. *See* discussion under **Ethics**.

Iovino v. Michael Stapleton Assocs., Ltd., No. 5:21-CV-00064, 2024 WL 3520170 (W.D. Va. July 24, 2024). The court in this whistleblower retaliation litigation affirmed a magistrate judge ruling in favor of defendant, which sought a protective order to ensure plaintiff obtain approval from the U.S. State Department before proceeding with depositions of State Department workers. In connection with its disposition of defendant’s motion for a protective order, the court issued a show-cause order pursuant to Rule 11(c) and directed plaintiff’s lawyers to explain why in the objections they filed to the magistrate judge order, they relied on “multiple cases and quotations that the court, and [defendant], could not find when independently reviewing [plaintiff’s] sources.” Among other things, plaintiff cited two cases that apparently did not exist and relied on statements from two other decisions that did not contain the language plaintiff quoted in her brief. The court was particularly concerned that plaintiff did not file a reply memorandum or otherwise respond to defendant’s position that these phony citations and quotations “were the result of “ChatGPT run amok.” “This silence is deafening,” was how the court characterized plaintiff’s failure to respond. At the show-cause hearing, counsel would be given the opportunity to demonstrate “why they should not be sanctioned and/or referred to their respective state bars for professional misconduct.”

POSSESSION, CUSTODY, OR CONTROL

Buergofol GMBH v. Omega Liner Co., Inc., No. 4:22-CV-04112-KES, 2024 WL 4068648 (D.S.D. Sept. 5, 2024). The court issued an award of monetary sanctions in favor of defendant (Omega) and against plaintiff (Buergofol) pursuant to Rule 37(b)(2)(C) after determining that Buergofol failed to comply with a discovery order directing it to produce relevant prior art in its possession, custody, or control. In this patent litigation dispute, Omega argued that Buergofol violated the order at issue “when it disclosed tens of thousands of unrelated, non-responsive patent references that were not known to Buergofol or in Buergofol’s custody, possession, or control.” The court agreed, concluding that the order was “clear,” and required Buergofol to produce prior art that was either known to the company or was in its possession, custody, or control. Instead, Buergofol “conducted searches of the information available at the United States Patent Office” and produced to Omega information relating to “over 65,000 irrelevant patents.” According to the court, the information Buergofol produced did not reflect prior art known to Buergofol. Nor was this information in Buergofol’s possession, custody, or control. The court determined that Omega incurred two types of prejudice from Buergofol’s noncompliance with the order. First, Omega was deprived of information relevant to its defenses and counterclaims. Second, Buergofol’s “document dump” imposed unnecessary burdens on defendant since it was forced “to spend considerable time (and thus, money) combing through largely unhelpful information with no way to navigate through it.” While imposing monetary sanctions on Buergofol and ordering it to comply with its prior ruling, the court refrained from imposing the more severe sanctions sought by Omega.

Harriman v. Smart, No. 1:22-CV-01883-SKC, 2024 WL 3900263 (D. Colo. Aug. 21, 2024). In this breach-of-contract dispute arising from plaintiff’s purchase of defendant’s shares in a certain company (411 Flash), the court denied plaintiffs’ motion for spoliation sanctions. Plaintiffs asserted that defendant failed to take reasonable steps to preserve relevant emails from 411 Flash after the parties entered into a stock purchase agreement (“SPA”). In particular, plaintiffs argued that defendant maintained “complete and sole control of [411 Flash’s] email domain and email [service]” after the parties executed the SPA, and defendant’s failure to transfer control to plaintiffs over the email domain

(GoDaddy) and email service (Microsoft 365) accounts resulted in the loss of emails once the subscriptions for those accounts terminated. Defendant countered by arguing that plaintiffs had control over the GoDaddy and Microsoft 365 accounts once they entered into the SPA, and that it was their failure to take any action relative to the lapsed subscriptions that resulted in the loss of emails. The court found that both sides had possession, custody, or control over the emails in question, and that both were ultimately responsible for the data loss. The court observed that plaintiffs “acceded to the legal right to control the [GoDaddy and Microsoft 365] Accounts and the Company’s intellectual property” after the SPA closed. Accordingly, the court determined that plaintiffs, pursuant to Rule 34, “had the legal right to obtain the ESI on demand.” The court also faulted defendant for failing to provide plaintiffs with access to the GoDaddy and Microsoft 365 accounts after the SPA closed since he “retained the sole ability to obtain access” to the accounts. Because each party had a duty to preserve the emails at issue and neither took reasonable steps to do so, the court concluded that the parties were both at fault and denied plaintiffs’ motion.

Clark v. Council of Unit Owners of 100 Harborview Drive Condo. Ass’n, No. 8:20-CV-1325-LKG, 2024 WL 2155021 (D. Md. May 13, 2024). The court determined that defendant had control over its board members and ordered defendant to conduct searches of certain of the board members’ private email accounts in an effort to identify particular records plaintiffs requested. Defendant had argued that it did not have possession, custody, or control of its board members’ private email accounts, particularly where the board members were nonparties to the litigation. The court found this argument unpersuasive and indicated that “[s]everal courts have rejected Defendant’s position that it has no control over the private email accounts of its Board Members even if they may have been using them to discuss Board-related matters . . . [s]uch an approach would gut Rule 34 and make it way too easy for high-level executives to hide evidence.”

PRIVACY

Yellow Rose Prods., Inc. v. Pandora Media, LLC, No. 2:22-CV-809-MCS-MAR, 2024 WL 661162 (C.D. Cal. Jan. 24, 2024). *See* discussion under **Rule 34 Requests, Responses, and Productions**.

PRIVILEGE

Cook v. Meta Platforms, Inc., No. 22-CV-02485-AMO (TSH), 2024 WL 4133811 (N.D. Cal. Sept. 9, 2024). *See* discussion under **ESI Protocols**.

P.A. on behalf of A.A. v. Voitier, No. CV 23-2228, 2024 WL 3970546. (E.D. La. Aug. 28, 2024). *See* discussion under **Sedona Conference Publications**.

Deltondo v. The School District of Pittsburgh, No. 2:22-CV-00350, 2024 WL 3861036 (W.D. Pa. Aug. 19, 2024). In an omnibus discovery order, the court directed plaintiff to serve an amended privilege log that clarified the nature of the privilege that she was asserting over particular documents withheld from discovery. In several entries on her privilege log, plaintiff claimed that many documents were protected by “attorney-client privilege and/or work product.” In defending her position, plaintiff argued that many of the documents were both attorney-client privileged and work product. The court agreed that plaintiff could assert claims of privilege *and* work product over certain documents, but she could not claim documents as privileged “and/or” work product because she had to state the precise nature of the claim.

Linet Americas, Inc. v. Hill-Rom Holdings, Inc., No. 1:21-CV-6890, 2024 WL 3425795 (N.D. Ill. July 15, 2024). In this antitrust litigation, the court issued several discovery rulings on attorney-client privilege issues in response to defendants' motion to compel. Among other things, defendants sought an order compelling plaintiff to produce certain documents identified on its privilege log, given plaintiff's alleged spoliation of ESI and what defendants asserted was plaintiff's implied waiver of the privilege. In support of their position, defendants relied on a discovery order the court previously issued in this matter on December 1, 2023 (2023 WL 9119836) in which the court authorized "discovery on discovery" to allow defendants to ascertain when plaintiff reasonably anticipated litigation. The court disagreed with defendants' position and held that plaintiff had not impliedly waived the privilege. As an initial matter, the court construed its prior discovery order more narrowly than defendants, declaring the order authorized only limited "discovery on discovery" and did not expressly or impliedly require the production of privileged documents. Nor did defendants present any authority that would warrant "piercing the attorney client privilege" in this instance. Finally, the court rejected the notion that mere allegations of spoliation would result in an implied waiver of the privilege given that it had not made any finding of spoliation and defendants had yet to even formally seek such relief. In other rulings, the court held that plaintiff's metadata privilege log complied with the court-ordered ESI protocol and ordered the parties to further meet and confer regarding the adequacy of plaintiff's document descriptions. In addition, the court held that attachments to privileged communications merited protection from discovery even if the attachments were not privileged. In reaching this determination, the court examined competing authorities on this issue and found that designating the attachments as privileged was the better approach to prevent adversaries from being able to "reverse engineer" contents from the attachment to ascertain the nature of the privileged communication.

