

# Selected eDiscovery and ESI Case Law from 2022

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Philip J. Favro, ed.<sup>1</sup>

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<sup>1</sup> The editor wishes to recognize the following individuals for their contributions to this annotated bibliography of eDiscovery and ESI case law: Thomas Y. Allman, Suzanne Clark, Ross Gotler, the Honorable Iain Johnston, Seth Kreger, David Lumia, Eric Mandel, Gregg Parker, Meghan Podolny, the Honorable Andrew Peck (ret.), the Honorable Gene E.K. Pratter, and Kenneth J. Withers.

## COOPERATION

*Mercer v. Rovella*, No. 3:16-CV-329 (CSH), 2022 WL 1540447 (D. Conn. May 16, 2022). In this civil rights action in which the plaintiff sought to compel responses to his document requests and contention interrogatories, the court mostly granted the discovery relief that the plaintiff requested while admonishing the parties to engage in cooperative advocacy. In doing so, the court pointed to *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1 (2018) as spotlighting the “party driven” and cooperative nature of the discovery process.

*Deal Genius, LLC v. O2 Cool, LLC*, No. 21 C 2046, 2022 WL 874690 (N.D. Ill. Mar. 24, 2022). In this patent infringement litigation, the court expressed reservations about resolving the parties’ dispute over searches ostensibly designed to identify and eventually produce responsive emails. With the parties apparently not making sufficient progress on this issue— “[t]he attorneys in this case are, essentially, at square one”—the court declined to assist the parties with the development of appropriate search terms. Reasoning that such a task “is counsels’ job, not the court’s,” the court indicated that it “cannot—and ought not—take over the selection of search terms and conjunctive terms that might assist in locating pertinent documents.” Instead, the court directed the parties to further meet and confer on their search-term dispute in order to find an appropriate resolution to the email production issue.

## CROSS-BORDER DISCOVERY

*Arigna Tech. Ltd. v. Nissan Motor Co., Ltd.*, No. 22:2-cv-00126-JRG-RSP, 2022 WL 3020136 (E.D. Tex. July 29, 2022). See discussion under **Privacy and Data Protection**.

*ZF Auto. US, Inc. v. Luxshare, Ltd.*, 213 L. Ed. 2d 163, 142 S. Ct. 2078 (2022). Resolving a disagreement between the U.S. Courts of Appeal, the Supreme Court held in a consolidated pair of cases, *ZF Automotive US, Inc. v. Luxshare, Ltd.* and *AlixPartners, LLP v. The Fund for Protection of Investors’ Rights in Foreign States*, that while 28 U.S.C. § 1782 was adopted in part to encourage international judicial cooperation, that goal is not advanced by using the U.S. courts to assist in international private arbitration. The *ZF Automotive* case involved an automotive sales dispute under a contract providing that all disputes would be resolved under the rules of the German Institute of Arbitration, a private organization based in Berlin. The *AlixPartners* case was more complex, as it involved investor claims to be resolved pursuant to a bilateral investment treaty between Lithuania and Russia, under the arbitration rules of the United Nations Commission on International Trade Law. Despite the involvement of foreign nations and treaties, the Court held that within the meaning of the statute:

“Foreign tribunal” more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation. . . . Similarly, an “international tribunal” is best understood as one that involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes. So understood, a “foreign tribunal” is a tribunal imbued with governmental authority by one nation, and an “international tribunal” is a tribunal imbued with governmental authority by multiple nations.

Therefore, neither the private arbitration being conducted in Germany, nor the private arbitration being conducted pursuant to an international investment treaty, satisfied the statutory requirement that the proposed discovery be “for use in a proceeding in a foreign or international tribunal.”

*Kashef v. BNP Paribas S.A.*, No. 16-CV-3228(AKH)(JW), 2022 WL 1617489 (S.D.N.Y. May 23, 2022). This matter—in which the plaintiffs claim that the defendants allegedly facilitated the genocide in Sudan—involves discovery of documents that the defendants previously pseudonymized before producing them to the U.S. Department of Justice in connection with its criminal case against defendants. Plaintiffs sought to compel the defendants to de-pseudonymize those records, arguing that the pseudonymized information included witnesses—presently unknown to plaintiffs—who have information relevant to their claims. In response, the defendants argued that foreign laws including French Law and the European Union (“EU”) General Data Protection Law (“GDPR”), militated against de-pseudonymizing the documents at issue. Analyzing the issues under the U.S. Supreme Court’s decision in *Société Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987) decision, the court ruled in favor of defendants. As an initial matter, the court found that the plaintiffs’ discovery requests conflicted with the French Bank Secrecy Law (which safeguards certain information from disclosure including customer lists and related data), the French blocking statute (which limits pretrial civil discovery in France), and the GDPR (Article 49 imposes a “necessity” element beyond Rule 26(b)(1) relevance and proportionality). Next, the court determined that *Aerospatiale*’s comity analysis weighed against compelling the defendants to de-pseudonymize the requested documents. In particular, the court found that factor five—weighing the competing interests of the U.S. against those of the foreign countries—favored the defendants since the U.S. interest in addressing global genocide (while significant) was relatively low compared against “France and the European Union [which] have demonstrated a strong interest in data privacy, and concurrently have an interest in having their laws apply to banks operating within their borders.”

## DATABASES

*In re Blair*, No. 08-21-00167-CV, 2022 WL 3135357 (Tex. App. Aug. 5, 2022). In this action where the parties disputed whether the relators had paid the real parties in interest (“real parties”) proceeds from relators’ sale of water on a Texas ranch, the real parties sought discovery of certain accounting records that they argued would substantiate their claims of nonpayment. While agreeing to produce accounting files in native format from their relational database (the “WolfePak” database), the relators ended up producing those records in Excel because, they argued, the native format did not allow them to redact certain confidential and privileged information from the records. The Texas Court of Appeals found these concerns outweighed by several other considerations and affirmed a trial court order requiring a native file production of the accounting records. In particular, the appellate court found that the Excel production did not include links to supporting data. Citing expert testimony from the real parties, the court observed that the accounting records at issue were maintained in a “relational database,” which preserves “relationships or links between different types of data such as invoices and payments.” The court explained that the produced Excels “did not link the data in the same way” and thereby made the information more burdensome for the real parties to analyze and review. Moreover, the relators apparently modified several key files once when they converted them to Excel, and the court determined that “a search of the native files would reveal when and who made the changes.” Finally, the court found the relators’ confidentiality concerns unfounded, as the real parties represented that confidential information could be redacted from the native accounting records.

## ESI EVIDENCE

*Schnatter v. 247 Group, LLC*, No. 3:20-CV-00003-BJB-CHL, 2022 WL 2402658 (W.D. Ky. Mar. 14, 2022). *Schnatter* arises from the defendants' alleged wrongful interference with contractual relationships involving the plaintiff, the founder and former president of Papa John's Pizza. In *Schnatter*, the court imposed sanctions on the plaintiff for failing to preserve relevant text messages and other ESI from the various mobile phones he used during the relevant time period. *See* discussion under **Ethics, Litigation Holds and Preservation, and Sanctions—Rule 37(e)**. Plaintiff had argued that certain text messages were not lost because he had taken screen shots of those messages. Rejecting this argument, the court found that the screen shot evidence “pales in comparison to the ESI in its original form . . . [and] do[es] not reveal the dates when messages were sent and received, the telephone numbers of the parties, or any other pertinent metadata.” Given the evidentiary deficiencies with the screenshots, the court ultimately held that the deleted text messages for which the plaintiff had screen shots were ultimately “lost” within the meaning of Rule 37(e).

## ESI PROTOCOLS

*Equal Employment Opportunity Commission v. Scottsdale Healthcare Hospitals*, No. CV-20-01894-PHX-MTL, 2022 WL 3593699 (D. Ariz. Aug. 23, 2022). In this action the EEOC brought against the defendant involving allegations of Americans with Disabilities Act violations, the parties submitted competing ESI protocols to the court and sought its approval as to their respective protocols. In its ruling on the matter, the court observed that the EEOC's protocol was 14 pages long, detailed in its provisions, and included exhibits describing (among other things) “the presumptive scope of ESI to be searched.” The EEOC argued that its “detailed” protocol was the better choice, as it would help “prevent future discovery disputes.” In response, the defendant asserted that the EEOC protocol would “create additional discovery disputes” and submitted a three-page model ESI order from the U.S. District Court for the Northern District of California (“model ESI order”). The court ultimately opted for the model ESI order, reasoning that it would provide more “flexibility” to handle discovery obligations relating to the production of ESI. Nevertheless, the court also ordered that the model ESI order include provisions from the EEOC's proposal on which the parties agreed. To the extent those provisions conflicted with aspects of the model ESI order, the court held that the provisions on which the parties agreed would supersede existing provisions in the model ESI order.

