

NEWSLETTER

# eDiscovery Advantage

Q1-Q2 2024  
VOLUME 6, NUMBER 1

**JOHN ROSENTHAL**  
EDITOR IN CHIEF

**JASON MOORE**  
LEAD EDITOR

**TUSHAR VAIDYA**  
EDITOR

**KAREN WAGSHUL**  
EDITOR

**WINSTON  
& STRAWN**  
LLP

eDISCOVERY  
& INFORMATION  
GOVERNANCE



**WINSTON  
LEGAL  
SOLUTIONS**

# Table of Contents

<b>INTRODUCTION</b> .....	<b>3</b>
<b>CASE SUMMARIES</b> .....	<b>5</b>
AC BLUEBONNET, LP V. SUTHER FEEDS, INC. ....	5
ARMSTRONG V. HOLMES. ....	5
CAPITAL SENIOR LIVING INC. V. BARNHISER. ....	6
CITIZENS BUSINESS BANK V. MISSION BANK ET AL. ....	7
COKER V. GOLDBERG & ASSOCIATES ....	8
IN RE: DIISOCYANATES ANTITRUST LITIGATION ....	8
DOES LS 340 V. UBER TECHNOLOGIES, INC.. ....	9
DAVIS V. LOCKHEED MARTIN CORPORATION ....	10
DOE V. NATIONAL COLLEGE ATHLETIC ASSOCIATION ....	11
EAGLE VIEW TECHNOLOGIES, INC. V. GAF MATERIALS LLC. ....	12
EAGLE VIEW TECHNOLOGIES, INC. V. NEARMAP US, INC. ....	13
GAUDET AND COMPANY, INC. V. ACE FIRE UNDERWRITERS INSURANCE COMPANY ....	13
GOLDSTEIN V. DENNER. ....	14
IN RE GOOGLE DIGITAL ADVERTISING ANTITRUST LITIGATION ....	15
INSTITUTE FOR ENERGY RESEARCH V. FEDERAL ENERGY REGULATORY COMMISSION ....	16
IN RE INSULIN PRICING LITIGATION ....	17
JONES V. RIOT HOSPITALITY GROUP LLC ....	18
KEAN V. BRINKER INTERNATIONAL, INC. ....	18
KING V. BROADBAND OF INDIANA, LLC ....	19
LUBRIZOL CORP. V. IBM CORP. ....	20
NAGY V. OUTBACK STEAKHOUSE ....	21
OKLAHOMA FIREFIGHTERS PENSION AND RETIREMENT SYSTEM V. MUSK ....	22
IN RE SOCIAL MEDIA ADOLESCENT ADDICTION/PERSONAL INJURY PRODUCTS LIABILITY LITIGATION ....	23
IN RE SOCIAL MEDIA ADOLESCENT ADDICTION/PERSONAL INJURY PRODUCTS LIABILITY LITIGATION ....	24
IN RE STUBHUB REFUND LITIGATION ....	25
TWO CANOES LLC V. ADDIAN, INC. ....	26
IN RE UBER TECHNOLOGIES, INC., PASSENGER SEXUAL ASSAULT LITIGATION. ....	26
UNITED STATES EX REL GILL V. CVS HEALTH CORP. ....	27
ZAGG, INC. V. ICHILEVICI. ....	28
<b>INDEX OF TOPICAL TAGS</b> .....	<b>30</b>
<b>ABOUT WINSTON &amp; STRAWN EDISCOVERY AND LEGAL SOLUTIONS</b> .....	<b>31</b>



# Introduction

The Winston & Strawn LLP eDiscovery and Information Governance Group (the “eDiscovery Group”) is pleased to be able to offer our insights into the decisions and developments that have taken place in the first half of 2024 in the e-discovery, information governance, and privacy arenas.

We hope that the following summaries and information will continue to aid your understanding of these important and rapidly evolving areas of law, and we look forward to helping you stay informed about upcoming e-discovery developments during the remainder of the year.

As the saying goes, the more things change, the more they stay the same. So far in 2024, the most salient and impactful trends are continuations of patterns we saw developing last year. From our review of the cases, we perceive that a substantial number of courts are being asked to evaluate preservation and spoliation issues around mobile device messaging, especially text messaging and WeChat. Preservation of text and mobile messaging is notoriously tricky, and often an afterthought for litigators stuck in a 2010 mentality about the presumptive relevance of such communication mediums. Courts are guided by the facts of each case, including testimony that witnesses either did or did not use text or mobile messaging to communicate about matters relevant to the subject matter. A number of the cases below, including **AC Bluebonnet, LP v. Suther Feeds, Inc.**, **Capital Senior Living, Inc. v. Barnhiser**, and **Goldstein v. Denner**, reinforce the notion that counsel must be diligent to determine whether their clients may have texted about matters relevant to the litigation as early as possible and then take reasonable steps to preserve any such messages that may exist.

Another continued theme of increasing importance is the pervasiveness of modern or hyperlinked attachments. An increasing number of courts are wrestling with disagreements between the parties about how these artifacts should be treated by a producing party, sometimes guided by the parties’ own agreement and sometimes by common sense or the application of proportionality factors. Whether the act of “sending” a file by inserting a “link” (or another form of locator) into a “message” (which can be of the email, chat, or instant variety) constitutes “attaching” the file to the message in the familiar manner of an email and attachment is almost philosophical, and not practical, in nature. Courts nevertheless are showing a desire and willingness to be guided by practical concerns, including whether associating a file stored externally from the messaging application with a transmittal message is technically possible or proportionally burdensome. **In re Insulin Pricing Litigation** and **In re Uber Technologies, Inc., Passenger Sexual Assault Litigation** both illustrate this approach. This area is likely to remain an area of focus as the ability to preserve, collect, and produce hyperlinked files differs among ecosystems (e.g., MS Office 365, Google Suite, Box.com) and is subject to continual developments.