Fed. Trade Comm'n v. Amazon.com, Inc., No. 2:23-CV-01495-JHC, 2024 WL 3342701 (W.D. Wash. July 9, 2024). The court denied without prejudice plaintiffs' motion to compel defendant Amazon to produce its litigation hold notices corresponding to this antitrust proceeding. Although protected from discovery by the attorney-client privilege, plaintiffs sought production of the hold notices to demonstrate that Amazon spoliated relevant evidence. In particular, the FTC argued that a "preliminary showing of spoliation overcomes the protections against disclosure that may otherwise apply to document preservation notices . . . and attorney-client communications about litigation holds or spoliation." Amazon countered this argument by asserting that a Rule 30(b)(6) deposition would be an appropriate remedy and provide plaintiffs an opportunity to explore "document retention" issues short of requiring production of privileged hold notices. The court sided with Amazon and ordered the company to make a corporate representative available to testify on the following topics: "(1) when and to whom the litigation hold notices were given, (2) what kinds and categories of information and data [Amazon's] employees were instructed to preserve and collect, and (3) what specific actions they were instructed to take to that end." The court also signaled that it would entertain a renewed motion to compel the hold notices if plaintiffs did not obtain the information they sought from Amazon regarding the alleged spoliation of ESI.

United States ex rel. Omni Healthcare, Inc. v. MD Spine Sols. LLC, --- F. Supp. 3d ---, 2024 WL 2883365 (D. Mass. June 7, 2024). See discussion under **Federal Rule of Evidence 502**.

In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., No. 22-md-03047-YGR (PHK), 2024 WL 1808607 (N.D. Cal. Apr. 25, 2024). In this multidistrict litigation, the court ordered defendants to produce basic identifying information regarding the recipients of litigation holds, including the names of custodians at issue, their job titles, and the date(s) on which they received a hold notice. Defendants argued that they should not be ordered to disclose this information, asserting that it was both attorney

work product and “discovery on discovery.” The court rejected both of these assertions. Regarding defendants’ position on work product, the court determined that the basic identifying information plaintiffs sought was not work product and cited (among other authorities) *Doe LS 340 v. Uber Technologies, Inc.*, --- F.Supp.3d ---, 2024 WL 107929 (N.D. Cal. 2024) in support of its holding. Nor was the court persuaded that the requested information was outside the scope of discovery unless, as defendants had argued, “document preservation issues are in dispute.” Instead, the court reasoned that this information would have been disclosed in any event on a privilege log.

Cynosure, LLC v. Reveal Lasers LLC, No. 22-CV-11176-PBS, 2024 WL 1620951 (D. Mass. Apr. 15, 2024). See discussion under **Discovery Process**.

PROPORTIONALITY

Samsung Elecs. Co. v. Microchip Tech. Inc., No. 1:24-MC-00269 (GHW) (SDA), 2024 WL 3907250 (S.D.N.Y. Aug. 23, 2024). See discussion under **Nonparties**.

Cox v. Gray Media Grp., Inc., No. 5:22-CV-00290-KKC-MAS, 2024 WL 1403074 (E.D. Ky. Apr. 1, 2024), *aff’d*, 2024 WL 2412266 (E.D. Ky. May 23, 2024). In this Title VII litigation, the court affirmed a magistrate judge’s order directing defendant to produce responsive information regarding “68 COVID-19 vaccine-related accommodation requests” that the court found relevant and proportional. Plaintiffs sought the information to substantiate their claims that defendant refused to provide plaintiffs with accommodations from its Covid-19 restrictions. Defendant argued that the requested information was neither relevant nor proportional and sought a protective order to prevent discovery of the requested information. Defendant contended that it would be disproportionate to the needs of the case if it were obligated to produce anything more than a narrow subset of accommodation requests from employees who were similarly situated to plaintiffs. The magistrate judge rejected defendant’s protective order request. On the issue of proportionality, the magistrate judge found that the requested sample of 68 accommodation requests was sufficiently narrow (the grand total was 444) and not unduly burdensome, particularly since it would only result in the production of no more than three to four emails for each request or 200 to 300 additional documents. Nor had defendant shown that “it lacks the means or resources to produce additional documents related to these employees.” The magistrate judge additionally found unpersuasive defendant’s assertion that granting plaintiffs’ request would eventually lead to discovery on the 376 accommodation requests defendant denied (“to assuage [defendant’s] concerns . . . this Order should not be construed as a greenlight for such discovery.”). Finally, the magistrate judge noted the low production volume in the litigation (approximately 500 documents produced during the two years since plaintiffs filed their lawsuit) also weighed in favor of production. The court adopted the magistrate judge’s ruling and ordered defendant to make its production of responsive information accordingly.

Ni v. HSBC Bank USA, N.A., No. 23-CV-0309 (AS) (KHP), 2024 WL 863699 (S.D.N.Y. Feb. 29, 2024). In this putative wage-and-hour class action, the court granted plaintiff’s request for a metadata log “showing email, text, and direct message . . . activity for a sample of the putative class to evaluate whether employees worked through their lunch breaks and/or after their branch closed for the day.” The sample plaintiff sought included 93 personal bankers who had worked at 53 of defendant’s branch banks “during the last three months of each year of the sampled individual’s employment.” The 93 individuals represented approximately 15% of the bankers in the proposed class, from around 25% of defendant’s branches, and would cover 25% of the total period (six years in total) encompassed by the class. Defendants argued that such a sample was disproportionate to the needs of the case and

proposed sharing metadata from only 49 personal bankers (8% of the proposed class) who worked at 24 branches (12% of the branches). Defendants also asserted that the sample only needed to include “sent” metadata from the proposed class members rather than all email metadata. The court rejected defendants’ positions and determined that plaintiff’s proposed sample was reasonable and proportional under the circumstances. It reasoned that defendant would not be obligated to review the contents of the communications at issue. In addition, the sought-after sample was “relatively modest” in that it did not encompass all of the proposed class, nor did it span the entire six-year statute of limitations period. Moreover, defendant did not submit time or cost estimates to substantiate any undue burden arguments. Finally, the court concluded that defendants must produce emails that were sent and received by the proposed class. While finding the requested sample reasonable and proportional in this instance, the court indicated that it would not become the “default” sample for subsequent discovery requests. The court opined that using the same sample size for other discovery such as email searches or depositions might be more burdensome and not be proportional to the needs of the case.

REASONABLE INQUIRY

Donofrio v. Ikea US Retail, LLC, No. CV 18-599, 2024 WL 1998094 (E.D. Pa. May 6, 2024). *See* discussion under **Ethics, Litigation Holds & Preservation, Sanctions—Other FRCP Provisions, and Sanctions—Rule 37(e)**.

RULE 34 REQUESTS, RESPONSES, AND PRODUCTIONS

Buergofol GMBH v. Omega Liner Co., Inc., No. 4:22-CV-04112-KES, 2024 WL 4068648 (D.S.D. Sept. 5, 2024). *See* discussion under **Possession, Custody, or Control**.