*In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, 14-MD-25, 2022 WL 1082087 (S.D.N.Y. Apr. 11, 2022). In *Keurig*, the parties executed a stipulated ESI protocol, which the court subsequently entered as an order. Pursuant to the ESI protocol, the parties agreed to take various steps toward preserving relevant, responsive ESI. Among other things, the parties confirmed: (1) they would “take reasonable steps in good faith to prevent the loss [or] destruction” of ESI; (2) “they had ‘implemented a data preservation plan [and] issued preservation memoranda to relevant employees;” and (3) they would ask their custodians if they kept relevant information “at the custodian's office, home, or online.” Despite these representations, defendant Keurig issued legal holds to only 89 percent of the agreed-upon list of custodians (48 of 54) and conducted only 80 percent of its custodian interviews (43 of 54) on a “timely” basis. The court found that such shortcomings constituted violations (albeit negligent) of the court-ordered ESI protocol and merited sanctions under Federal Rule of Civil Procedure 37(b)(2)(A). In addition, the court held that Keurig's deficiencies constituted a failure to take reasonable steps within the meaning of Rule 37(e). *See* discussion under **Information Governance; Possession, Custody, or Control; Sanctions—Rule 37(b); Sanctions—Rule 37(e)**.

*EVERYTHING Ltd. v. Avery Dennison Retail Information Services, LLC*, No. 1:21-CV-04411 (LJL) (S.D.N.Y. Mar. 7, 2022), [ECF No. 246](#). Shortly before dismissing this trade secret misappropriation lawsuit, the court entered an ESI protocol as a “Discovery Order.” The order memorialized various specifications on the handling of electronic discovery, including a provision entitled “Other Business Communications” that excluded several sources of information from the discovery process absent a showing of good cause. That provision specifically considered “non-e-mail business communications such as Google Hangouts, Microsoft Teams, Skype, WhatsApp, and Slack,” along with text messages and mobile devices, to be not reasonably accessible and beyond the scope of preservation and collection.

*In re Omega Healthcare Investors, Inc. Securities Litigation*, No. 1:17-cv-08983-NRB (S.D.N.Y. Feb. 9, 2022), [ECF No. 126](#). In this investor class action suit, the court enter a stipulated “ESI Plan” as an order to address the discovery of ESI. Among other provisions, the order delineated that family relationships among traditional documents should be maintained within document productions. The order also had a separate provision designed to handle family relationships for content that was embedded in documents. Such content included, among other things, hyperlinked documents from “a fileshare or other shared repository (such as Google Drive/Docs/Sheets, OneDrive, DropBox, or Slack).” That separate provision did not *require* that embedded content be treated as a family member of the document in which it was found in every instance. Instead, the order indicated that embedded content *may* be considered a family member, depending on a variety of factors such as “logistical burdens,” proportionality considerations, and the availability of such content from other sources. The order directed the parties to meet and confer about the issues and affirmed that neither the requesting party nor the responding party yielded their rights relating to the benefits, burdens, or proportionality relating to the possible production of embedded content in a family complete manner.

## ETHICS

*Tera II, LLC v. Rice Drilling D, LLC*, No. 2:19-CV-2221, 2022 WL 1114943 (S.D. Ohio Apr. 14, 2022). *See* discussion under **Reasonable Inquiry**.

*Schnatter v. 247 Group, LLC*, No. 3:20-CV-00003-BJB-CHL, 2022 WL 2402658 (W.D. Ky. Mar. 14, 2022). In this case involving the defendants’ alleged wrongful interference with certain contractual relationships involving the plaintiff (the founder and former president of Papa John’s Pizza), the court implicitly criticized the plaintiff’s counsel for “fail[ing] to intervene in order to mitigate the effects of [plaintiff’s] conduct” that resulted in the court’s Rule 37(e)(1) sanctions order. *See* discussion under **ESI Evidence, Litigation Holds and Preservation, and Sanctions—Rule 37(e)**. The court declined to undertake an inquiry into the precise nature of counsel’s conduct since the defendants had not moved for sanctions against the plaintiff’s counsel. Nevertheless, the court did observe that counsel generally has an obligation to lead out on preservation issues for the client and to remain involved with the process so relevant evidence is actually preserved and produced in discovery. The court also highlighted the Rule 26(g) certification requirement and admonished counsel that “any failure to comply with their independent obligations and ethical duties may be grounds for sanctions.”

*Zox LLC v. Zox*, No. 2:21-cv-01609-PA (SKx), 2022 WL 3137939 (C.D. Cal. Feb. 4, 2022). *See* discussion under **Text Messages & Ephemeral Messages**.

## FEDERAL RULE OF EVIDENCE 502(d)

*DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2022 WL 2905838 (N.D. Ill. July 22, 2022). In this trademark dispute riddled by the defendants' failure to preserve relevant ESI, the court determined that Rule 502(d) did not apply to disputes over the application of the marital communications privilege. Defendants had argued that Rule 502(d) should apply to inadvertently disclosed communications between defendant Brent Duke and his wife (who was an employee working for defendant 21 Century Smoking), since the court had previously declared to the parties that the Rule 502(d) order entered in the litigation "would be applied to the fullest extent available." The court rejected this argument and, relying on the express language of Rule 502 and The Sedona Conference, *Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders*, 23 SEDONA CONF. J. 1 (2022), found that the Rule 502(d) order is limited to the attorney-client privilege and attorney work product.

*In re Google RTB Consumer Privacy Litigation*, No. 21-cv-02155-YGR(VKD), 2022 WL 1316586 (N.D. Cal. May 3, 2022). The court was asked to consider whether parties may discuss the contents of a putatively privileged document in briefing to argue that the document should or should not be considered privileged. The court rejected this argument, reasoning it was not supported by the text or advisory committee notes of Rule 26(b)(5) or Rule 502(d).

## INFORMATION GOVERNANCE

*Drips Holdings, LLC v. Teledrip LLC*, No. 5:19-CV-02789-JRA, 2022 WL 3282676 (N.D. Ohio Apr. 5, 2022), *report and recommendation adopted in part, rejected in part sub nom.* 2022 WL 4545233 (N.D. Ohio Sept. 29, 2022). *See* discussion under **Sanctions—Rule 37(e), Workplace Collaboration Tools**.

*In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, 14-MD-25, 2022 WL 1082087 (S.D.N.Y. Apr. 11, 2022). In this antitrust action involving defendant Keurig's business practices relating to its coffee making machines, the court examined certain information-related policies that Keurig implemented that affected its preservation, collection, and production of relevant ESI. Prior to the litigation, Keurig adopted a policy that directed its employees to save documents on "network or 'share' drives" rather than on local hard drives. The purpose of the policy was to offer a repository that would back up employee documents. In connection with discovery, Keurig did not undertake an exhaustive search of employee hard drives, relying instead on the assumption that its employees observed the policy and saved their documents on the company's network. In their motion for sanctions, the plaintiffs argued that Keurig's reliance on its policy was both unreasonable and evidence of an intent to deprive them of relevant information found on custodians' hard drives. The court rejected the plaintiffs' argument, holding instead that such reliance was "not unreasonable" and, citing *La Belle v. Barclays Cap. Inc.*, 340 F.R.D. 74 (S.D.N.Y. 2022), determined that Keurig's actions in this regard did not constitute negligence, much less evidence of "an intent to deprive" under Rule 37(e)(2). *See* discussion under **ESI Protocols; Possession, Custody, or Control; Sanctions—Rule 37(b); Sanctions—Rule 37(e)**.

## LITIGATION HOLDS AND PRESERVATION

*Hollis v. CEVA Logistics U.S., Inc.*, No. 19 CV 50135, 2022 WL 1591731 (N.D. Ill. May 19, 2022). In this employment discrimination suit in which the court imposed Rule 37(e) sanctions, the defendant argued that the duty to preserve triggered after the EEOC apprised the defendant of the plaintiff's

racial discrimination charge and that relevant video evidence (which allegedly memorialized the incident giving rise to the lawsuit) was eliminated pursuant to the defendant's 30- to 90-day video retention policy. The court disagreed with the defendant and instead held that the duty to preserve attached when the plaintiff sent the defendant three months earlier a "formal letter of complaint against [defendant] for workplace race discrimination" that spotlighted the importance of the video feed at issue. Citing to *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1 (2018) for the proposition that the duty to preserve attaches upon the reasonable anticipation of litigation, the court found that (among other things) the plaintiff's letter and his emphasis on the importance of the video feed at issue combined to put the defendant on notice that it should reasonably anticipate litigation against plaintiff. *See* discussion under **Sanctions—Rule 37(e)**.

*Schnatter v. 247 Group, LLC*, No. 3:20-CV-00003-BJB-CHL, 2022 WL 2402658 (W.D. Ky. Mar. 14, 2022). *Schnatter* arises from defendants' alleged wrongful interference with contractual relationships involving the plaintiff, the founder and former president of Papa John's Pizza. In *Schnatter*, the court imposed sanctions on the plaintiff for failing to preserve relevant text messages and other ESI from the various mobile phones he used during the relevant time period. *See* discussion under **ESI Evidence, Ethics, and Sanctions—Rule 37(e)**. In its sanctions order, the court spotlighted the plaintiff's failure to obey the litigation hold that its counsel issued shortly after an incident that triggered this litigation and other lawsuits involving the plaintiff. The court meticulously analyzed the hold, observing that it placed the plaintiff on notice of his duty to preserve relevant evidence found on his cell phones; that such a duty was both present and continuing; and that this duty required the plaintiff to preserve relevant text messages on personal phones and eliminate automatic destruction practices that might eliminate relevant evidence. After reviewing these items, the court determined that the plaintiff failed to follow these points from the hold. In particular, the plaintiff discarded four cell phones; had two other phones imaged at particular points in time, but failed to preserve text messages and other evidence that were likely generated or received on the phones after they were imaged; and the plaintiff did not cease his practice of deleting individual text message strings after receiving the hold. All of which eventually led the court to issue sanctions against the plaintiff under Rule 37(e)(1).