We have yet to see any decisions regarding the use and adoption of Generative AI as part of the discovery process. Several of the leading e-discovery software and service providers have introduced Generative AI capabilities into their products. With this

said, guidance around the use of the newer tools is in its early stage and, thus, lawyers and technologists appear to be struggling around when, whether, and how to use Generative AI for relevancy, privilege, and issue tagging. By way of example, there is no consensus regarding best practices for the generation, testing, and validation of a prompt, although some of the providers have begun to offer additional guidance around this important topic. Price also remains a significant factor that may preclude the use of these tools on larger data sets, where the cost to run a prompt can be as high as \$0.20 to \$0.75 per prompt per document. We anticipate the pricing to be reduced over time as the major foundational model providers (e.g., OpenAI), introduce newer, cheaper, and more cost-effective models.

## **IN MEMORIAM**

With sadness, we note the June 2024 passing of Craig Weinlein, the Executive Director of The Sedona Conference. We want to recognize Craig for his dedication and leadership to The Sedona Conference and its mission to move the law forward in a reasoned and just way. We offer Craig's family and the entire Sedona Conference family our sincerest condolences.

# Case Summaries

## AC BLUEBONNET, LP V. SUTHER FEEDS, INC.

#Rule37e; #Sanctions; #Spoliation; #Adverse-Inference;  
#Text-Messages

In **AC Bluebonnet, LP v. Suther Feeds, Inc.**, 2024 WL 940501 (D. Neb. Feb. 16, 2024), United States District Judge Joseph F. Bataillon denied the plaintiff's motion for Federal Rule of Civil Procedure 37(e)(2) sanctions for failing to preserve text messages and other ESI that were pertinent to the case.

In the underlying litigation, the plaintiff alleged, among other things, that the defendant violated the parties' non-solicitation agreement. During discovery, the plaintiff learned that one of the defendant's key custodians had deleted text messages that he sent and received during the non-solicitation period. Indeed, while the key custodian testified during his deposition that he did not manually delete text messages, he also admitted that he was unaware his cell phone had been set to auto-delete messages older than one year; that he therefore had not disabled said function; and that, as such, messages from the non-solicitation period had been auto-deleted. In addition, the evidence presented also indicated that the defendant never asked him to check the auto-delete setting on his mobile phone. The plaintiff was able to obtain some of the messages it sought via other means, but others were permanently lost. The plaintiff therefore moved for sanctions under Rule 37(e)(2), alleging the defendant intentionally destroyed the messages and seeking an adverse instruction that the jury could presume the lost messages were unfavorable to the defendant.

Sanctions for spoliation under Rule 37(e)(2) require a finding that (i) ESI that should have been preserved in anticipation of litigation was irretrievably lost because a party failed to take reasonable steps to preserve it; and (ii) the party did so with an intent to deprive another party of the use of that ESI during the

litigation. Relying on this guidance, Judge Bataillon readily found that the defendant had failed to take reasonable steps to preserve its employee's messages, but also determined that the evidence did not support a finding of intent. Here, the plaintiff had argued that "the Court should presume [the defendant] intended to deprive it of information from its failure to ensure the preservation of the text messages..." Judge Bataillon disagreed, stating that "[w]hile it may be true that [the defendant] could have asked [the key custodian] to check the auto-delete setting on his phone at the outset of the litigation, its failure to do so does not mean it acted with the intent to deprive [the plaintiff] of discoverable information. The most the evidence supports is that the automatic deletion of [the key custodian's] messages was an unfortunate oversight, not an intentional act." As such, Judge Bataillon held that the sanction of a presumption of unfavorability was not warranted, and he denied the plaintiff's motion.

## ARMSTRONG V. HOLMES

#Rule37e; #Sanctions; #Spoliation; #Adverse-Inference;  
#Text-Messages

In **Armstrong v. Holmes**, 2024 WL 1345214 (D. Nev. Mar. 29, 2024), United States Magistrate Judge Craig S. Denney granted the plaintiff's motion for Rule 37(e) sanctions against the defendant for intentionally deleting text messages but ordered a less severe sanction than the requested terminating sanctions.

In the underlying litigation, the plaintiff alleged that the defendant violated the terms of the non-disparagement provisions of their settlement agreement. During discovery, the plaintiff sought text messages between the defendant and the parties' son and between the defendant and the parties' daughter. The defendant produced text messages she exchanged with the son, but produced few, if any, that

the exchanged with the daughter. The defendant submitted a declaration where she stated that she did not often text her daughter because they live in the same house. She also stated that she saved text messages that she thought were important, but that she historically deleted text messages after reading them and, in addition, her iPhone was set to auto-delete messages after 30 days. Importantly, the evidence presented showed that the defendant continued her manual deletion practice and did not disable the auto-delete feature after receiving the litigation preservation letter.