Bah v. Sampson Bladen Oil Co., Inc. d/b/a Han-Dee Hugo’s, No. 5:23-CV-00330, 2024 WL 3678337 (E.D.N.C. Aug. 5, 2024). In this single plaintiff employment discrimination case, the court denied plaintiff’s motion to compel defendant to produce additional metadata with its ESI production. In her motion, plaintiff argued that defendant—while producing some metadata fields with its mostly TIFF production of ESI—did not include enough metadata to allow her to “easily sort, search, and process the production.” Plaintiff, who received a “handful” of native format documents, also argued that she was entitled to obtain the entire production in native format pursuant to Rule 34. The court rejected plaintiff’s arguments and held that defendant’s production included enough metadata to ensure it was text-searchable and accordingly reasonably usable under Rule 34. The court dismissed plaintiff’s concerns about missing metadata fields, deeming them inaccurate (plaintiff’s ESI vendor contradicted several of plaintiff’s representations regarding her inability to search defendant’s ESI production), unsubstantiated (“counsel claims that the lack of file extension metadata . . . impedes her eDiscovery software from functioning . . . she conceded that she can view the documents on her eDiscovery platform”), or lacking merit (“And it is also unclear to what extent this additional metadata would streamline Bah’s ability to review the documents.”). *See* discussion under **ESI Protocols** and **Ethics**.

In re Insulin Pricing Litig., No. 2:23-md-03080 (BRM) (RLS), 2024 WL 2808083 (D.N.J. May 28, 2024). The parties in this multidistrict litigation submitted for the court’s determination various competing provisions for inclusion in a court-ordered ESI protocol, including a dispute between the parties over relevance redactions. Defendants sought to include a provision that would have provided them with broad latitude to redact “non-responsive, irrelevant material” from several categories of documents. In response, plaintiffs argued that any type of redaction outside of attorney-client privileged

communications or work product would be inappropriate. Ultimately, the court did not allow defendants to redact irrelevant information based on issues of “sensitivity and confidentiality” and found that a protective order would generally safeguard such information from disclosure. However, the court permitted defendants to redact the identities of certain employees given the “specific and particularized” showing of harm they advanced. Regarding other ESI protocol disputes, the court agreed with plaintiffs that email suppression was not appropriate and, citing *In re Actos Antitrust Litig.*, 340 F.R.D. 549 (S.D.N.Y. 2022), ordered defendants to produce lesser included emails in connection with email productions. The court also ruled that the scope of discoverable information provided for in the ESI protocol need only be “responsive” rather than “relevant or responsive.” Plaintiffs argued that the court should instead adopt the latter expression, but the court reasoned that this wording could be problematic since the Federal Rules of Civil Procedure provide for the discovery of relevant information that is both nonprivileged and proportional to the needs of the case: “Including language in the ESI Protocol that could be read to impose added obligations as to all potentially ‘relevant’ material runs the risk of injecting confusion and potentially more disputes over what is ‘relevant’ for purposes of searching, culling, and producing ESI.” *See* discussion under **ESI Protocols**.

Boone v. Allpro Parking, LLC, No. 22-CV-0862V(SR), 2024 WL 1973822 (W.D.N.Y. May 3, 2024). In an omnibus discovery order, the court ordered defendants to run plaintiff’s search terms against their identified custodians’ data and produce responsive documents. However, the court declined to order a corresponding production of metadata, citing Local Rule of Civil Procedure 26(e)(4), since plaintiff had apparently neglected to make a “proffer of good cause.” Local Rule 26(e)(4) provides that “Except as otherwise provided, metadata, especially substantive metadata, need not be routinely produced, except upon agreement of the requesting and producing litigants, or upon a showing of good cause in a motion filed by the requesting party.”

Wolt v. Embankscape Equip., LLC, No. 4:22-CV-2503, 2024 WL 1096563 (S.D. Tex. Mar. 13, 2024). In this products liability lawsuit regarding a remote-controlled lawnmower, the court overruled several objections from two defendants (Kar-Tech) to plaintiffs’ discovery requests. First, the court overruled certain “rote and non-specific objections” to plaintiffs’ discovery requests. Next, the court found that Kar-Tech’s responses to plaintiffs’ requests were unclear due to its representation that “it was producing *some* documents ‘subject to’ its objections” (emphasis in original). The court expressed concern with Kar-Tech’s approach, opining that this type of response “injects further confusion as to whether [documents] were withheld because of an asserted objection.” Finally, the court rejected Kar-Tech’s objections that documents regarding the remote-control system design of the lawnmower at issue were trade secrets and “vulnerable to inadvertent disclosure or acquisition by ‘some sort of espionage or hacking.’” As the court explained, “the mere status of information as confidential, proprietary, or a trade secret does not entitle Kar-Tech to withhold it from discovery.” Instead, the court directed the parties to enter into a confidentiality stipulation and protective order to properly safeguard discoverable information.

Ni v. HSBC Bank USA, N.A., No. 23-CV-0309 (AS) (KHP), 2024 WL 863699 (S.D.N.Y. Feb. 29, 2024). *See* discussion under **Proportionality**.

In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., No. 22-MD-03047-YGR (PHK), 2024 WL 1786293 (N.D. Cal. Feb. 20, 2024). In this multidistrict litigation involving various product liability claims against social media companies, the court resolved several disputed proposed provisions for the parties’ ESI protocol, including whether responding parties should be allowed to use email threading to produce only the most inclusive messages in email threads. As the court observed, the

parties' competing proposals agreed that responding parties could limit its production to the most inclusive email messages, and that they were under no obligation to produce lesser inclusive emails. The parties also stipulated that responding parties would produce "lesser inclusive copies of a Last In Time Email or other earlier chains of emails otherwise excluded by email thread suppression" in response to reasonable requests. Where the parties disagreed was whether responding parties were obligated to disclose additional details regarding email threading such as whether a "thread member contains any additional or altered data that is not contained in the most-inclusive email (including, without limitation, attachments or BCC recipients)." Plaintiffs sought disclosure of this information to ameliorate the harm that could arise if email threading were "misused in some unknown way to remove otherwise responsive, substantive, and presumably non-privileged emails from document productions." Defendants argued against inclusion of plaintiffs' proposed language, suggesting that their threading technologies could not support plaintiffs' request and asserting that it would expose defendants to technical violations of the ESI protocol. The court found that the parties had not sufficiently met or conferred on this topic and directed that the ESI protocol include appropriate provisions to address plaintiffs' concerns once the parties reached a corresponding agreement on this issue. *See* discussion under **ESI Protocols** and **Search**.

Yellow Rose Prods., Inc. v. Pandora Media, LLC, No. 2:22-CV-809-MCS-MAR, 2024 WL 661162 (C.D. Cal. Jan. 24, 2024). The court rejected plaintiffs' unilateral relevance redactions and ordered plaintiffs to produce responsive documents without redactions where plaintiffs had excised solely irrelevant content. The court reiterated the general rule adopted by courts in the U.S. Court of Appeals for the Ninth Circuit against relevance redactions and opined that it "is a rare document that contains only relevant information; and irrelevant information within an otherwise relevant document may provide context necessary to understand the relevant information." The court also emphasized that unilateral relevance redactions "breed suspicion" among litigation adversaries and inevitably lead to motion practice, which contravenes the purposes of Rule 1. In addition, the court spotlighted the existence of a protective order, which should reduce the risk of disclosing irrelevant information beyond the litigation. Finally, the court indicated that while plaintiffs could redact certain information such as social security numbers and other "sensitive identifying information" for parties and nonparties alike, they must produce a "log of these redactions that identifies [the particular nonparties] and what type of private information that was redacted."