## NONPARTIES

*Leonard v. Martin*, 38 F.4th 481 (5th Cir. 2022). In a personal injury lawsuit, the defendants subpoenaed patient records from a nonparty anesthesiologist who performed a procedure on the plaintiff that the defendants asserted was not medically necessary and for which, they argued, they were not financially responsible. The anesthesiologist sought to quash the subpoena, arguing that it was overly broad as to both time (ten years of records) and scope (over the frequency of the procedures) and that it placed an undue burden upon him as a nonparty given the number of documents he would be forced to review and produce. While the lower court narrowed the subpoena's time (five years of records) and scope, it declined to quash the subpoena in its entirety and held that it was not unduly burdensome. The anesthesiologist accordingly sought relief from the U.S. Court of Appeals for the Fifth Circuit. Unlike the district court, a Fifth Circuit three-judge panel found that the subpoena did impose an undue burden on the anesthesiologist. However, in a 2-1 decision, the court held that it could not quash the subpoena. Observing that "district courts are afforded wide discretion in discovery matters," the majority found that the anesthesiologist had failed to establish "a clear and indisputable right" for a writ of mandamus to issue. In a concluding footnote, though, the majority articulated the expected costs for the anesthesiologist, reiterated its view that those costs constitute an undue burden, and



articulated in dicta that “the district court should shift those costs to the defendants” under Rule 45 (d)(2)(B)(ii).

*Martley v. City of Basehor, Kansas*, No. 19-02138-DDC-GEB, 2022 WL 1302820 (D. Kan. May 2, 2022). Defendants sought to quash a Rule 45 subpoena that plaintiff served on a nonparty—the defendants’ former information technology service provider—to obtain responsive emails that the nonparty might still have retained from the defendant. In its motion to quash, the defendants argued that its former IT service provider did not have a legal right to disclose the subpoenaed emails. The court agreed, observing that it was “uncomfortable with Plaintiff’s tactic of going around Defendants to their former IT vendor to conduct searches on any of the City’s email data it may still have in its possession after its services were terminated.” Relying on The Sedona Conference, *Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition*, 22 SEDONA CONF. J. 1 (2021), the court also indicated that for various reasons “the burdens of discovery should fall on the parties to the litigation instead of non-party.” While granting the motion to quash so as to protect the nonparty from discovery burdens, the court issued relief that would enable the plaintiff to obtain the responsive emails it sought directly from the defendants.

### **POSSESSION, CUSTODY, OR CONTROL**

*Signify Holding B.V. v. TP-Link Research America Corp.*, No. 21-CV-9472(JGK)(KHP), 2022 WL 3704001 (S.D.N.Y. Aug. 26, 2022). This matter arises over the plaintiff’s efforts to obtain certain royalty payments from the defendants pursuant to a patent licensing agreement regarding the defendants’ sale of LED retrofit bulbs. Plaintiff sought discovery from the defendants of records relating to the sale of bulbs by a nonparty (TPC) that the plaintiff asserts is an affiliate of the defendants under the licensing agreement. Defendants objected to the production of the requested sales records, contending that TPC is not an affiliate, is a separate corporate entity, and that TPC’s sales records are accordingly beyond their possession, custody, or control. Plaintiff disagreed and argued in its motion to compel that possession, custody, and control are evident from the defendants and TPC belonging to the same corporate family, that they share the same counsel, and that TPC provided the records at issue to its counsel in connection with certain settlement negotiations between the plaintiff and the defendants. In response, Magistrate Judge Katharine Parker held that the plaintiff had not definitively established that defendants have possession, custody, or control over TPC’s records. In particular, Judge Parker rejected the notion that TPC’s provision of documents to its counsel rendered those documents under the “control” of defendants simply because they shared the same lawyers. While denying the plaintiff’s motion to compel, Judge Parker found that the defendants had been “cheeky” in their opposition, failing to clearly deny that they possessed the records at issue. As a result, Judge Parker ordered the defendants to indicate in a supplemental discovery response to the plaintiff whether they had had actual possession of the requested sales records. If they confirmed possession of those records, the defendants would be ordered to produce them forthwith.

*Trustees of Chicago Regional Council of Carpenters Pension Fund v. Drive Construction, Inc.*, No. 1:19-CV-2965, 2022 WL 2237621 (N.D. Ill. June 22, 2022). The court held that the plaintiffs did not have possession, custody, or control over certain text messages and phone records belonging to two members of a carpenters’ union (“Union”) that was closely affiliated with the plaintiffs. In denying the defendant’s motion to compel, the court found that the defendant had failed to offer evidence that the plaintiffs had a legal right to obtain the sought-after text messages and phone records even though the Union and plaintiffs had the same lawyers and they jointly investigated the defendant for allegedly making insufficient Employment Retirement Income Security Act (“ERISA”) payments to the plaintiffs.

*In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, 14-MD-25, 2022 WL 1082087 (S.D.N.Y. Apr. 11, 2022). In connection with the court’s sanctions order against defendant Keurig, the court addressed the issue of whether an organization has an obligation to preserve relevant, responsive information in the possession of its former employees. Relying on district court precedent from the U.S. Court of Appeals for the Second Circuit, the court first observed that enterprises generally have an obligation to “ask” their former employees to cooperate in the preservation and production of relevant, responsive information. The court then concluded that Keurig was required to “ensure” that former employees preserved relevant information, essentially holding that company information in the hands of former employees was within the organization’s possession, custody, or control. Based on this finding, the court held that the failure of Keurig to issue litigation holds to and conduct interviews of certain custodians—including former employees—constituted a failure to take reasonable steps to preserve relevant ESI. *See* discussion under **ESI Protocols; Information Governance; Sanctions—Rule 37(b); Sanctions—Rule 37(e)**.

*In re Pork Antitrust Litigation*, No. 18-CV-1776 (JRT/HB), 2022 WL 972401 (D. Minn. Mar. 31, 2022). In this multidistrict litigation involving price-fixing allegations against large U.S. pork producers, the court denied the plaintiffs’ motion to compel defendant Hormel Foods Corporation (“Hormel”) to produce relevant, responsive text messages from its custodian employees and held that Hormel did not have possession, custody, or control over its employees’ text messages. Plaintiffs had argued that Hormel’s “bring your own device” (“BYOD”) policy provided the company with the “legal right” to obtain employee text messages because Hormel could remotely wipe employee personal devices. Plaintiffs additionally asserted that Hormel had the practical ability to obtain text messages from its employees since several employees had already agreed to have their phones imaged for preservation. Magistrate Judge Hildy Bowbeer rejected both of these arguments. First, Judge Bowbeer found that Hormel did not have control over its employee text messages under the legal right test because the BYOD policy did not provide Hormel with express ownership rights over employee text messages, and Hormel did not require or expect that its employees would use text messages in the course of their employment. Judge Bowbeer next determined that Hormel did not have the “practical ability” to require its employees to turn over relevant, responsive text messages. While Hormel could “ask” its employees to preserve and disclose relevant text messages, it could not “demand” that employees do so given the terms of the BYOD policy (emphasis in original). Relying on *The Sedona Conference Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations*, 19 SEDONA CONF. J. 495 (2018), Judge Bowbeer reasoned that Hormel “should not be compelled to terminate or threaten employees who refuse to turn over their devices for preservation or collection.” In connection with her opinion, Judge Bowbeer also discussed extensively *The Sedona Conference Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control,”* 17 SEDONA CONF. J. 467 (2016).

*Weisman v. Barnes Jewish Hospital*, No. 4:19-CV-00075 JAR, 2022 WL 850772 (E.D. Mo. Mar. 22, 2022). In this action arising from the individual plaintiffs (Weisman) resignation from a residency program, the plaintiffs sought production of relevant text messages exchanged on the Telegram messaging application by doctors and residents working for certain of the defendants. Plaintiffs asserted that relevant Telegram messages should be produced because they would reflect, among other things, the work Weisman performed as a resident. In their opposition, the defendants argued that any messages the plaintiffs sought were beyond the defendants’ possession, custody, or control and that, in any event, they do not require their doctors or residents to use Telegram for communications. The court agreed with the defendants and held that the defendants were under no obligation to produce information beyond their possession, custody, or control. In its opinion, the court did not articulate

whether the defendants had an “acceptable uses” policy mandating the use of certain communications applications or whether there was a “bring your own device” (BYOD) policy governing the use and ownership messages and other information on their doctors’ and residents’ phones.