Judge Denney reviewed the evidence presented and concluded that the requirements of Rule 37(e) (2) had been met. Specifically, he found that the defendant had an obligation to preserve text messages with her daughter, that she was aware of that duty but nevertheless failed to take reasonable steps to preserve them, and they were not recoverable or restorable by any reasonable alternative means. He further determined that “the affirmative steps [the defendant took] to delete messages after receiving a litigation preservation letter, and the select deletion of messages” demonstrated that the defendant acted with the requisite intent to deprive. He also appeared to question the credibility of the defendant, expressing disbelief about there being no messages between a frequent texter like the defendant and her daughter. Regarding what sanctions to impose, Judge Denney rejected the request for terminating sanctions, finding they would be too severe. He reasoned that “[w]hile the defendant’s conduct in deleting message after being served the preservation letter was egregious, it had not “so harmed [the plaintiff] that he would be unable to present his case.” Relying on this rationale, Judge Denney issued an order for an adverse inference instruction, stating that the plaintiff may present evidence to the jury concerning the defendant’s conduct and the likely relevance of the messages to the litigation, that “[t]he jury may consider that evidence in deciding whether to presume or infer the lost information was unfavorable to the plaintiff,” and that

the precise parameters of the jury instruction would be subject to the District Judge’s review prior to trial.

## CAPITAL SENIOR LIVING INC. V. BARNHISER

#Rule37e; #Sanctions; #Spoliation; #Adverse-Inference; #Text-Messages; #PC&C

In **Capital Senior Living Inc. v. Barnhiser**, 2024 WL 278105 (N.D. Ohio Jan. 25, 2024), United States District Judge James G. Carr granted the plaintiff’s motion for sanctions for spoliation of evidence against the defendants. The plaintiff, a senior living facility operator, had sued its former employee and her current employer for breach of a non-solicitation agreement that the employee signed while working for the plaintiff. The plaintiff alleged that the employee violated the agreement by soliciting the plaintiff’s employees and residents to join the new employer’s competing facility.

The plaintiff sought sanctions for spoliation of evidence based on the employee’s deletion of tens of thousands of text messages from her personal phone after the plaintiff instructed her to preserve potential evidence. The plaintiff argued that the deleted text messages were relevant to its claims and that the employee and her new employer had control over and a duty to preserve them. The defendants argued that the employee’s deletions were not intentional, that the new employer lacked possession, custody, or control over the employee’s personal phone, and that the deleted text messages were not relevant.

Judge Carr rejected the defendants’ arguments and found that the plaintiff established all three elements for spoliation sanctions under the Sixth Circuit’s prevailing test. He found that the employee and the new employer had control over the text messages because the employee used her personal phone for work purposes and the new employer assured the plaintiff that it expected the employee to comply with her agreements. He also found that the de-

defendants had a duty to preserve the text messages after receiving the plaintiff's litigation hold letter, which clearly stated the scope of the potential evidence. He further found that the employee had a culpable state of mind because she knowingly deleted the text messages after receiving the litigation hold letter and that the text messages were relevant because they likely contained evidence of the employee's solicitation of the plaintiff's employees and residents.

As a result, Judge Carr imposed the following sanctions on the defendants: (1) an adverse inference instruction to the jury that at least some of the deleted text messages evidenced the employee's efforts to solicit the plaintiff's employees and residents; (2) reimbursement of the plaintiff's costs related to the forensic examination of the employee's phone; and (3) payment of the plaintiff's attorneys' fees for having to compel the production of the employee's phone and to make the motion for sanctions. He also ordered the plaintiff to submit a statement of its expenses within three weeks of the order and the defendants to file their opposition within two weeks thereafter.

## CITIZENS BUSINESS BANK V. MISSION BANK ET AL.

#Forensic-Exam; #Rule26; #Rule34; #Motion-to-Compel; #Email

In **Citizens Business Bank v. Mission Bank et al.**, 2024 WL 3363593 (C.D. Cal. Mar. 15, 2024), United States Magistrate Judge Sheri Pym denied the plaintiff's motion to compel a forensic examination of several of the defendant's computers and devices. The plaintiff alleged that the defendant had misappropriated its trade secrets, interfered with its contracts and customer relations, and unfairly competed with it following the plaintiff's acquisition of a third bank. The plaintiff sought a forensic examination to search for deleted emails and documents relevant to its discovery requests and interrogatories, based on its

discovery of emails from a third-party subpoena that the defendant had not produced.

Judge Pym found that the plaintiff's motion was not ripe with respect to some of the devices and backup platforms that the plaintiff requested to examine, because the plaintiff had not served a Rule 34 request for inspection or allowed the defendant to respond to its latest round of discovery requests. Judge Pym also found that the plaintiff had not shown good cause for ordering a forensic examination of the devices of the defendant's chief banking officer who had deleted some emails before the litigation commenced. Judge Pym noted that the defendant had explained that the officer's deletion of emails was in accordance with his personal email practices and that he had preserved potentially discoverable documents after the dispute arose.

Judge Pym concluded that the plaintiff had not presented evidence of destruction or concealment of evidence by the defendant, or other misconduct that would warrant a forensic examination. Judge Pym observed that the defendant had cooperated with the plaintiff in conducting additional searches and making supplemental productions, and that the defendant had preserved and produced the emails that the plaintiff claimed were missing or destroyed. Judge Pym also rejected the plaintiff's request for sanctions, finding that the significant issues raised by the plaintiff would make an award of expenses for the defendant unjust.