Shintech Inc. v. Olin Corp., No. 3:23-CV-00112, 2023 WL 6807006 (S.D. Tex. Oct. 16, 2023). The court criticized both parties in the portion of its discovery order relating to defendant Olin Corporation's (Olin) motion to strike plaintiff's objections to two document requests. While noting that the requests at issue were both "simple and straightforward," the court criticized Olin for including six pages of definitions and instructions accompanying those two requests. In doing so, the court observed that many of the defined terms were not included in either of the documents requests Olin served. In addition, the court noted that certain instructions were "nonsensical" (asking for the estimated location of an unknown document) and "gibberish" (attempting to define the words "any" and "all" to be "construed either broadly or narrowly, as necessary, to expand the scope of the discovery request"). Turning the focus to plaintiff's objections, the court condemned plaintiff's use of general and boilerplate objections. The court explained that plaintiff interposed privilege objections in response to both document requests even though they did not seek privileged documents. The court disapproved of plaintiff's use of the following objection in its responses, expressing its inability to grasp the purpose for this wording:

[Plaintiff]’s] responses are made pursuant to, and as limited by, the Federal Rules of Civil Procedure and the Local Rules. The responses and objections here are based upon information available at this time within its possession, custody, and control and upon such investigation as was reasonable for [Plaintiff] to undertake.

Citing *Smash Tech., LLC v. Smash Sols., LLC*, 335 F.R.D. 438, 447 (D. Utah 2020) and several other cases that reject general and boilerplate objections (“The idea that boilerplate in some talismanic way preserves an objection is fallacy. It has been fairly styled an ‘urban legend.’”), the court granted Olin’s motion and struck all of plaintiff’s general objections. *See* discussion under **Cooperation**.

SANCTIONS—OTHER FRCP PROVISIONS

Domus BWW Funding, LLC v. Arch Ins. Co., No. 2:23-CV-00094-JDW, 2024 WL 3761737 (E.D. Pa. Aug. 12, 2024). In this litigation involving disputes over insurance coverage, the court declined to impose sanctions under Rule 37(a)(5)(A), Rule 37(b)(2), or Rule 37(c)(1) against defendant Arch Insurance Company (“Arch”) despite its failure to timely produce relevant ESI. While Arch’s disclosure of ESI from a certain custodian (Miller) was late and forced plaintiffs to reopen her deposition and supplement expert reports, the court found that discovery relief under Rule 37(c)(1) was not appropriate given the lack of prejudice plaintiffs suffered (“Certainly, there was some added cost to the meet-and-confers, and maybe a little additional ramp up for the reopened deposition, but on balance, I conclude that [plaintiffs]’ decision to press forward on [their] own, with [their] own remedies for [defendant’s] misconduct, makes a later request for relief inequitable.”). Nor were monetary sanctions appropriate under Rule 37(a)(5)(A) since plaintiffs had not filed a motion to compel. Moreover, Rule 37(b)(2) afforded plaintiffs no remedy since Arch’s untimely disclosure of ESI—while breaching the parties’ ESI stipulation—did not violate a court order. The court did impose sanctions against Arch under Rule 37(e)(1) for failing to preserve relevant ESI from a different custodian. *See* discussion under **Ethics** and **Sanctions—Rule 37(e)(1)**.

In re StubHub Refund Litig., No. 20-MD-02951-HSG (TSH), 2024 WL 2305604 (N.D. Cal. May 20, 2024). In connection with its disposition modifying the previously issued ESI order regarding family productions (*see* discussion under **ESI Protocols**), the court denied plaintiffs’ motion for sanctions against defendant and its counsel arising from their alleged noncompliance with the ESI order. Plaintiffs had sought sanctions pursuant to Rule 37(b)(2)(A) (for violating three different court orders), the court’s inherent authority (for bad-faith and vexatious discovery practices), and Rule 26(g)(3) (for serving “unreasonable” discovery responses). In each instance, the court found that sanctions were not warranted. Regarding alleged violations of its orders, the court held (among other things) that it would not be “just” under Rule 37(b)(2)(A) to impose sanctions on defendant for not complying with the ESI order’s family production requirement where the court determined that it “was in most cases impossible to comply with” and defendant’s noncompliance was “substantially justified.” While criticizing defendant for its “foolish decision to stipulate to the hyperlink requirement in the first place,” the court observed that “Rule 37(b)(2) does not authorize sanctions for improvidently stipulating to a Court order.” On the issue of inherent authority, the court found that defendant’s discovery conduct in connection with the ESI order’s family production requirement was, at worst, negligent and fell short of the standard (bad faith) required for the issuance of sanctions. Regarding Rule 26(g)(3) sanctions, the court held that defendant’s responses did not run afoul of the applicable provision found in Rule 26(g)(1)(B) requiring that responses be “consistent with these rules and warranted by existing law,” “not interposed for any improper purpose,” and “neither unreasonable nor unduly burdensome or expensive.”

Halo Unlimited v. Anthem Blue Cross Life & Health Ins. Co., No. SA CV20-00399-JAK (KESX), 2024 WL 3009319 (C.D. Cal. May 8, 2024). The court rejected plaintiff's objections to a magistrate judge's order imposing cost-shifting in this insurance coverage dispute after plaintiff failed to comply with various discovery obligations. The order at issue directed that plaintiff provide defendants with access to its Microsoft 365 cloud environment to allow defendants to conduct searches "using designated custodian restrictions, date filters and search terms." In addition, the order delineated the process by which responsive documents were to be collected from plaintiff and then reviewed. Finally, the magistrate judge provided that defendants could seek "reasonable costs" to reimburse them for their collection and review expenses. The court affirmed all aspects of the magistrate judge disposition, finding that the order was reasonably related to a prior magistrate judge ruling providing for the discovery of the information defendants previously requested from plaintiff. Nor was the court persuaded that plaintiff would not be able to afford to cover the cost-shifting. As the court reasoned, the order provided that plaintiff cover only reasonable expenses arising from the discovery exercise, and the issue of cost-shifting only arose "in response to Plaintiff's failure to comply with multiple orders relating to discovery."

Donofrio v. Ikea US Retail, LLC, No. CV 18-599, 2024 WL 1998094 (E.D. Pa. May 6, 2024). In this ADEA class action, the court imposed sanctions against defendant (IKEA) after it failed to produce responsive ESI in compliance with a discovery order from May 2022. The discovery order at issue required IKEA to produce relevant communications from "13 'key players' in retail management, human resources, recruiting and diversity roles; 18 custodians that represented a cross section of Human Resources and Recruiting Staff; and a cross section of store managers" by December 31, 2022. In connection with IKEA's efforts to recover lost emails from four key custodians (*see* discussion under **Ethics, Litigation Holds & Preservation**, and **Sanctions—Rule 37(e)**), IKEA produced 830 additional documents on December 12, 2023. The court determined that approximately 200 of those 830 documents should have been produced a year earlier in response to the court's discovery order since they originated from several custodians encompassed by that order. That was not immediately apparent, however, from the documents themselves since IKEA—through its electronic discovery vendor—had manually modified their metadata to conceal the identities of the custodians from whom the documents originated. This misconduct was particularly concerning since some of the 200 or so documents at issue concerned "IKEA's age-based personnel goals" and were "smoking gun documents." Given the tardy production of these documents, the material nature of their content, and the efforts IKEA undertook to mask the identities of the custodians from which many of these documents originated, the court concluded that IKEA's noncompliance with its discovery order was both willful and in bad faith. The court imposed sanctions pursuant to Rule 37(b)(2)(A)(i), deeming the following facts established for purposes of the litigation: "It is established for purposes of second stage certification that IKEA had in place a common employer practice, or standard operating procedure, to which its U.S. retail employees were subject, of favoring younger employees for leadership development and management level positions." The court also issued a monetary sanctions award collectively under Rule 37(b)(2)(C) and Rule 37(e)(1) in the amount of \$566,731.54 (2024 WL 3511614 (E.D. Pa. July 23, 2024)).