## PRIVACY AND DATA PROTECTION

*Drips Holdings, LLC v. Teledrip LLC*, No. 5:19-CV-02789-JRA, 2022 WL 3282676 (N.D. Ohio Apr. 5, 2022), *report and recommendation adopted in part, rejected in part sub nom.* 2022 WL 4545233 (N.D. Ohio Sept. 29, 2022). *See* discussion under **Sanctions—Rule 37(e), Workplace Collaboration Tools**.

*Arigna Tech. Ltd. v. Nissan Motor Co., Ltd.*, No. 22:2-cv-00126-JRG-RSP, 2022 WL 3020136 (E.D. Tex. July 29, 2022). Plaintiff sought to enforce a production order in which the court previously ruled that the defendants must produce relevant ESI in response to the plaintiff’s document requests. Until filing its motion to enforce compliance, the plaintiff complained that the defendants had produced few responsive documents and the documents they did produce were heavily redacted. In response, the defendants argued that they generally could not produce the ESI required by the production order as they were German-based companies, regulated by the GDPR, and that the GDPR forbade (among other things) the disclosure of employee names and email addresses. The court rejected the notion that the GDPR prevented defendants from producing the requested discovery. Relying on the U.S. Supreme Court’s *Société Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987) decision, the court reasoned that it could still order the defendants to comply with its discovery order notwithstanding the existence of the GDPR. In addition, the court—citing recent district court authority—indicated that responding parties such as the defendants could not stave off discovery by relying on unsubstantiated GDPR objections. Where the defendants had not introduced any evidence or authority beyond attorney argument for their position and given GDPR Article 49’s “exemption that allows for the production of information . . . ‘for the purpose of formal pre-trial discovery procedures in civil litigation,’” the court overruled the defendants’ GDPR objection and ordered the defendants to comply with the earlier production order.

*Freitag v. La Jolla Bridge, LLC*, No. 3:21-cv-01642, 2022 WL 2079447 (S.D. Cal. June 9, 2022). In this action involving a court-appointed receiver seeking to claw back certain payments pursuant to the California Uniform Voidable Transfers Act (“CUTVA”), the defendants objected (among other grounds) on the basis of privacy to interrogatories the receiver propounded to obtain the identities of members and investors (“transferees”) in one of the defendant entities. In their opposition to the receiver’s motion to compel, the defendants argued that the California constitution’s right to privacy forbade them from disclosing the transferees’ identities without their consent. In addition, the defendants contended that the receiver’s litigation position was meritless since the transferees received interest payments from a nonreceivership entity and not fraudulent transfers, and as a result, they should not be forced to turn over the transferees’ identities. Magistrate Judge Allison Goddard rejected both arguments and ordered the defendants to respond to the receiver’s interrogatories. First, Judge Goddard held that the defendants’ privacy objection must be analyzed under the federal right to privacy since the action—while substantively involving CUTVA claims—arose under 28 U.S.C. 1345 (United States as plaintiff). Next, Judge Goddard determined that there was nothing “particularly private or sensitive” about the transferees’ identities under federal privacy law or the “much more protective ‘compelling need’ standard in cases involving the California constitutional right to privacy.” Finally, Judge Goddard rejected the defendants’ argument involving the merits, finding that it was “not a legitimate reason to withhold discovery” since it could be used to forestall any participation in the discovery process.

*Kashef v. BNP Paribas S.A.*, No. 16-CV-3228(AKH)(JW), 2022 WL 1617489 (S.D.N.Y. May 23, 2022). See discussion under **Cross-Border Discovery**.

*Porter v. Equinox Holdings, Inc.*, No. RG19009052, 2022 WL 887242 (Cal. Super. Mar. 17, 2022). In this Private Attorneys General Act lawsuit involving claims for unpaid wages against the defendant, the plaintiffs sought production of emails that the defendant sent to certain of its trainers and instructors regarding the taking of breaks. In response, the defendant objected on privacy grounds and argued that producing those emails would require it to disclose private information belonging to its former and current employees. The court disagreed, finding that the privacy rights of its employees enshrined in the California constitution would be adequately protected if the defendant produced the emails subject to one of the designations available under the protective order the court entered in the litigation.

### PRIVILEGE LOGGING

*Podium Corp. v. Chekkit Geolocation Services Inc.*, No. 2:20-CV-00352, 2022 WL 3576280 (D. Utah Aug. 19, 2022). In this case involving intellectual property theft between business competitors, the defendants sought production of relevant messages from the plaintiff's Slack communications platform. In response, the plaintiff asserted attorney-client privilege objections, served a privilege log with 140 entries for documents it either withheld or redacted for privilege, and produced redacted Slack messages. Defendants sought *in camera* review of the withheld and redacted messages, arguing that the plaintiff's privilege objections were inappropriate. In support of their motion, the defendants pointed to the fact that plaintiff's in-house counsel was not included on various messages claimed as privileged; that the produced messages were "heavily redacted" and thus did not allow for a meaningful evaluation of their content; and recent deposition testimony suggested that certain redacted messages were in fact not privileged at all. The court denied the defendants' motion and rejected each of their arguments. As an initial matter, the court did not find anything objectionable about the plaintiff's privilege log, which reflected the dates of and participants to each conversation, along with substantiating descriptions. The court next observed that there was nothing inherently wrong with an organization asserting privilege over communications lacking the presence of counsel where "information [was] gathered for and at the request of [plaintiff's] in-house legal counsel for the purposes of seeking legal advice." Finally, the defendants neglected to attach any of the redacted Slack messages at issue or excerpts from pertinent deposition testimony to substantiate their arguments. If there were Slack messages or deposition testimony that would arguably raise legitimate questions about the plaintiff's privilege claims, the court signaled that the defendants could refile their motion and directed that they include such information in support of the motion.

*Jones v. Varsity Brands, LLC*, No. 20-CV-02892-SHL-TMP, 2022 WL 1913043 (W.D. Tenn. June 3, 2022). Plaintiffs in this antitrust action sought discovery relief from the court to remedy what they argued were tardy and flawed privilege logs served by two defendants. Relying on *Burlington Northern & Santa Fe Railway Co. v. District Court of Montana*, 408 F.3d 1142 (9th Cir. 2005), the plaintiff argued that the court should deem the privilege waived over the documents memorialized in the defendants' privilege log given their 13-month delay in serving a privilege log, combined with deficiencies in the log itself. In response, the court refused to find that the defendants waived privilege over the log. The court found that the defendants' delay was excusable given a variety of circumstances, including the plaintiffs seeking "extensions of time to file their motion to compel." In addition, the court reasoned that there was nothing objectionable about the logs' content. While opining that the logs "could have

been more detailed,” the court observed that they generally offered “the type of information that is commonly included in a privilege” such as “the subject matter of the documents, the privilege claimed, and the basis of the privilege, as well as the names of individuals who sent and received the documents.”

## PROPORTIONALITY

*Stephan Zouras LLP, v. Thomas More Marrone*, No. 3:20-CV-2357, 2022 WL 4007296 (M.D. Pa. Sept. 1, 2022). The discovery dispute in *Stephan Zouras* arose after the parties were unable to amicably decide how to divide the nearly \$1.8 million in attorney’s fees they were awarded after successfully representing the plaintiffs in an underlying Fair Labor Standards Act litigation. With the defendants holding the entire sum of fees in trust for the parties, the plaintiff in *Stephan Zouras* filed suit and propounded discovery seeking the defendants’ billing records and related documentation that would purportedly justify their pro rata share of the fee award. Defendants objected, arguing that the discovery was irrelevant and disproportionate to the needs of the case. On the issue of disproportionality, the defendants argued that it would be unduly burdensome to search through 122,000 emails, which represented the universe of their potentially relevant communications relating to the underlying litigation. The court overruled both objections, holding the requested discovery squarely within the ambit of relevance and rejecting the defendants’ proportionality objection. Regarding proportionality, the court found that the defendants’ burdens could be alleviated by drawing on “the guiding tenants” from *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1 (2018) regarding the development of search terms. Among those tenants, the court spotlighted the importance of the defendants engaging in “collaborative efforts” with the plaintiff to more readily “mitigate the burden of this discovery.”

*Edwards v. McDermott International, Inc.*, No. 4:18-CV-04330, 2022 WL 1568279 (S.D. Tex. May 18, 2022). In this securities fraud case, the plaintiffs sought to compel the defendants to use the search queries that the plaintiffs prepared, which would require the defendants to review approximately 1.3 million documents. In response, the defendants argued that reviewing 1.3 million documents would be unduly burdensome and disproportionate to the needs of the case. Defendants countered that they should be allowed to use their own search terms, which they represented resulted in approximately 650,000 documents for review. The court analyzed the discovery dispute through the lens of the six Rule 26(b)(1) proportionality factors and ultimately decided that the plaintiffs’ search terms were proportional given the sizable damages figure the plaintiffs pleaded in their complaint: “The purported damages in this case are huge, and that indicates to me that Plaintiffs’ proposal is proportional to the needs of the case. It is a close call, but I ultimately conclude that the scales tip in favor of Plaintiffs on the proportionality analysis.” See discussion under **Search**.

## REASONABLE INQUIRY

*Red Wolf Energy Trading, LLC v. Bia Capital Management, LLC*, No. CV 19-10119-MLW, 2022 WL 4112081 (D. Mass. Sept. 8, 2022). See discussion under **Workplace Collaboration Tools**.