## COKER V. GOLDBERG & ASSOCIATES

#Motion-to-Compel; #Privilege; #Waiver; #Rule37b; #Sanctions

In **Coker v. Goldberg & Associates**, 2024 WL 263121 (S.D.N.Y. Jan. 24, 2024), United States Magistrate Judge Barbara Moses granted the plaintiff's motion for sanctions but used her discretion as to the type of sanctions she ordered. In the underlying litigation, the plaintiff sued her former law firm employer for unpaid wages. The defendants' repeated foot-dragging during discovery resulted in a court order that they produce "all outstanding discovery . . . or face possible sanctions." Following receipt of the defendants' subsequent production, the plaintiff filed the instant request, claiming that the defendants failed to comply with the order, and specifically identified two key types of information that were missing from the production: (i) WhatsApp audio files exchanged between the plaintiff and her former boss; and (ii) WhatsApp messages regarding the defendants' good faith defense that they did not improperly withhold the plaintiff's wages. The defendants claimed that they did the best they could to respond to the plaintiff's extensive discovery demands while protecting information that was protected by the attorney-client privilege. Notably, the defendants did not produce a privilege log.

Judge Moses relied on Rule 37(b)(2), which governs sanctions for "not obeying a discovery order" and gives courts broad discretion to select the appropriate sanction. As Judge Moses noted, the only predicates to imposing sanctions under Rule 37(b) are a "court order directing compliance with discovery requests" and "non-compliance with that order." Here, Judge Moses's review of the record confirmed that both predicates were satisfied. That the withheld documents were potentially privileged did not absolve the defendants of their responsibility since, as Judge Moses observed, "[a] party has not completed all discovery," where, as here, "it has withheld responsive documents on privilege grounds but has failed to produce a privilege log." Having concluded

that the defendants violated the court's discovery order, Judge Moses turned to the question of what sanctions to order.

In the instant motion, the plaintiff asked for dispositive sanctions, including a default judgment or an order striking the defendants' affirmative defense. In addition, the plaintiff identified an alternative sanction of an instruction to the jury to draw a negative inference as to the content of the withheld files. Judge Moses held that the dispositive sanctions were disproportionate to the sanctionable conduct. As to the alternative sanction, Judge Moses held that it likewise was inappropriate, noting (i) there was no indication that the files had been destroyed and, as such, there was no need to infer their contents; and (ii) there was no indication that their absence had prejudiced the plaintiff in any way. After weighing the relevant factors, Judge Moses arrived at sanctions she deemed appropriate and ordered (i) as to the WhatsApp audio files, that the defendants had waived their privilege claim and must produce them on an attorneys-eyes-only basis; and (ii) as to the WhatsApp messages that could support the defendants' good faith defense, that the defendants were precluded from using or relying on any such messages that they had not previously disclosed.

## IN RE: DIISOCYANATES ANTITRUST LITIGATION

#Motion-to-Compel; #Privilege; #Privilege-Logs; #Waiver; #ESI-Protocol; #In-Camera

In **In Re: Diisocyanates Antitrust Litigation**, 2024 WL 643037 (W.D. Pa. Feb. 15, 2024), United States District Judge W. Scott Hardy ruled on the plaintiffs' motion to compel the defendant Covestro to produce 818 documents identified on its privilege log. Judge Hardy ordered the parties to file a joint report identifying one or more neutrals to act as a special master and conduct an *in camera* review of the 818 documents in question. The underlying dispute is a multi-district litigation alleging that multiple defendants conspired to reduce supply and increase



prices for methylene diphenyl diisocyanate (“MDI”) and toluene diisocyanate (“TDI”), both of which are precursor ingredients for the manufacture of polyurethane foam and thermoplastic polyurethanes.

The defendant produced a privilege log which it amended twice. The plaintiffs alleged that the defendant provided vague and conclusory descriptions for 818 documents on its privilege log. Specifically, the plaintiffs claimed that the 818 documents fell into one of four categories: (1) documents that facially appear to contain routine business communications rather than legal advice; (2) communications that appear to not involve an attorney at all; (3) communications not prepared in anticipation of litigation; and (4) communications disclosed to third parties. Conversely, the defendant argued that the plaintiffs’ challenges were improper because they did not specify which of their objections applied to specific log entries as required by the parties’ Stipulated ESI Protocol.

Judge Hardy first looked to the ESI Protocol, which stated privilege logs must be produced in compliance with the Federal Rules of Civil Procedure and “be detailed enough to enable other parties to assess the applicability of the privilege asserted; shall identify the custodian(s), author(s), last author, any and all recipient(s), date, filename, beginning and ending Bates or Document identification numbers, privilege and/or doctrine relied upon, and subject matter of the Document; and shall provide a description of the Document and/or Document family by type and content in conformity with the Federal Rules of Civil Procedure.” The ESI Protocol also allowed for categorical privilege logging. Judge Hardy then further noted that “[T]he burden of proving that the privilege applies is placed on the party asserting the privilege. Once the privilege-invoking party provides facts showing the privilege is applicable, the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the privilege.”

After conducting his own review of Covestro’s privilege log and the parties’ conferral efforts, Judge Hardy concluded that the “necessary assessment of these shifting burdens cannot be completed absent an *in camera* inspection of the underlying documents.” Accordingly, Judge Hardy referenced FRCP 1 and ordered that a special master be appointed to conduct an *in camera* review of the 818 challenged documents, noting that this review “would be the most just speedy, inexpensive, and effective means for resolving this dispute.”