Treminio v. Crowley Mar. Corp., No. 3:22-CV-00174-CRK, 2024 WL 1075433 (M.D. Fla. Mar. 12, 2024). In this action involving claims for sex trafficking and forced labor, the court imposed sanctions against plaintiff pursuant to Rule 37(c)(1) after concluding that plaintiff failed both to disclose to defendant, and to supplement its discovery responses to include, the existence of relevant communications and the identities of witnesses with relevant information. In addition, the court imposed sanctions on

plaintiff in accordance with Rule 37(e)(1) for failing to preserve relevant Facebook messages. *See* discussion under **Sanctions—Rule 37(e)**. Regarding the failure to disclose and supplement, the court observed that plaintiff had an affirmative obligation under Rule 26(a) to disclose the existence of former employees of defendant with whom she communicated and who had knowledge of her claims against defendant in the instant litigation. In response to plaintiff’s assertion that she did not recall the existence of certain communications and that others were irrelevant, the court held that such information should have been disclosed in any event in response to an interrogatory that sought identification of communications between plaintiff and defendant’s current or former employees. Neglecting to disclose the identities of the witnesses and the existence of the communications and then failing to supplement her initial disclosures and discovery responses violated Rule 37(c)(1). Finally, in awarding sanctions (which included attorney’s fees) against plaintiff, the court observed that plaintiff’s actions were not an “honest mistake,” as she characterized them, nor substantially justified. The court listed instances where plaintiff constructively knew that her discovery responses needed supplementing, such as when she “reviewed the Facebook data for confidentiality concerns.” Given these circumstances, the court concluded that “[u]nder no definition could Plaintiff’s conduct be considered harmless. Her failure to update her disclosures after the Facebook dispute and the confidentiality designations cannot be considered a mistake.”

SANCTIONS—RULE 37(e)

Doe v. Charlotte Mecklenburg Bd. of Educ., No. 23-1182, 2024 WL 3565522 (4th Cir. July 29, 2024). The U.S. Court of Appeals for the Fourth Circuit affirmed a district court order denying appellant’s motion in limine that sought an adverse inference instruction against defendants for failing to preserve relevant video footage. Appellant argued that the spoliated video footage would have shown the kidnapping—and the failure of defendants’ “school resource officer” to intervene—and that the district court should have issued an adverse inference instruction at trial against defendants. The Fourth Circuit held that the district court did not abuse its discretion in denying appellant’s motion since the evidence reflected that the footage was destroyed negligently and not with any intent to deprive pursuant to Rule 37(e)(2). In particular, the Fourth Circuit observed that the footage was destroyed by the routine operation of the video recording system—“the system erased video recordings after about two weeks”—and that “the record reveals no more than mere negligence in the failure to preserve the footage.” Citing to the 2015 advisory committee note to Rule 37(e), the Fourth Circuit concluded as follows: “Mindful that courts ‘should exercise caution’ in giving an adverse inference instruction under Rule 37(e)(2)(B), and in light of the district court’s ‘broad discretion’ in this regard, we hold that the district court did not abuse its discretion when it denied [appellant’s] request for an adverse inference instruction.”

Harriman v. Smart, No. 1:22-CV-01883-SKC, 2024 WL 3900263 (D. Colo. Aug. 21, 2024). *See* discussion under **Possession, Custody, or Control**.

Domus BWW Funding, LLC v. Arch Ins. Co., No. 2:23-CV-00094-JDW, 2024 WL 3761737 (E.D. Pa. Aug. 12, 2024). In this litigation involving disputes over insurance coverage, the court imposed sanctions under Rule 37(e)(1) against defendant Arch Insurance (“Arch”) for failing to preserve relevant emails from one of its custodians (McGowan). The court noted that Arch took affirmative steps at the outset of the litigation to preserve the emails at issue, including issuing a litigation hold to McGowan and then preserving his emails. The emails in question were nevertheless lost when Arch subsequently undertook a data migration and placed an “incorrect tag” on McGowan’s emails, leading to their elimination. Arch argued the loss of McGowan’s emails was “accidental” and should not result

in sanctions. The court disagreed, finding instead that Arch was “dismissive of the need to collect and review ESI,” unreasonably delaying the collection and production of relevant ESI until after McGowan’s emails were eliminated. The court also dismissed Arch’s assertion that it identified all of McGowan’s missing emails by “searching other custodians at Arch with whom Mr. McGowan communicated.” The court reasoned that McGowan may have corresponded with other Arch employees whose emails “were also destroyed, or . . . he corresponded with individuals not within the scope of Arch’s search.” The court did not find evidence of intent to deprive by Arch. As the court observed, there was no evidence of selective deletion, and “the destruction appears to have been the result of operator error during a standard procedure for system migration.” To remedy the prejudice plaintiffs suffered by being deprived of McGowan’s emails, the court indicated that it would allow plaintiffs to “introduce evidence of Arch’s failure to preserve Mr. McGowan’s emails, and . . . craft appropriate jury instructions at the time of trial to ensure that this sanction does not collapse into the adverse inferences available only under Rule 37(e)(2).” *See* discussion under **Sanctions—Other Provisions and Ethics**.

United States v. Google LLC, --- F. Supp. 3d ---, 2024 WL 3647498 (D.D.C. 2024). The court declined to order sanctions under Rule 37(e) against defendant (Google) after concluding that the sanction the government requested—an adverse inference—would not change the court’s determinations on the government’s antitrust claims. While not ordering sanctions, the court indicated in dicta that its order “should not be understood as condoning Google’s failure to preserve chat evidence.” Instead, the court opined that “any company that puts the onus on its employees to identify and preserve relevant evidence does so at its own peril” and suggested that Google was lucky to have “avoided sanctions in this case.”

Pable v. Chicago Transit Authority, No. 19 CV 7868, 2024 WL 3688708 (N.D. Ill. Aug. 7, 2024). In this whistleblower action brought by a former Chicago Transit Authority (“CTA”) employee, the court adopted a report and recommendation from the magistrate judge and dismissed plaintiff’s lawsuit pursuant to Rule 37(e)(2) as a discovery sanction for spoliating relevant text messages and other ESI on his mobile phone. Regarding the text message spoliation, the court agreed with the magistrate judge who found that plaintiff failed to take reasonable steps to preserve two categories of relevant messages he exchanged with his supervisor (Haynes) over the encrypted and ephemeral messaging application Signal. Regarding the first category of messages (which were exchanged prior to plaintiff’s and Haynes’s departures from CTA), the court held that plaintiff both failed to take reasonable steps to keep those communications and deleted them “with the intent to hide adverse information.” That the deletion of those messages was intentional and calculated to deprive CTA of relevant evidence was evinced by “plaintiff’s explanations for the deletion of these messages [which were] not credible.” After first blaming the deletion of those messages on Haynes (which Signal’s chief operating officer refuted in sworn written testimony), plaintiff then attributed the deletion to his decision to configure Signal to only retain the last 50 messages he exchanged. Citing *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 979 (N.D. Ill. 2021), the court determined that plaintiff “failed to take the reasonable [step] of turning off the fifty-message cap on his Signal messages following his duty to preserve.” The court next concluded 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, which “resulted in the irrevocable loss of Signal messages between him and Haynes.” Although the evidence did not suggest plaintiff eliminated the messages with an intent to deprive, the court did find that their elimination prejudiced CTA. Finally, the court held that plaintiff failed to take reasonable steps to preserve relevant evidence on plaintiff’s phone. While plaintiff’s counsel