*Tera II, LLC v. Rice Drilling D, LLC*, No. 2:19-CV-2221, 2022 WL 1114943 (S.D. Ohio Apr. 14, 2022). In this case involving oil and gas leases, the defendant (Rice) sought relevant emails and other communications from the plaintiff that it argued had not been produced in discovery. While the plaintiffs had produced some emails, Rice argued that the plaintiffs’ overall collection was

underinclusive since their counsel had relied on the plaintiffs to self-collect relevant communications. Rice sought the appointment of a third-party service provider “to conduct a forensically defensible collection and search of Plaintiffs’ emails using a defined set of relevant search terms.” The court agreed and ordered the plaintiffs to engage a service provider and conduct the collection and searches that Rice requested. The court found such relief was warranted given the manner and nature in which the plaintiffs conducted their searches for relevant communications. Relying on *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1 (2018), the court opined that while some self-collections might be acceptable, the plaintiffs’ self-collection of relevant communications was not reasonable because it lacked both “legal [and] forensic oversight.” By way of example, one of the plaintiffs’ custodians (Shaw) pushed out emails and text messages for production without any meaningful guidance from the plaintiffs’ lawyers to ensure the collection was complete. During her deposition, Shaw conceded that nobody assisted her in collecting documents. Moreover, the court observed that Shaw gave conflicting answers regarding her collection of relevant messages and even displayed relevant text messages that the plaintiffs never produced in discovery. The court recommended that the plaintiffs implement a “systematic procedure for producing documents, overseen by a legal or forensic professional.” In addition, the court suggested that the plaintiffs’ counsel not simply “accept custodians’ production at face value,” but apply “additional scrutiny . . . to ensure that Plaintiffs are complying with their legal obligations.”

*Schnatter v. 247 Grp., LLC*, No. 3:20-CV-00003-BJB-CHL, 2022 WL 2402658 (W.D. Ky. Mar. 14, 2022). See discussion under **ESI Evidence, Ethics, and Litigation Holds and Preservation**.

## **RULE 34 REQUESTS AND RESPONSES**

*Skye Orthobiologics, LLC v. CTM Biomedical, LLC*, No. No. CV 20-3444 MEMF (PVCx), 2022 WL 3134122 (C.D. Cal. June 28, 2022). In this trade secret misappropriation case, the plaintiffs sought to compel (among other things) the production of relevant messages that two individual defendants (Boulais, Stumpe) purportedly exchanged on the Telegram messaging application. In support of their motion, the plaintiffs pointed to text messages that the defendants shared on WhatsApp and other messaging applications, which suggested defendants had also corresponded by Telegram about matters at issue in the litigation. In opposition to the motion, Boulais represented that “he never used the Telegram app and that no messages exist.” While the court indicated that it could not compel Boulais “to produce documents that do not exist,” the court was implicitly concerned with Boulais’s representation. Boulais previously stated in his written discovery responses that “he would produce documents in response to the requests, [t]o the extent [they were] not already produced in this action.” In addition, his counsel indicated during the parties’ meet and confer that “he would ‘have to check’ to see if messages on the Telegram app exist.” Given these circumstances, the court ordered Boulais to provide “a supplemental declaration” unequivocally stating that he had no Telegram messages that were responsive to plaintiffs’ document requests.

## **SANCTIONS—RULE 37(a)(5)(A)**

*Axis Insurance Co. v. American Specialty Insurance & Risk Services, Inc.*, No. 1:19-cv-00165-DRL-SLC, 2022 WL 950604 (N.D. Ind. Mar. 30, 2022). The court ordered the defendant to pay monetary sanctions to the plaintiff in the amount of \$115,184.25 for opposing the plaintiff’s discovery motion without substantial justification. Magistrate Judge Susan Collins had previously ordered the defendant to search all ESI storage repositories for relevant, responsive documents and also required the defendant to

submit an affidavit discussing the particulars regarding the nature and extent of its search. In addition, Judge Collins directed the defendant to produce metadata corresponding to documents it already turned over and which the plaintiff originally requested in its Request for Proposals. Defendant would have to produce an affidavit both describing the steps it took ensure the production of the sought-after metadata and detailing any problems that resulted in the modification of documents or their metadata. Finally, Judge Collins found that the defendant's opposition to the plaintiff's motion was not substantially justified pursuant to Rule 37(a)(5)(A) and provisionally awarded the plaintiff its attorney's fees in connection with bringing its motion to compel. *Axis Insurance Co. v. American Specialty Insurance & Risk Services, Inc.*, No. 1:19-cv-00165-DRL-SLC, 2021 WL 2910814 (N.D. Ind. July 12, 2021), *aff'd*, 340 F.R.D. 570 (N.D. Ind. 2021). The district court affirmed Judge Collins's findings, including her decision to award the plaintiff its reasonable expenses in connection with its discovery motion. The court found the defendant's objections were not justified and that it had otherwise failed to meet production commitments to which it had agreed. *Axis Insurance Co. v. American Specialty Insurance & Risk Services, Inc.*, 340 F.R.D. 570 (N.D. Ind. 2021). In response to the plaintiff's fee application, the \$115,184.25 sum that the court awarded the plaintiff is based on the following figures: \$84,222.93 for expenses incurred in connection with its motion to compel; \$11,430.66 for expenses opposing the defendant's objection to Judge Collins's order; and \$19,530.66 for expenses relating to its fee application.

#### **SANCTIONS—RULE 37(b)**

*Red Wolf Energy Trading, LLC v. Bia Capital Management, LLC*, No. CV 19-10119-MLW, 2022 WL 4112081 (D. Mass. Sept. 8, 2022). The court issued an order of default judgment against the defendants in this trade secret misappropriation dispute after the defendants failed to comply with multiple discovery orders requiring that they produce relevant documents from their Google workspace and Slack messaging platforms and given the misrepresentations they made to the court regarding their compliance efforts. *See* discussion under **Workplace Collaboration Tools**.

*Brown v. Google LLC*, No. 20-cv-03664-YGR(SVK), 2022 WL 2789897 (N.D. Cal. July 15, 2022). Following the issuance of a sealed order in which the court imposed Rule 37(b)(2)(A) and Rule 37(c) sanctions on the defendant for violating three discovery orders and belatedly producing material information relevant to the plaintiffs' claim that the defendant violated federal wiretapping laws by improperly intercepting and collecting certain user information, the court issued an attorney's fees and costs award in favor of the plaintiffs for \$971,715.09.

*In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, 14-MD-25, 2022 WL 1082087 (S.D.N.Y. Apr. 11, 2022). The court imposed monetary sanctions against defendant Keurig for its failure to satisfy key preservation provisions from the parties' stipulated ESI protocol that the court had previously entered as an order. Keurig issued legal holds to only 89 percent of the agreed-upon list of its custodians (48 of 54) and conducted only 80 percent of its custodian interviews (43 of 54) on a "timely" basis. The court found that such shortcomings constituted violations (albeit negligent) of the court-ordered ESI protocol and merited sanctions under Federal Rule of Civil Procedure 37(b)(2)(A). While signaling its willingness to authorize the issuance of severe sanctions under 37(b)(2)(A)—including "preclusion and adverse inference" measures—for the defendant's violation of the ESI order, the court ultimately declined to impose those severe sanctions given the limited prejudice the plaintiffs suffered. *See* discussion under **ESI Protocols; Information Governance; Possession, Custody, or Control; Sanctions—Rule 37(e)**.

*Columbia Pictures Indus., Inc. v. Galindo*, No. 2:20-cv-03129-MEMF (GJSx), 2022 WL 3009463 (C.D. Cal. June 14, 2022), *report and recommendation adopted*, 2022 WL 3369629 (C.D. Cal. Aug. 15, 2022). *See* discussion under **Text Messages & Ephemeral Messages**.

#### **SANCTIONS—RULE 37(c)**

*Brown v. Google LLC*, No. 20-cv-03664-YGR(SVK), 2022 WL 2789897 (N.D. Cal. July 15, 2022). *See* discussion under **Sanctions—Rule 37(b)**.

*Industria de Alimentos Zenu S.A.S. v. Latinfood U.S. Corp.*, No. 16-6576, 2022 WL 1683747 (D.N.J. May 26, 2022). In this trademark infringement dispute involving competitors in Latin American foods, the court held that the defendants violated Rule 37(c) by failing to “supplement and correct” various discovery responses and disclosures. In particular, the court determined that the defendants failed to disclose or unreasonably delayed disclosing several sources of relevant ESI. These sources included a hard drive containing approximately 100,000 documents and which additionally referenced four cloud accounts belonging to defendants (“Amazon Drive, Dropbox, One Drive, and Google Drive”) and a flash drive, all of which the court observed contain relevant, responsive information. While criticizing several aspects of the defendants’ conduct that resulted in the nondisclosure of such information and violations of Rule 26(e), the court did not impose severe sanctions on the defendants such as an order of default judgment or issuing an instruction that would inform the jury regarding the defendants’ conduct. Instead, the court issued monetary sanctions against the defendants and also ordered them to produce relevant, responsive information from the cloud accounts and other unsearched data repositories in the defendants’ possession, custody, or control. *See* discussion under **Sanctions—Rule 37(e)**.