## DOES LS 340 V. UBER TECHNOLOGIES, INC.

#Motion-to-Compel; #Preservation; #Legal-Hold; #Privilege

In **Doe LS 340 v. Uber Technologies, Inc.**, 2024 WL 107929 (N.D. Cal. Jan. 9, 2024), United States Magistrate Judge Lisa J. Cisneros granted the plaintiffs’ motion to compel the defendant to produce basic information regarding its litigation holds, granted in part the plaintiffs’ motion to compel the defendant to disclose information about the ESI it had preserved, and denied the plaintiffs’ motion to compel the defendant to implement a company-wide suspension of its document destruction policies. The underlying matter is a multi-district litigation involving allegations that the defendant failed to implement appropriate safety precautions to protect passengers and, as a result, the plaintiffs suffered sexual assault or harassment by drivers using the defendant’s application. In the fall of 2023, the parties began discussing the scope of the defendant’s preservation efforts, but their inability to reach agreement led the plaintiffs to file the instant motion.

In their motion, the plaintiffs asked the Court to order the defendant to (1) produce basic details surrounding its litigation holds, including the names, job titles, and dates of employment of the recipients of the hold notices, the dates of issue, and what litigation or claim the holds relate to; (2) disclose information regarding the ESI sources – including non-custodial sources – it was preserving, when it preserved

them, when they were used, what they were used for, the general types of information they housed, and which employees used or had access to them; and (3) suspend company-wide its document destruction policies.

As to the plaintiffs' request for basic details relating to the litigation holds, Judge Cisneros rejected the defendant's argument that the information sought regarding its litigation holds was privileged and granted the request in its entirety. She observed that while the "[p]laintiffs are not entitled to probe what exactly [the defendant's] employees were told by its attorneys through the litigation holds, they are entitled to know what [the defendant's] employees are doing with respect to collecting and preserving ESI." Regarding the plaintiffs' request for information about the ESI sources, Judge Cisneros observed the "[c]ourts routinely hold that parties are entitled to know what kinds and categories of ESI a party has collected and preserved and what specific actions were undertaken to that end" and that "the disclosure of information indicating non-custodial sources of ESI is expected in the ordinary course of discovery." She therefore granted the request to the extent it sought what ESI sources were preserved, when each was used, what they were used for, and the general types of information they housed; however, she declined to order the defendant to identify which employees used or had access to the ESI sources, noting it would likely be too burdensome. Finally, regarding the plaintiffs' request for a company-wide suspension of the defendant's document destruction policies, Judge Cisneros denied it in its entirety, holding that such a request was "exceedingly broad."

## DAVIS V. LOCKHEED MARTIN CORPORATION

#Motion-to-Compel; #ESI-Protocols; #Discovery-on-Discovery

In **Davis v. Lockheed Martin Corporation**, 2023 WL 6845250 (M.D. Fla. Oct. 17, 2023), United States

Magistrate Judge Daniel C. Irick denied the plaintiff's motion to compel the defendant to produce all documents that hit on agreed-upon search terms, irrespective of whether the documents were responsive to the plaintiff's requests for production.

The underlying dispute is one of several related toxic-tort cases. Through deposition testimony, the plaintiff identified two documents relating to chromium hexavalent, a chemical compound, which were responsive to the plaintiff's document requests. The plaintiff filed a motion to compel the defendant to produce documents relating to chromium hexavalent. Magistrate Judge Irick granted this motion and ordered the defendant to locate, review, and produce any non-privileged documents relating to chromium hexavalent that were not previously produced. The defendant complied with Judge Irick's order and produced approximately 2,800 out of approximately 15,000 chromium hexavalent documents. During this review, the defendant also found additional responsive documents unrelated to chromium hexavalent that should have previously been produced. The defendant produced these documents.

In response, the plaintiff filed a motion to compel the defendant to produce all non-privileged documents containing agreed-upon search terms without a responsiveness review. The defendants countered that they had negotiated an ESI protocol with the plaintiff, conducted searches pursuant to that protocol, and produced documents responsive to the plaintiff's discovery requests.

Judge Irick denied the plaintiff's motion to compel the defendant to produce all 15,000 documents relating to hexavalent chromium, noting that "plaintiff offers no legal support for its proposition that an error in defendant's production entitles them to unfettered access to all the raw results from defendant's ESI searches." Judge Irick further stated that "it is commonly understood that discovery is not perfect." Judge Irick also reasoned that "[T]he Federal Rules of Civil Procedure do not require perfection," thus, the fact "that some relevant documents have fallen

through the cracks,’ or there was a delay in producing documents, does not make discovery on discovery more than of ‘dubious value.’”