represented that “a complete forensic image” of plaintiff’s phone had been made, the court, on the contrary, found that the forensic expert plaintiff’s counsel engaged did not make a forensic image and that counsel had instructed the expert to only preserve a limited amount of information based on a “particular date range and within and/or with certain key words.” While CTA later obtained a forensic image of plaintiff’s phone, relevant Signal messages and other ESI had long since been eliminated. The misrepresentations by plaintiff’s lawyer and his subsequent failure to correct them established that this third category of relevant ESI was likewise eliminated with an intent to deprive. In addition to terminating sanctions, the court adopted the magistrate judge’s recommendation that it award reasonable attorney’s fees and costs in favor of CTA and against plaintiff under Rule 37(e)(1). In so doing, the court rejected plaintiff’s argument that Rule 37(e) does not expressly authorize the issuance of attorney’s fees and costs. Citing the 2015 advisory committee note, the court reasoned that Rule 37(e) provides courts with broad discretion to devise a sanction “no greater than necessary to cure the prejudice,” and in this instance, the court concluded “a monetary sanction is warranted given the financial prejudice that CTA has suffered.” The court ordered plaintiff and his attorney to pay “\$75,175.42, split equally between them, as an award for CTA’s motion for Rule 37(e) sanctions.” Finally, the court adopted the magistrate judge’s recommendation and sanctioned plaintiff’s counsel under 28 U.S.C. § 1927 regarding his misrepresentations and ensuing actions that resulted in the spoliation of relevant data from plaintiff’s phone: “The court determines that [counsel] engaged in ‘conduct that a reasonably careful attorney would know to be unsound’ by making a series of misrepresentations to CTA and the court, and by failing to correct the record.” The court ordered plaintiff’s lawyer to pay \$53,388.00, along with an additional \$21,367.00 pursuant to Rule 37(a)(5)(A) arising from a motion to compel imaging of plaintiff’s phone the court previously granted.

Kellar v. Union Pacific Railroad Co., No. CV 21-02045, 2024 WL 3818535 (E.D. La. July 26, 2024). *See* discussion under **Ethics** and **Nontraditional Sources of ESI**.

Two Canoes LLC v. Addian Inc., No. 2:21-cv-19729-SDW-JRA, 2024 WL 2939178 (D.N.J. Apr. 30, 2024), *report and recommendation adopted*, 2024 WL 3470851 (D.N.J. July 19, 2024). The court accepted the magistrate judge’s report and recommendation that Rule 37(e) sanctions should be imposed on defendant (Addian) for failing to preserve relevant WeChat messages. In this matter involving the sale of “allegedly counterfeited 3M N-95 masks,” the court found that Addian should have preserved a modest number of WeChat messages that Addian’s principal (Wolworth) exchanged with his supplier (Fisher) of N-95 masks in China. Those messages were lost when Wolworth dropped his phone and then left it at store to be “recycled” without taking action to keep the WeChat messages at issue. The fact that Wolworth failed to affirmatively preserve the messages and then neglected to ensure the messages were backed up to the cloud (“Wolworth claims that he ‘understood that [his] phone was automatically regularly backing up to [his] Google Account’ . . . Nothing in the record shows what, if anything, he did to ensure that the Google Account was in fact preserving his WeChat messages”) established that Addian failed to take reasonable steps to preserve the messages in question. Nevertheless, the magistrate judge indicated that plaintiff suffered little if any prejudice from not having access to the deleted messages. Wolworth and Fisher generally communicated by voice call, most of the deleted WeChat messages were exchanged prior to the duty to preserve attaching, and Addian produced other ESI, including emails and text messages. All of this led the magistrate judge to recommend—and the court to agree—that the consideration of any sanction be delayed until the time of trial. The magistrate judge reasoned that the court would be better situated to examine the evidence supporting plaintiff’s claims at that time and “determine what [if anything] the missing WeChat messages could plausibly establish.” Neither the magistrate judge nor the court found evidence supporting an intent to deprive that would merit the issuance of severe sanctions under Rule

37(e)(2). The magistrate judge held the nature and extent of Addian’s remediation efforts (issuing a litigation hold, trying to back up data to the cloud, hiring a forensic expert, and producing other ESI) militated against a finding of intentional loss or destruction. And yet, the magistrate judge reasoned that the court or the jury should be given the opportunity to weigh Wolworth’s credibility “because the issue of intent is one that might hinge on credibility.” The magistrate judge then suggested the court follow the procedure delineated in the 2015 advisory committee note to Rule 37(e), which allows for the jury to determine the issue of intent. The court adopted these recommendations, opining that “it would become clearer to what extent Plaintiff would be prejudiced by the lost data and whether any prejudice can be cured by an adverse inference charge given at the end of the trial.” *See* discussion under **Litigation Holds & Preservation** and **Text Messages & Ephemeral Messages**.

Donofrio v. Ikea US Retail, LLC, No. CV 18-599, 2024 WL 1998094 (E.D. Pa. May 6, 2024). In this ADEA class action, the court imposed sanctions against defendant (IKEA) for failing to preserve relevant emails from four key custodians and failing to produce responsive ESI in compliance with a discovery order. Regarding its preservation failure, the court found (among other things) that IKEA neglected to take reasonable steps to keep those messages. While IKEA’s outside and in-house counsel directed the issuance of a litigation hold on the Microsoft 365 mailbox accounts for the custodians at issue, IKEA personnel neglected—either through “human error” or a “miscommunication”—to do so. Moreover, the court observed that neither in-house nor outside counsel took follow-up steps to ensure that the hold had been implemented. The failure to do so resulted in the destruction of relevant communications once those custodians left IKEA and their mailboxes were eliminated pursuant to IKEA’s policy of deleting employee emails within 30 days after departure from the company. In addition, IKEA did not come forward with evidence that could adequately replace the lost emails. While IKEA identified messages the custodians sent to other company employees, it could not retrieve emails the custodians exchanged just with each other. The court found that fact to be determinative on this issue, particularly since two of the custodians (Brody and Ixtabalan) communicated about IKEA’s “implementation of age-based personnel goals” and diversity, equity, and inclusion topics. While IKEA’s preservation failings were “grossly negligent” and justified the issuance of Rule 37(e)(1) curative measures, the court did not identify evidence confirming IKEA eliminated relevant communications with “an intent to deprive” under Rule 37(e)(2). To remediate the harm arising from the prejudice plaintiffs incurred, the court issued an award of monetary sanctions against IKEA in the amount of \$566,731.54 (2024 WL 3511614 (E.D. Pa. July 23, 2024)). *See* discussion under **Ethics, Litigation Holds & Preservation**, and **Sanctions—Other FRCP Provisions**.

Treminio v. Crowley Mar. Corp., No. 3:22-CV-00174-CRK, 2024 WL 1075433 (M.D. Fla. Mar. 12, 2024). In this action for relief under the Trafficking Victims Protection Reauthorization Act, the court imposed various sanctions against plaintiff pursuant to Rule 37(e)(1) after concluding that plaintiff deleted relevant Facebook messages. In addition, the court imposed sanctions on plaintiff in accordance with Rule 37(c)(1) for failing to disclose relevant Facebook data and the identities of witnesses. *See* discussion under **Sanctions—Other FRCP Provisions**. Regarding the deleted Facebook messages, the court determined that defendant established the prefatory elements of Rule 37(e). In particular, the court found that plaintiff deleted the messages at issue after the duty to preserve attached and with an understanding of their pertinence to the litigation she would pursue against defendant: “Plaintiff states two messages before the deletions that ‘[i]f I win the lawsuit, I will donate a part to an organization for abused women’ . . . Not only did Plaintiff anticipate the lawsuit, but the messages themselves reveal that Plaintiff understood her communications would be relevant to that lawsuit.” Plaintiff additionally conceded that the messages were lost due to her “negligent oversight,” which confirmed that plaintiff failed to take reasonable steps to preserve the Facebook

messages. After omitting any discussion of replacement evidence, the court found there was no evidence to suggest plaintiff eliminated the messages in question in bad faith, which (relying on *Skanska v. U.S.A. Civil Southeast, Inc. v. Bagelheads, Inc.*, 75 F.4th 1290 (11th Cir. 2023)) was the standard for imposing severe sanctions under Rule 37(e)(2). However, defendant established that it had been prejudiced under Rule 37(e)(1). Because the extent of that prejudice was still unclear, the court ordered additional discovery geared toward determining the nature and extent of the harm defendant suffered by not having access to the deleted Facebook messages. The court ordered a forensic examination of any cell phones, computers, and tablets plaintiff used over a seven-year period, with plaintiff bearing the costs of the examination. In addition, the court permitted defendant to take additional depositions, including that of plaintiff, and issued an attorney's fees award in favor of defendant and against plaintiff. Finally, the court invited defendant to seek additional sanctions if, after completing additional discovery pursuant to the court's order, defendant deemed they were warranted.