#### **SANCTIONS—RULE 37(e)**

*DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2022 WL 5245340 (N.D. Ill. Oct. 6, 2022). In this trademark infringement lawsuit in which the court previously found that the defendants, among other things, violated Rule 37(e) by failing to preserve relevant emails and instant messages (*DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839 (N.D. Ill. 2021)), the court issued a monetary sanctions order against one of the defendants (Duke), along with defendants’ former counsel of record (pursuant to Rule 26(g)(3)), in the amount of \$2,526,744.76. The court ordered Duke to pay half the sanctions award (\$1,263,372.38) while requiring two former defense lawyers to bear the other half of the award, apportioning 80 percent (\$1,010,697.90) of those fees to former lead counsel and 20 percent (\$252,674.48) to another prominent member of the defense team.

*Drips Holdings, LLC v. Teledrip LLC*, No. 5:19-CV-02789-JRA, 2022 WL 3282676 (N.D. Ohio Apr. 5, 2022), *report and recommendation adopted in part, rejected in part sub nom.* 2022 WL 4545233 (N.D. Ohio Sept. 29, 2022). The court analyzed the defendants’ spoliation of relevant Slack messages under a hybrid of the three-factor test the U.S. Court of Appeals articulated in *John B. v. Goetz*, 531 F.3d 448 (6th Cir. 2008) and Rule 37(e). The court ultimately found that the defendants’ decision to modify the retention settings for its Slack platform from indefinite to seven days was intentional and that the defendants’ conduct in doing so was merited a mandatory adverse inference and not a permissive adverse inference, as the magistrate judge had recommended. *See* discussion under **Workplace Collaboration Tools**.



*SiteLock LLC v. GoDaddy.com LLC*, No. CV-19-02746-PHX-DWL, 2022 WL 3716499 (D. Ariz. Aug. 29, 2022). Defendant brought a motion for Rule 37(e)(2) sanctions in this breach-of-contract dispute, arguing the court should sanction the plaintiff for failing to preserve certain relevant ESI. That ESI included “customer communications”—written messages and phone call recordings from plaintiff’s customers—and relevant Application Programming Interface (API) data, *i.e.*, automated call data that the plaintiff received from the defendant’s computer system with customer order information. Defendant maintained that after the duty to preserve attached, the plaintiff should have begun preserving relevant call and API data and that its failure to do so merited either an evidence preclusion sanction or an adverse inference instruction. While sympathizing with these arguments, the court ultimately denied the defendant’s requested relief. As an initial matter, the court found that the plaintiff should have suspended its 90-day automated retention policy that eliminated relevant customer communications, particularly communications reflecting the defendant disparaging the plaintiff. Despite the loss of that relevant data, the court refused to issue sanctions, finding they were not appropriate given that the lost evidence would have been favorable to the plaintiff and harmful to the defendant. Under the circumstances, the court used its discretion and refused to “impose such disproportionate, windfall-producing sanctions.” As for the lost API data, the court found that it was not relevant to the parties’ claims or defenses, nor could the defendant show it could not be replaced by other information, particularly since the plaintiff “produced all of the transaction records associated with [the API] calls.”

*Bhattacharya v. Murray*, No. 3:19-CV-00054, 2022 WL 1510550 (W.D. Va. May 12, 2022), *appeal denied*, No. 3:19-CV-54, 2022 WL 2873176 (W.D. Va. July 21, 2022). The court rejected the plaintiff’s request for spoliation sanctions arising from the deletion of emails by the defendants. In his underlying opinion, the magistrate judge observed that it would not sanction the defendants for deleting emails before their duty to preserve attached or for deleting emails after the duty triggered where those emails could be recovered from other custodians. For example, the magistrate judge reasoned that emails an individual defendant (“Densmore”) deleted were not “lost” within the meaning of Rule 37(e) because the plaintiff himself had copies of the emails in question. Moreover, the magistrate judge rejected as speculation the plaintiff’s position that there were other missing relevant emails that Densmore exchanged with other people, as the defendants had produced many such emails from a variety of other custodians. The magistrate judge did authorize the plaintiff to explore in Densmore’s deposition questions regarding his email use and deletion practices. In a subsequent order, the district court affirmed the magistrate judge’s rulings.

*Industria de Alimentos Zenu S.A.S. v. Latinfood U.S. Corp.*, No. 16-6576, 2022 WL 1683747 (D.N.J. May 26, 2022). The court declined to impose sanctions against the defendants for the loss of relevant ESI under Rule 37(e). Plaintiff argued that sanctions were appropriate because the defendants discarded relevant emails when they failed to disable an email auto-deletion function that eliminated messages after two weeks. In addition, the plaintiff argued that the defendant improperly disposed of a hard drive, which apparently had saved copies of the relevant emails in question. The court, however, rejected these positions and denied the plaintiff’s motion. In particular, the court found that the plaintiff failed to show that the defendants lost the relevant emails. While there was no dispute that the defendants failed to disable the email auto-deletion functionality or that they disposed of the hard drive, the court determined that there was no evidence that emails relevant to the plaintiff’s claims—such as emails evidencing customer confusion—had been saved on the hard drive or that such evidence even existed. Indeed, the court dismissed as “speculative” the plaintiff’s arguments that there were “undoubtedly” emails reflecting customer confusion when other evidence instead suggested the existence of phone calls on this topic. While not issuing Rule 37(e) sanctions against the defendants,

the court held that the defendants violated Rule 37(c) by failing to disclose relevant ESI and imposed sanctions on the defendants. *See* discussion under **Sanctions—Rule 37(c)**.

*Hollis v. CEVA Logistics U.S., Inc.*, No. 19 CV 50135, 2022 WL 1591731 (N.D. Ill. May 19, 2022). The court held that the defendant improperly allowed relevant video evidence to be destroyed but did not impose sanctions under Rule 37(e)(2) because there was not sufficient evidence of an intent to deprive. Observing that people “are just as likely to be dimwitted as they are dastardly,” the court decided that the jury should determine whether the defendant had the required “intent to deprive” when it allowed relevant video evidence to be deleted. The instruction the court provided to the jury on this issue is as follows:

If you decide that CEVA intentionally failed to preserve the video recording of November 28, 2018, to prevent Hollis from using the video recording in this case, you may—but are not required to—presume that the video recording was unfavorable to CEVA. You may then consider your decision regarding the video recording, along with all the other evidence, to decide whether CEVA terminated Hollis because of his race.

The court read the jury this instruction before they began their deliberations. After the jury deadlocked, the parties settled the litigation. *See* discussion under **Litigation Holds and Preservation**.

*Burris v. JPMorgan Chase & Co.*, 341 F.R.D. 604 (D. Ariz. 2022). After previously imposing terminating sanctions on plaintiff under Rule 37(e) for eliminating several sources of relevant ESI (*Burris v. JPMorgan Chase & Co.*, 566 F. Supp. 3d 995, 1019 (D. Ariz. 2021)), the court drew upon its inherent authority to issue a monetary sanctions award against the plaintiff in the amount of \$296,490.50. While finding that Rule 37(e) did not specifically authorize the issuance of monetary sanctions, it nonetheless did not displace the court’s power to issue monetary sanctions under its inherent authority.

*In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, 14-MD-25, 2022 WL 1082087 (S.D.N.Y. Apr. 11, 2022). This long-running antitrust dispute over defendant Keurig’s business practices relating to its coffee making machines involved widespread allegations of spoliation against Keurig. The court held that Keurig spoliated (among other things) relevant ESI by failing to preserve information on laptop computers for several of its employees. In particular, the court faulted Keurig for its inability to retrieve relevant, responsive data from 25 hard drives corresponding to 23 custodians. Of the 25 hard drives, Keurig was unable to image six of the drives and could not decrypt 10 of the drives; it otherwise lost nine other employee hard drives. The court nevertheless held that the plaintiffs suffered prejudice only from Keurig’s failure to produce relevant ESI from three of the 23 custodians. Plaintiffs were additionally prejudiced by having to incur costs to recover lost data from two additional custodians. As a result, the court imposed monetary sanctions against Keurig pursuant to Rule 37(e)(1) and held that the plaintiffs could offer certain evidence and argument to the jury regarding Keurig’s spoliation of relevant ESI from three of its custodians’ hard drives. While plaintiffs also sought more severe sanctions under Rule 37(e)(2), the court determined that the plaintiffs had not demonstrated by clear and convincing evidence that Keurig’s evidence preservation failures were intentional within the meaning of the rule. In particular, the court offered deference to an information-related policy Keurig implemented in which Keurig directed its employees to save documents on “network or ‘share’ drives” rather than on local hard drives. In reliance on that policy, Keurig did not undertake an

exhaustive search of employee hard drives, preferring instead to rely on its policy and assume compliance by its employees. The court found that such reliance was “not unreasonable” and, citing *La Belle v. Barclays Capital Inc.*, 340 F.R.D. 74 (S.D.N.Y. Jan. 2022), determined that the defendant’s actions in this regard did not constitute negligence, much less evidence of “an intent to deprive” under Rule 37(e)(2). *See* discussion under **ESI Protocols; Possession, Custody, or Control; Sanctions—Rule 37(b)**.