## EDITOR’S NOTE

*This is a well-reasoned decision that should serve as a warning to overzealous litigants who try to use negligible or inadvertent document production deficiencies to seek unjustified relief. Magistrate Judge Irick highlighted several important realities, namely that (1) agreed-upon ESI protocols will govern discovery; (2) the plaintiff did not offer any legal authority for the proposition that a production deficiency entitles it to all documents that hit on a specific keyword; (3) discovery is not perfect, nor do the Federal Rules require perfection; (4) search terms, whether agreed-upon or otherwise, are not a proxy for responsiveness discovery requests; (5) parties are entitled to conduct a responsiveness review in advance of production and that (6) even in the face of production deficiencies or delay, discovery on discovery is “dubious.”*

## DOE V. NATIONAL COLLEGE ATHLETIC ASSOCIATION

#Motion-to-Compel; #Search-Terms; #Social-Media; #Proportionality; #Scope-of-Discovery

In **John Doe 1, et. al. v. National College Athletic Association**, 2024 WL 643038 (S.D. Ind. Feb. 15, 2024), United States Magistrate Judge Mark J. Dinsmore granted the defendant’s motion to compel the fourteen individual and anonymous plaintiffs to produce private messages sent or received via social media applications. The plaintiffs were current and former college baseball players alleging that their college coaches subjected them to “rampant sexualized harassment and misconduct.” The plaintiffs filed an amended complaint asserting a variety of tort claims, including negligence, breach of fiduciary duty, breach of contract, and intentional and negligent infliction of emotional distress.

The defendant requested that the plaintiffs produce, among other items, private messages from their social media accounts. The plaintiffs resisted this request as disproportionate and unduly burdensome and had yet to produce any ESI, arguing that the parties were at an impasse regarding the use of search terms to identify relevant information. The defendant subsequently filed a motion to compel the plaintiffs to produce their social media feeds and associated information.

Magistrate Judge Dinsmore held a hearing on the defendant’s motion, during which the plaintiffs agreed to produce the raw exports of their social media feeds. However, the plaintiffs continued to resist producing private messages from those same social media accounts, arguing that they could not agree with the defendant on keywords to use to search these private messages. The defendant countered, and Judge Dinsmore agreed, that the plaintiffs’ alleged burden “arises out of Plaintiffs’ desire to narrow their production to avoid producing potentially irrelevant private information along with relevant information.”

Magistrate Judge Dinsmore noted his concern with the “Plaintiffs’ lackadaisical approach to discovery,” noting that the plaintiffs had not produced any ESI in response to the defendant’s discovery requests. Judge Dinsmore found that the private messages at issue undoubtedly 1) contain information relevant to the plaintiffs’ claims for emotional distress; and 2) contain information that is wholly irrelevant to the claims and defenses at issue. Judge Dinsmore further found that the plaintiffs were effectively arguing “that they not be required to produce any of their private messages, or at least any that are not identified by the use of search terms, because the burden of finding any additional relevant information would be disproportionate to the marginal relevance of that information.” Judge Dinsmore characterized the defendant’s position as requesting that the plaintiffs produce all of their private social media messages.

Judge Dinsmore rejected the plaintiffs' arguments because they had not satisfied their obligation of specifying the burden of conducting a message-by-message relevancy review, citing prior precedent which held that "[a]n objecting party must specifically establish the nature of any alleged burden, usually by affidavit or other reliable evidence." By way of example, Judge Dinsmore noted that the plaintiffs could not even specify how many private messages were at issue. He also dismissed the plaintiffs' privacy concerns because the plaintiffs would be allowed to use pseudonyms to protect the identify of individuals and any such information can be designated as confidential under the operative protective order entered in the dispute.

Judge Dinsmore reasoned that the plaintiffs had had six months to propose a process to identify relevant messages absent a message-by-message review, but had not made a "robust effort to explore other options, or to at least produce any obviously relevant social media information in a timely manner." Judge Dinsmore further found that the "Plaintiffs essentially held all of their social media information hostage to Defendant's agreement to their review proposal, not making any real effort to begin production of indisputably relevant information, because the parties were debating the use of search terms as a way to reduce plaintiffs' burden of culling their social media information." Judge Dinsmore went further, stating that the plaintiffs' position was "not an acceptable way to approach discovery."

## EDITOR'S NOTE

*There are several key takeaways from this decision. First, this decision serves as yet another reminder that parties arguing that requested discovery is unduly burdensome must specifically support their arguments with affidavits, declarations, or record evidence. Second, courts typically resist arguments that information should not be produced because portions are private or irrelevant because protective orders and other mechanisms allow for the protection of privacy rights. Third, search terms are not a*

*proxy for responsiveness or relevance, nor should they be used to exclude known responsive or relevant information from discovery.*

*Finally, we note that the plaintiffs argued, and Judge Dinsmore rejected, that reviewing and producing their private social media messages would be disproportionate because the burden of finding additional relevant information would be outweighed by the marginal relevance of the messages. We agree that any proportionality analysis must include a marginal utility test to determine if the burden of producing the information outweighs its usefulness. We believe that, had the plaintiffs engaged in meaningful and cooperative discussions regarding producing social media information, Judge Dinsmore may have ruled differently.*

## EAGLE VIEW TECHNOLOGIES, INC. V. GAF MATERIALS LLC

#Motion-to-Compel; #Search-Terms; #Discovery-on-Discovery

In **Eagle View Technologies, Inc. v. GAF Materials LLC**, 2024 WL 384984 (D. Utah Feb. 1, 2024), United States Magistrate Judge Daphne A. Oberg granted the defendant's motion to compel the plaintiffs to produce a witness to address topics relating to the plaintiffs' search for and production of documents responsive to the defendant's request for production. The case involves a patent infringement claim by the plaintiffs, who sell software related to aerial imagery, against the defendant, who sells roofing materials. The defendant sought documents relating to the plaintiffs' sales, offers, licenses, and offers to license certain software, including the plaintiffs' "EFS" software, which allegedly infringes the defendant's patent.