McBride v. Moore, No. 2:23-cv-02904-RGK-JPR, 2024 WL 1136429 (C.D. Cal. Feb. 23, 2024). The court declined to issue Rule 37(e) sanctions against plaintiff in this employment discrimination and retaliation lawsuit. Defendants sought sanctions after asserting that plaintiff deleted comments to an Instagram post to purportedly "prevent their discovery in litigation." In addition, defendants argued that Rule 37(e) sanctions should also be imposed to remediate the harm from plaintiff's allegedly tardy production of certain Instagram metadata. The court declined to order any sanctions, finding that plaintiff deleted the Instagram comments at issue more than a year before the alleged discriminatory and retaliatory conduct was alleged to have begun: "Defendants offer no evidence to suggest Plaintiff deleted the comments while she knew or should have known the comments would be relevant to future litigation." In addition, the court determined that Rule 37(e) sanctions could not issue against plaintiff since she actually produced the metadata in question, and sanctions would only be appropriate if the ESI at issue were lost. Finally, the court concluded that defendants' motion was untimely on multiple grounds: They filed the motion after the close of discovery, and they "unreasonably waited" more than a month "after uncovering the facts that underlie the motion" before pursuing Rule 37(e) motion practice.

SEARCH

Edgar v. Teva A Pharmaceutical Industries, Ltd., No. 22-CV-2501-DDC-TJJ, 2024 WL 3677614 (D. Kan. Aug. 5, 2024). The court resolved a dispute over a provision regarding the use of technology-assisted review ("TAR") for the ESI protocol the parties negotiated and then entered that protocol as a separate order. While the parties agreed to "meet and confer to enter into a mutually agreeable TAR protocol," they disagreed about whether the party wishing to use TAR needed to advance some type of good-cause showing to do so. Plaintiffs suggested the following language to support their position that responding parties disclose why they need to use TAR: "If a producing Party intends to use TAR to cull documents for review and production after a good faith attempt to produce from the search term protocol, the producing party shall disclose the need for implementation of TAR." Defendants objected to that language, arguing that it would limit responding parties' use of TAR until "after the parties manually review and produce documents" identified through search terms. Defendants maintained that such a scenario would increase "the cost and time of document review, without a corresponding increase in accuracy." The parties also disagreed about whether a TAR protocol should be "cooperative and transparent," with plaintiffs seeking inclusion of such language while defendants objected to it as being both "ambiguous" and potentially compromising privileged information. While crediting both sides with raising "valid arguments," the court ultimately sided with plaintiffs and included their proposed provision in the ESI protocol, together with the "cooperative and

transparent” language they suggested. In particular, the court was convinced by the case law plaintiffs cited about the importance of transparency and cooperation in connection with the use of TAR. *See, e.g., In re Diisocyanates Antitrust Litig.*, No. MC 18-1001, 2021 WL 4295729, at *7 (W.D. Pa. Aug. 23, 2021), *report and recommendation adopted*, 2021 WL 4295719 (W.D. Pa. Sept. 21, 2021); *Youngevity Int’l, Corp. v. Smith*, No. 16-cv-00704-BTM(JLB), 2019 WL 1542300, at *12 (S.D. Cal. Apr. 9, 2019); *In re Valsartan, Losartan, & Irbesartan Prod. Liab. Litig.*, 337 F.R.D. 610, 622 (D.N.J. 2020). Nevertheless, the court expressed concern that “the cost-saving benefits of TAR may be significantly reduced if a party intending to use TAR is required to first conduct an extensive manual review and production of responsive ESI.” Given the lack of clarity regarding a responding party’s burden to satisfy the “good faith attempt” language plaintiffs proposed and the court adopted, the court indicated that a “‘reasonableness’ standard shall apply to the TAR provision requiring a ‘good faith attempt to produce from the search term protocol.’” *See* discussion under **Federal Rule of Evidence 502**.

Tremblay v. OpenAI, Inc., No. 23-CV-03223-AMO (RMI), 2024 WL 3638421 (N.D. Cal. July 31, 2024). The parties reached an impasse on multiple issues relating to search in connection with their negotiations over an ESI protocol. The first issue was “whether the [responding] Party should disclose its search terms before the review process (and whether input from the requesting party should be considered in determining search terms).” The court agreed with plaintiffs that the responding party must disclose its search terms to requesting parties but expressed concern regarding plaintiffs’ assertion that requesting parties “have input in determining search terms.” Because such a position “raises the specter of too many future delays and disputes over methodology and search term formulation,” the court denied this request from plaintiffs. Citing to *In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig.*, No. 22-MD-03047-YGR (PHK), 2024 WL 1786293 (N.D. Cal. Feb. 20, 2024), the court then inserted the following provision regarding search into the ESI protocol:

The Parties shall adopt reasonable and proportionate methodologies to identify, search, collect, cull, review, and produce ESI as required under applicable legal standards. The Parties recognize and agree that each Party may use one or more methodologies to identify, search, collect, cull, review, and produce responsive and non-privileged ESI, including the use of keyword search terms and/or the use of technology assisted review (“TAR”) as discussed further herein. The Parties further recognize that different data sets may implicate different methodologies to identify, search, collect, cull, review, and produce responsive and nonprivileged ESI. The Parties therefore agree to meet and confer in good faith regarding any potential disputes over their respective ESI productions.

Regarding other disputed provisions, the parties argued “whether recall or elusion is the appropriate evaluation method for validating the efficacy of a search” and “whether Plaintiffs’ proposal of 98% +/-2% or Defendants’ proposal of 95% +/-5% is the appropriate confidence metric for sampling.” Defendants argued that requesting parties should not allowed “to examine and evaluate the way the production was made or require collaboration in the review protocol and validation process” and substantiated this position by spotlighting the lack of a validation provision in “either of this District’s model ESI orders.” The court rejected defendants’ position “in part,” holding that responding parties must “disclose their evaluation method for validating the efficiency of searches as well as their method for identifying the confidence metric for their sampling.” For the ESI protocol, the court—again citing *In re Social Media*—directed responding parties to use “reasonable steps to validate [their] review process,” including “quality control measures to determine whether its production is missing relevant ESI or contains substantial amounts of irrelevant ESI.” The court also ordered responding parties to

disclose, in response to reasonable requests for details regarding validation, their “end-to-end recall” and be willing to meet and confer regarding other pertinent validation issues such as “the tool used and the parameters used to obtain or calculate the level of recall.” The court defined “end-to-end recall” as “the percentage of responsive Documents in the collection which were identified as responsive by that [responding] Party’s methodology.”