*Europe v. Equinox Holdings, Inc.*, No. 20-CV-7787(JGK)(KHP), 2022 WL 832027 (S.D.N.Y. Mar. 21, 2022). This racial discrimination and retaliation case involved an assertion by the plaintiff that the defendant intentionally discarded an electronic monthly shift schedule showing start and end times for its fitness club managers and accordingly sought Rule 37(e) sanctions for the loss of such ESI. In its attempt to stave off sanctions, the defendant argued that the existence of other ESI—*i.e.*, records memorializing the check-in and check-out times for managers—more than offset the loss of the monthly managerial schedule. Magistrate Judge Katharine Parker disagreed, finding that the check-in and check-out records were not a reliable substitute for the managerial schedule since, according to the plaintiff, managers did not always immediately note the times they checked in or left the defendant’s facility and did not unequivocally support the defendant’s position that it terminated the plaintiff for repeated tardiness. Judge Parker also criticized the defendant for failing to timely preserve the schedule at issue, finding that the defendant did not take action to identify and retain the schedule until after the plaintiff served her discovery request seeking such information. While holding that the defendant’s failure to preserve the schedule prejudiced the plaintiff and merited the issuance of certain jury instructions to rectify its loss pursuant to Rule 37(e)(1), the court rejected the plaintiff’s request for severe sanctions under Rule 37(e)(2). No such sanctions could issue as the defendant had produced other monthly schedules during the relevant time period, along with the check-in and check-out records, and had otherwise undertaken a good-faith effort (albeit tardy and ultimately unsuccessful) to first retrieve and then recover the lost schedule.

*Schnatter v. 247 Group, LLC*, No. 3:20-CV-00003-BJB-CHL, 2022 WL 2402658 (W.D. Ky. Mar. 14, 2022). In this case involving the defendants’ alleged wrongful interference with certain contractual relationships involving the plaintiff (the founder and former president of Papa John’s Pizza), the court issued a report and recommendation (to which neither party objected) that sanctions be imposed against the plaintiff under Rule 37(e)(1) for his destruction of relevant text messages and other ESI. The sanctions included allowing the presentation of evidence to the jury regarding the plaintiff’s spoliation of relevant evidence, along with a monetary sanctions award to compensate the defendants for the efforts they expended ferreting out the nature and extent of the spoliation. In its opinion, the court found that Rule 37(e)(1) sanctions were appropriate given the prejudice the defendants incurred by not having access to the plaintiff’s deleted text messages, along with other relevant ESI, including drafts of text and email messages, call logs, and calendar entries. The court also rejected the plaintiff’s assertion that the defendants had not suffered any prejudice since they could obtain adequate replacement simply by taking the plaintiff’s deposition. This was particularly the case since the plaintiff’s previous responses to interrogatories designed to identify possible replacement evidence were vague and failed to identify senders or recipients with whom he corresponded by text message. Finally, the court declined to issue severe measures under 37(e)(2) because the defendants had not shown the plaintiff intended to deprive them of relevant evidence. In particular, the court noted that there was no evidence that the plaintiff selectively deleted certain text messages or ESI. Nor had the defendants refuted the plaintiff’s apparent basis—to safeguard his privacy given his public-figure

status—for deleting his text messages and discarding his mobile phones. *See* discussion under **ESI Evidence, Litigation Holds and Preservation, and Sanctions—Rule 37(e)**.

*teamLab Inc. v. Museum of Dream Space, LLC*, No. 2:19-cv-06906-VAP (GJSx), 2022 WL 1590746 (C.D. Cal. Mar. 10, 2022). In response to the plaintiff's motion for sanctions for the defendants' spoliation of relevant messages from the Telegram and WeChat messaging applications (*see* discussion under **Text Messages & Ephemeral Messages**), the court drew upon a three-factor analysis the U.S. Court of Appeals for the Ninth Circuit adopted for determining whether to issue an adverse inference jury instruction. Defendants had argued that the court should evaluate its conduct under the framework established under Rule 37(e). The court rejected this argument, observing that the defendants failed to "explain how this rule imposes any additional burden from the three-factor test, which already requires a showing that the records were destroyed with a 'culpable mind.'" Applying that test to the facts at hand, the court held that the defendants' failure to take reasonable steps to preserve relevant Telegram and WeChat messages satisfied the element of culpability and justified the issuance of an adverse inference instruction.

#### **SANCTIONS—RULE 26(g)**

*DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2022 WL 5245340 (N.D. Ill. Oct. 6, 2022). *See* discussion under **SANCTIONS—RULE 37(e)**.

*World Nutrition Inc. v. Advanced Supplementary Technologies Corp.*, No. CV-19-00265-PHX-GMS, 2022 WL 2111226 (D. Ariz. June 10, 2022). In this litigation between business competitors involving allegations of false advertising, the court imposed Rule 26(g) sanctions on the plaintiff for making a late production of documents that was unexplained, unsubstantiated, and the result of an inadequate search for relevant, responsive documents. The court found that sanctions were warranted given plaintiff's production of over 450 documents while the defendant's motion for sanctions was pending. The court observed that the plaintiff served responses to the defendant's document requests that were "deficient" and particularly so in the face of third-party productions of documents. And yet, after a lengthy meet and confer, the plaintiff still declined to produce further responsive documents, which precipitated the defendant's motion for sanctions. The court held that the plaintiff's failure to produce the responsive documents earlier resulted from its failure to conduct a "simple search" of its website for "webpages advertising products" that were at issue in the litigation. From the court's perspective, it did not matter that the plaintiff's failure to make the production was, as the plaintiff asserted in its supplemental discovery responses, an inadvertent oversight. Such a course of conduct—waiting a year to produce such information and only after defendant resorted to motion practice—merited sanctions under Rule 26(g). The sanctions amount totaled \$73,027.75.

*Gunter v. Alutiq Advanced Security Solutions, LLC*, No. CV RDB-20-3410, 2022 WL 1139875 (D. Md. Apr. 18, 2022). In this employment litigation, the court imposed monetary sanctions on the plaintiff pursuant to Rule 26(g) and under its inherent authority for the harm resulted from the plaintiff falsifying certain text messages. The court also imposed Rule 37(e) sanctions, precluding the plaintiff from relying on fabricated text messages in motion practice or at trial while allowing the defendant "to introduce both the fraudulent and the authentic versions of the text messages to attack Plaintiff's credibility before the finder of fact."

*Schnatter v. 247 Group, LLC*, No. 3:20-CV-00003-BJB-CHL, 2022 WL 2402658 (W.D. Ky. Mar. 14, 2022). *See* discussion under **Ethics**.

## SEARCH

*Weinstein v. Katapult Group, Inc.*, No. 21-CV-05175-PJH, 2022 WL 4548798 (N.D. Cal. Sept. 29, 2022). The parties raised similar concerns regarding their adversaries' respective searches for relevant documents, arguing that those searches were unduly limited in time and scope. The court rejected the parties' respective arguments and denied their discovery motions. Relying on Principle Six from *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1 (2018), the court observed that "responding parties are in the best position to evaluate the procedures appropriate for preserving and producing their own electronically stored information" and reasoned that the parties' requests would improperly remove from the parties responding to discovery the discretion to determine the breadth and manner of their searches for relevant information.

*Simon & Simon, PC v. Align Technology, Inc.*, No. 20-CV-03754-VC (TSH), 2022 WL 2387729 (N.D. Cal. July 1, 2022). In this antitrust litigation, the court ordered the defendant to eliminate from its search queries certain geographic limitations that it previously placed on those queries. Defendant had imposed those limitations—*e.g.*, restricting particular searches within 25 words of "'USA' or U.S.A. or 'US' or U.S. or 'United States' or 'North America' or America\* or 'NA'"—in an effort to help limit search results to relevant U.S. domestic documents. The court rejected the defendant's position, finding that "geographic limiters cannot be understood as even a rational attempt to target document collection to conduct that occurred in the U.S."

*Edwards v. McDermott International, Inc.*, No. 4:18-CV-04330, 2022 WL 1568279 (S.D. Tex. May 18, 2022). In this securities fraud case, the court held that the plaintiffs' proposed search terms—which yielded 1.3 million (family complete) document hits—were proportionate to the needs of the case. Defendants had argued that reviewing 1.3 million documents was unduly burdensome and that they should be allowed to use their own search terms, which they represented resulted in approximately 650,000 document hits for review. The court appeared flummoxed by the search-term dispute, opining that "[t]he truth of the matter is that I cannot say, with absolute certainty, that Plaintiffs' requested search terms will provide substantially more information than Defendants' proposed search terms. One would expect that the additional search hits will yield more information, but where do you draw the line?" The court further speculated regarding the quality and nature of the plaintiffs' search terms, conjecturing that "[n]obody, of course, knows what the email searches will reveal until the documents are reviewed and non-privileged, relevant documents are produced. But it is awful likely that the sought-after documentation is relevant and highly probative of Plaintiffs' claims and Defendants' defenses in the case." The court ultimately determined that the large damages figure pleaded in the complaint (more than \$1 billion) tipped the scales in favor of the plaintiffs. *See* discussion under **Proportionality**.