The court had previously ordered the plaintiffs to conduct a new, targeted search for responsive documents after finding the plaintiffs' initial response insufficient. The plaintiffs produced hundreds of additional documents, but the defendant argued there



were still gaps in the production and sought discovery on the process the plaintiffs used to search for and produce responsive documents. The plaintiffs objected to this request as overly broad, unduly burdensome, and an improper attempt to seek “discovery on discovery.” The plaintiffs offered to produce a witness to testify about the plaintiffs’ document repositories as they have existed over time, but refused to provide testimony on the nature of the searches performed.

The court found the defendant had demonstrated an adequate factual basis to question the sufficiency of the plaintiffs’ response, based on the plaintiffs’ prior failure to produce responsive documents, the incompleteness of some of the produced documents, and the references to additional repositories and custodians in the produced documents. The court held that discovery on the process the plaintiffs used to respond to the defendant’s request was appropriate and justified, and that the plaintiffs’ offer to produce a witness on the repositories was insufficient. The court ordered the plaintiffs to produce a witness for the topics specified by the defendant, which required the plaintiffs to identify all repositories or sources of responsive documents, the nature of the searches performed, and the circumstances and timing of any repositories that no longer exist or contain responsive documents.

## EAGLE VIEW TECHNOLOGIES, INC. V. NEARMAP US, INC.

#Motion-to-Compel; #Scope-of-Discovery; #Rule26; #Slack; #Proportionality

In **Eagle View Technologies, Inc. v. Nearmap US, Inc.**, 2024 WL 694724 (D. Utah Feb. 20, 2024), United States Magistrate Judge Daphne A. Oberg denied the defendant’s motion to compel the plaintiff to produce information from its Slack channel called “competitiveintel.” The judge found that the defendant’s requests for production were overly broad and sought irrelevant information, in violation of Rule 26(b)(1) of the Federal Rules of Civil Proce-

dure. The judge rejected the defendant’s arguments that the Slack channel was relevant to the plaintiff’s trade-secret-misappropriation claim or that the plaintiff had put at issue the nature of competitive intelligence shared on Slack channels.

Judge Oberg explained that the defendant’s requests, which sought all documents relating to the accused products or the market for products relating to the asserted patents, were facially overbroad because they referred to a wide variety of information without regard to any issues in dispute in the case. She also noted that the defendant failed to adequately explain how the contents of the plaintiff’s “competitiveintel” Slack channel related to a claim or defense in the case, even if the requests were narrowed. The judge distinguished the plaintiff’s request for information from the defendant’s Slack channel, which was based on a specific email indicating that the defendant had transmitted the plaintiff’s purported trade secrets through that channel.

Judge Oberg concluded that the defendant had not shown that its requests were relevant or proportional to the needs of the case, as required by Rule 26(b)(1). The judge therefore denied the defendant’s motion to compel production of the plaintiff’s “competitiveintel” Slack channel.

## GAUDET AND COMPANY, INC. V. ACE FIRE UNDERWRITERS INSURANCE COMPANY

#Motion-to-Compel; #Rule26; #Relevance-Redactions; #In-Camera

In **Gaudet and Company, Inc. v. ACE Fire Underwriters Insurance Company**, 2024 WL 457134 (S.D. Ala. Feb. 6, 2024), United States Magistrate Judge P. Bradley Murray granted in part and denied in part the plaintiff’s motions to compel discovery from the defendants. The plaintiff, a home healthcare services provider, sought to recover from the defendants, its insurers, the amount of a judgment entered against it in favor of its franchisor, who had cross-claimed

for indemnification after settling with the estate of a deceased client that had sued for wrongful death.

Among other things, the plaintiff's motions challenged the propriety of their redactions and withholdings of documents based on claims of confidentiality, relevance, attorney-client privilege, and work product protection. With respect to redactions for relevance, the court's orders respecting production of ESI and protection of confidential information did not mention redacting or withholding documents on the basis of relevance. Judge Murray reviewed the disputed documents *in camera* and found that the defendants had improperly redacted or withheld many documents that were relevant to the plaintiff's claims and not protected by any privilege or confidentiality interest. Judge Murray ordered the defendants to produce unredacted versions of those documents, which included a loss report, an email chain discussing the claim handling, and information on reserves. Judge Murray observed that "relevancy is construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case," and that "where there is a doubt over relevancy, the court should still permit discovery." Here, Judge Murray noted that the defendants had purported to redact "either information belonging to other insureds or confidential business, privileged, technical information relating to Defendants' insurance operations." However, upon reviewing the documents, Judge Murray noted that there were many documents containing redactions, that the redactions applied did not identify the basis on which the information was redacted, and that in either event, he had "not seen any redacted information that would constitute confidential, proprietary business information, and even if such information were present, no evidence has been presented that the existing Protective Order would not adequately protect such sensitive information." While noting that some courts have permitted redaction of non-relevant information, Judge Murray observed that in most of those cases, the number of redacted documents was small, the basis of the redactions was clear, the

types of documents redacted were consistent, and the unilateral redaction did not require the court to be burdened with extensive *in camera* review.

However, Judge Murray also found that some of the documents or portions thereof were protected by the attorney-client privilege or the work product doctrine and did not have to be produced to the plaintiff. Judge Murray denied the plaintiff's motion to compel as to those documents, finding that the defendants had met their burden of establishing that the discovery was improper.