Ravin Crossbows, LLC v. Hunter’s Mfg. Co., Inc., No. 5:23-CV-598, 2024 WL 3253265 (N.D. Ohio July 1, 2024). In this patent infringement litigation, the court affirmed a magistrate judge’s ruling that found a particular document request plaintiff served was inappropriate given the overbreadth of its proposed search terms. In doing so, the court noted that the standard of review for examining the magistrate judge’s order was “clearly erroneous or contrary to law.” The court explained that its review for clear error was “limited,” and that it could not sustain plaintiff’s objections to the magistrate judge’s order on a mere difference of opinion: “A court may not overturn a ruling just because, if it were the original fact-finder, it would have decided the evidence differently. If there are two plausible views of a matter, then a decision cannot be ‘clearly erroneous.’” The “contrary to law” standard is even more limited, with the district court reviewing the order under a benchmark comparable to “abuse of discretion.” As the court observed, these standards are deferential and provide the magistrate judge with “broad discretion” to handle discovery disputes. With these standards in mind, the court found no error in the magistrate judge ruling. The court determined that plaintiff’s proposed search terms corresponding to the document request at issue were overly broad on their face since they were “not limited to a particular source, time, subject matter, or custodian.” In addition, the court expressed concern about the use of search terms given that they often result in both overinclusive and underinclusive search results. Citing *William A. Gross Const. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009), the court emphasized the importance of cooperation in the development of search terms and observed that in the instant dispute, “cooperation is non-existent.” The court observed that there was no evidence that “custodians worked together to identify appropriate terms or that any testing has been done to ensure [plaintiff’s] keywords would be effective search terms.”

In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., No. 22-MD-03047-YGR (PHK), 2024 WL 1786293 (N.D. Cal. Feb. 20, 2024). In this MDL, the court adjudicated several disputed provisions proposed for the parties’ ESI protocol, including the nature of a validation provision for ESI search methodologies. While agreeing that a party producing responsive information should undertake validation measures, the parties disagreed about the nature and extent of the information a responding party should disclose to requesting parties regarding their search methodologies. Among other things, plaintiffs sought disclosure of “end to end recall,” which they characterized as “the percentage of responsive Documents in the collection which were identified as responsive by Defendants’ methodology.” They also requested inclusion of a “reassessment” provision that arguably could require responding parties to redo their validation or search processes regardless of “issues of reasonableness and proportionality.” In response, defendants offered to divulge their validation methodology, but only upon a showing of good cause. The court resolved the dispute by requiring that a responding party validate its review process, i.e., use “quality control measures to determine whether its production is missing relevant ESI or contains substantial amounts of irrelevant ESI,” and then make changes to that process as needed. In response to reasonable requests for details regarding “validation method(s),” the court mandated that a responding party disclose its “end to end recall” metric. The court additionally ordered that any negotiation over validation procedures include “a reasonable discussion regarding the tool used and the parameters used to obtain or calculate the level of recall.” See discussion under **ESI Protocols** and **Rule 34 Requests, Responses, and Productions**.

SEDONA CONFERENCE PUBLICATIONS

P.A. on behalf of A.A. v. Voitier, No. CV 23-2228, 2024 WL 3970546. (E.D. La. Aug. 28, 2024). In an order determining various disputed issues over privileged information, the court cited the *Commentary on Privilege Logs*, 25 SEDONA CONF. J. 221 (2024) for the proposition that “[c]ategorical logs, meta data logs, and production of redacted documents in lieu of a privilege log may be appropriate, depending on the case and documents at issue.” The court also discussed the *Commentary*’s suggested treatment of redacted information in privileged documents, indicating that “where only the privileged portion of an email is redacted but other parts of the communication, along with the email sender, recipients, date, and subject, are visible, the redacting party may have provided sufficient information to establish the privilege invoked.”

Ravin Crossbows, LLC v. Hunter’s Mfg. Co., Inc., No. 5:23-CV-598, 2024 WL 3253265 (N.D. Ohio July 1, 2024). In its order affirming a magistrate judge’s ruling that plaintiff’s search terms were overly broad and its corresponding document request was therefore inappropriate, the court cited *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189 (2007) for the proposition that search terms often result in overinclusive and underinclusive search hits. *See* discussion under **Search**.

In re Insulin Pricing Litig., No. 2:23-md-03080 (BRM) (RLS), 2024 WL 2808083 (D.N.J. May 28, 2024). In connection with its determination regarding which of the parties’ competing provisions should be included in the ESI protocol order, the court cited several Sedona Conference publications, including *The Sedona Principles, Third Edition*, the *Cooperation Proclamation*, the *Database Principles*, and the *TAR Case Law Primer, Second Edition*, 24 SEDONA CONF. J. 1 (2023). *See* discussion under **ESI Protocols**.

In re Uber Techs., Inc., Passenger Sexual Assault Litig., No. 23-md-03084-CRB (LJC), 2024 WL 1772832 (N.D. Cal. Apr. 23, 2024). In its order directing that defendants include two additional metadata fields relating to family production issues involving hyperlinked documents and rejecting plaintiff’s request for a third such field, the court referenced *The Sedona Principles, Third Edition* for the proposition that “parties should not demand metadata fields for which they have no practical use, or which do not materially aid in the discovery process.” *See* discussion under **ESI Protocols**.

In re Uber Techs., Inc., Passenger Sexual Assault Litig., No. MDL 3084 CRB, 2024 WL 3491760 (N.D. Cal. Mar. 15, 2024). In its order resolving the parties’ disputes over proposed provisions for an ESI protocol, the court mentioned the *TAR Case Law Primer, Second Edition*, 24 SEDONA CONF. J. 1 (2023).

SOCIAL MEDIA

Webb v. United States, No. 19-CF-0391, 2024 WL 3448243 (D.C. July 18, 2024). *See* discussion under **Criminal Law**.

Dupraz v. Does 1-10, --- F. Supp. 3d ---, 2024 WL 1644227 (N.D. Cal. 2024). *See* discussion under **Nonparties**.

McBride v. Moore, No. 2:23-cv-02904-RGK-JPR, 2024 WL 1136429 (C.D. Cal. Feb. 23, 2024). *See* discussion under **Sanctions—Rule 37(e)**.

TEXT MESSAGES & EPHEMERAL MESSAGES

Pable v. Chicago Transit Authority, No. 19 CV 7868, 2024 WL 3688708 (N.D. Ill. Aug. 7, 2024). *See* discussion under **Sanctions—Rule 37(e)**.

Stokes v. New Jersey Manufacturers Ins. Co., No. CV 23-114, 2024 WL 3497884 (E.D. Pa. July 19, 2024). *See* discussion under **ESI Evidence**.

Two Canoes LLC v. Addian Inc., No. 2:21-cv-19729-SDW-JRA, 2024 WL 2939178 (D.N.J. Apr. 30, 2024), *report and recommendation adopted*, 2024 WL 3470851 (D.N.J. July 19, 2024). In connection with his report and recommendation regarding the disposition of plaintiff's Rule 37(e) sanctions motion relating to lost WeChat messages, the magistrate judge discussed various features of the WeChat messaging application. As an initial matter, the court characterized WeChat as an "ephemeral messaging application." The court did so apparently because WeChat does not maintain messages on its servers once 72 hours elapse after a user sends a message. Nor does WeChat keep other exchanged media such as images or videos on its servers more than 120 hours after they are shared. However, the court observed that WeChat users may retain their messages and media locally on their applications irrespective of WeChat's policies. In addition, WeChat users can back up message data or transfer it to a different device. The magistrate judge eventually determined that defendant failed to preserve relevant WeChat messages and recommended (among other things) that the court wait until trial before issuing an appropriate curative measure pursuant to Rule 37(e)(1). *See* discussion under **Litigation Holds & Sanctions—Rule 37(e)**.

Browne v. Waldo, No. 2:20-CV-196 JD, 2024 WL 726389 (N.D. Ind. Feb. 22, 2024). *See* discussion under **ESI Evidence**.

Peak v. Laborers Union Loc. No. 1, No. 19-CV-3351, 2024 WL 216698 (N.D. Ill. Jan. 19, 2024). *See* discussion under **ESI Evidence**.

WORKPLACE COLLABORATION TOOLS

Donofrio v. Ikea US Retail, LLC, No. CV 18-599, 2024 WL 1998094 (E.D. Pa. May 6, 2024). *See* discussion under **Sanctions—Rule 37(e)**.

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