## SEDONA CONFERENCE PUBLICATIONS

*Weinstein v. Katapult Group, Inc.*, No. 21-CV-05175-PJH, 2022 WL 4548798 (N.D. Cal. Sept. 29, 2022). *See* discussion under **Search**.

*Stephan Zouras LLP, v. Thomas More Marrone*, No. 3:20-CV-2357, 2022 WL 4007296 (M.D. Pa. Sept. 1, 2022). *See* discussion under **Proportionality**.

*DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2022 WL 2905838 (N.D. Ill. July 22, 2022). *See* discussion under **Federal Rule Of Evidence 502(d)**.

*Hollis v. CEVA Logistics U.S., Inc.*, No. 19 CV 50135, 2022 WL 1591731 (N.D. Ill. May 19, 2022). *See* discussion under **Sanctions—Rule 37(e)**.

*Mercer v. Rovella*, No. 3:16-CV-329 (CSH), 2022 WL 1540447 (D. Conn. May 16, 2022). *See* discussion under **Cooperation**.

*Martley v. City of Basehor, Kansas*, No. 19-02138-DDC-GEB, 2022 WL 1302820 (D. Kan. May 2, 2022). *See* discussion under **Nonparties**.

*Tera II, LLC v. Rice Drilling D, LLC*, No. 2:19-CV-2221, 2022 WL 1114943 (S.D. Ohio Apr. 14, 2022). *See* discussion under **Reasonable Inquiry**.

*In re Pork Antitrust Litigation*, No. 18-CV-1776 (JRT/HB), 2022 WL 972401 (D. Minn. Mar. 31, 2022). *See* discussion under **Possession, Custody, or Control**.

## **TEXT MESSAGES & EPHEMERAL MESSAGES**

*Columbia Pictures Industries, Inc. v. Galindo*, No. 2:20-cv-03129-MEMF (GJSx), 2022 WL 3009463 (C.D. Cal. June 14, 2022), *report and recommendation adopted*, 2022 WL 3369629 (C.D. Cal. Aug. 15, 2022). The court imposed terminating sanctions, along with two monetary sanctions awards in the amount of \$181,080, against a defendant in this copyright infringement action for his failure to preserve and produce relevant ESI during discovery, including messages exchanged on the Telegram messaging application. The court condemned the defendant's continued use of Telegram after the commencement of the lawsuit, observing that the defendant had "no excuse for his continued use of Telegram set to automatically delete messages" after his duty to preserve attached. The court ultimately held that such "willful" conduct satisfied the intent element required for the sanction of default judgment to issue under Rule 37(b)(2)(A).

*Skeye Orthobiologics, LLC v. CTM Biomedical, LLC*, No. No. CV 20-3444 MEMF (PVCx), 2022 WL 3134122 (C.D. Cal. June 28, 2022). *See* discussion under **Rule 34 Requests and Responses**.

*teamLab Inc. v. Museum of Dream Space, LLC*, No. 2:19-cv-06906-VAP (GJSx), 2022 WL 1590746 (C.D. Cal. Mar. 10, 2022). The court granted the plaintiff's motion for spoliation sanctions and agreed to issue an adverse inference instruction against the defendants after they failed to retain relevant messages from their shared chief executive officer (Chang) after the duty to preserve attached. In this copyright infringement action, Chang had corresponded with certain individuals using the Telegram and WeChat messaging applications. The court found that Chang spoliated relevant messages from those respective applications by: (1) ceasing all communications on Telegram for over six months, which caused those messages to "self-destruct;" and (2) by dismantling the WeChat communication channel he previously established, "which resulted in the loss of those messages." *See* discussion under **Sanctions—Rule 37(e)**. In a separate order four months later, the court issued an order of summary judgment in favor of the defendants on the plaintiff's copyright claims and dismissed the action in its

entirety. *See teamLab, Inc. v. Museum of Dream Space, LLC*, No. 2:19-cv-06906-PSG (GJSx), 2022 WL 4372667 (C.D. Cal. July 12, 2022).

*Zox LLC v. Zox*, No. 2:21-cv-01609-PA (SKx), 2022 WL 3137939 (C.D. Cal. Feb. 4, 2022). Magistrate Judge Steve Kim decried a defendant's evasive responses and representations regarding his failure to preserve and produce relevant text messages exchanged with his co-defendants on the Signal messaging application. Judge Kim criticized the defendant for his failure to produce relevant messages and for allowing Signal's default functionality to purge those texts and caustically observed that "somehow the automatic elimination of text messages escaped or evaded the attention of Daniel's attorneys." Despite the "whiff (stench?) of potential spoliation," Judge Kim ultimately took no action to enforce the court's prior discovery order compelling the defendant to produce those messages and declined to impose sanctions on the defendant since fact discovery had closed, the parties were on the eve of trial, and there was not sufficient time "for further discovery motion practice under the current scheduling order." As a result, the court declined the plaintiff's motion, but without prejudice and indicated that plaintiff could seek the severe sanctions it sought—including default judgment—directly from the court.

## WORKPLACE COLLABORATION TOOLS

*Drips Holdings, LLC v. Teledrip LLC*, No. 5:19-CV-02789-JRA, 2022 WL 3282676 (N.D. Ohio Apr. 5, 2022), *report and recommendation adopted in part, rejected in part sub nom.* 2022 WL 4545233 (N.D. Ohio Sept. 29, 2022). In this trademark infringement dispute, the court issued a mandatory adverse inference instruction against the defendants for intentionally deleting relevant messages from defendant Teledrip's Slack messaging platform. After the duty to preserve attached but before plaintiff filed suit, the defendants modified Teledrip's Slack retention settings from indefinite to seven-day retention. Changing the retention settings resulted in the elimination of all internal Teledrip Slack communications (Teledrip previously downloaded relevant external "customer communications" from Slack shortly before it changed the retention settings). Despite their admittedly intentional destruction of relevant Slack messages, the defendants argued that sanctions should not be imposed because they modified the retention settings to comply with the California Consumer Privacy Act ("CCPA") and International Standard of Operation Compliance ("ISO") 27001. The court rejected this argument, reasoning that ISO 27001 directed companies in many instances to protect *against* data loss while observing that ISO 27001 did not appear to mandate the deletion of data for compliance purposes. In addition, the court found that while the CCPA required regulated companies to "protect" customer information, the defendants' "goal of protecting consumer information could have been accomplished by far less drastic measures." *See* discussion under **Sanctions—Rule 37(e)**.

*Red Wolf Energy Trading, LLC v. Bia Capital Management, LLC*, No. CV 19-10119-MLW, 2022 WL 4112081 (D. Mass. Sept. 8, 2022). In response to multiple production delays and misrepresentations regarding their compliance efforts with orders requiring the production of relevant Google documents and Slack communications, the court issued a default judgment sanction against two of the named defendants (Bia, Moeller) pursuant to Rule 37(b)(2)(A). *See* discussion under **Sanctions—Rule 37(b)**. Eight months after the court initially ordered the defendants to turn over responsive communications and other documents relating to the plaintiff's trade secret claims, the defendants turned over 47 "Google Vault documents," which the court characterized as "significant evidence" supporting the plaintiff's claims. Defendants did not identify or produce those documents previously due to a search "error" in which an employee "inadvertently conducted a search of only Bia's Gmail and not . . . other electronic records stored in Google Vault." Defendants also failed to disclose a

complete set of relevant, responsive records from their Slack communications platform. Defendants' belated Slack productions resulted from their failure to engage an eDiscovery provider or use search processes or technologies that might reveal the nature and extent of relevant information on their Slack platform. Instead, in a purported effort to save costs, the defendants relied on a consultant, who "had no experience with Slack," to develop a program that would search for and identify relevant Slack communications. The consultant's efforts were woefully incomplete, leading to sporadic and incomplete productions. Subsequent written testimony from service providers retained by the plaintiff and defendants confirmed that the defendants could have identified the relevant Slack materials by following standard eDiscovery processes such as exporting the Slack data to a third-party review platform for search, review, and analysis.

*Podium Corp. v. Chekkit Geolocation Services Inc.*, No. 2:20-CV-00352, 2022 WL 3576280 (D. Utah Aug. 19, 2022). *See* discussion under **Privilege Logging**.

*Mobile Equity Corp. v. Walmart Inc.*, No. 2:21-cv-00126-JRG-RSP (E.D. Tex. Jan. 4, 2022), [ECF No. 114](#). In this patent infringement litigation, the court ordered Walmart to produce "relevant Slack channels" and relevant, responsive documents from its Jira platform. Regarding the Slack production, the court indicated that the plaintiff had singled out up to 40 Slack channels as having relevant, responsive information. "[S]ensitive" to the burdens such a production could place on Walmart, the court ordered the parties to meet and confer regarding the Slack channels at issue and "narrow the list of forty channels." The court agreed to resolve any remaining issues regarding Walmart's Slack production after the parties completed their meet-and-confer efforts.