## GOLDSTEIN V. DENNER

#Rule37e; #Sanctions; #Spoliation; #Adverse-Inference;  
#Text-Messages

In **Goldstein v. Denner**, 310 A.3d 548 (Del. Ch. 2024), Vice Chancellor J. Travis Laster granted the plaintiff's motion for sanctions based on the defendant's failure to preserve text messages relating to the sale of a company in which the defendant was a director. Vice Chancellor Laster found that the defendant, an activist hedge fund principal who was also a director of the sold company, had a duty to preserve text messages from his personal devices and those of other key personnel at the fund, starting from at least February 2018, when he received the first of three litigation hold notices. He also found that the defendant failed to take reasonable steps to preserve the text messages, which were lost due to inexplicable failures of data backup or transfer, and that the plaintiff suffered prejudice from the loss of evidence.

Vice Chancellor Laster analyzed the motion under Court of Chancery Rule 37(e), which governs sanctions for spoliation of ESI. He determined that the text messages were relevant ESI that should have been preserved, that they were irretrievably lost and could not be replaced from other sources, and that the loss was attributable to the defendant's failure to identify, collect, and preserve the ESI. Vice Chancellor Laster also determined that the defendant acted

recklessly, at a minimum, in spoliating the evidence, and that recklessness was sufficient to impose sanctions under Rule 37(e)(2), which provides, in part, that severe sanctions such as an adverse inference instruction or terminating orders may be predicated “upon a finding that the party acted recklessly or with the intent to deprive another party of the information’s use in the litigation.”

To remedy the prejudice, Vice Chancellor Laster imposed sanctions that included presumptions that the defendant traded based on insider information and that the lost texts would have supported the plaintiff’s position that the sale process was tainted by the defendant’s insider trading. Vice Chancellor Laster also raised the defendant’s burden of proof by one level on any issue where the defendant had the burden, and he awarded the plaintiff the reasonable attorneys’ fees and expenses incurred in pursuing his motion. The court noted that the sanctions were necessary to address both the lack of evidence that the plaintiff had to prove its affirmative case and the greater ability of the defendant to testify with impunity.

## IN RE GOOGLE DIGITAL ADVERTISING ANTITRUST LITIGATION

#Motion-to-Compel; #Discovery-on-Discovery; #Rule37b

In **In re Google Digital Advertising Antitrust Litigation**, 2024 U.S. Dist. LEXIS 49342 (S.D.N.Y. Mar. 20, 2024), United States District Judge P. Kevin Castel denied the MDL plaintiff’s motion to compel the defendant to fully respond to the plaintiffs’ interrogatories. The underlying litigation is a class action in which the plaintiffs claim that the defendant’s digital advertising business constitutes a monopoly.

In the instant motion, the plaintiffs sought to compel the defendant to fully respond to interrogatories that “seek information on Google’s internal file systems and the identification and descriptions of Google data fields and data analysis tools relevant to named

Plaintiffs’ data.” The defendant had provided some information in response to the interrogatories, but the plaintiffs deemed them inadequate and submitted this motion. In their motion, the plaintiffs asserted that the purpose of the interrogatories was to “allow the Plaintiffs to assess the appropriateness of Google’s data production thus far,” that an “appropriate response will permit Plaintiffs properly to assess the scope and completeness of produced data and analysis materials, particularly as to information relevant to Plaintiffs’ damages and impact analyses,” and that “supplemental answers ‘will inform what additional, targeted discovery, if any, may be necessary.’” The defendant opposed the motion on various grounds, including that the interrogatories improperly seek “discovery on discovery” without a proper foundation.

Judge Castel agreed with the defendant. He observed that the plaintiffs’ assertions served as a “candid acknowledgment that theirs is a collateral inquiry—an assessment of whether Google’s production is adequate” and, moreover, that the plaintiffs had made “no showing that would warrant the inquiry.” Judge Castel observed that “when the discovery sought is collateral to the relevant issues (*i.e.*, discovery on discovery), the party seeking the discovery must provide an ‘adequate factual basis’ to justify the discovery.” And, as Judge Castel noted, the plaintiffs failed to satisfy that requirement. He rebuked the plaintiffs for their “tell me what you’ve got regardless of its relevance, and I’ll tell you what I want” approach to discovery, describing it as vastly overbroad and seeking material that is neither relevant nor proportional to the needs of the case. And, based on this conclusion, Judge Castel denied the plaintiffs’ motion to compel.

## INSTITUTE FOR ENERGY RESEARCH V. FEDERAL ENERGY REGULATORY COMMISSION

#Text-Messages; #Form-of-Production; #Email; #Rule34

In **Institute for Energy Research v. Federal Energy Regulatory Commission**, 2024 WL 1091791 (D.D.C. Mar. 13, 2024), United States District Judge Christopher R. Cooper determined that the defendant's production of individual text messages – as opposed to full message threads – was reasonable and relied on same to grant the defendant's motion for summary judgment. The underlying litigation relates to the plaintiff's 2022 FOIA request to the defendant, asking for text messages that included one or more of four specified terms. The defendant responded with a production of individual text messages, each of which included at least one of the referenced terms. The plaintiff then sued, claiming the defendant had incorrectly and unreasonably defined the request as seeking single text messages, and asserting that the defendant "was required to produce entire text message threads even if only one message in the thread hit on a responsive term." In addition, the plaintiff argued that if the defendant had properly interpreted the request to seek single text messages, it was nevertheless required to also produce surrounding messages as necessary context.

The issue presented, as described by Judge Cooper, was "whether [the defendant] properly defined 'a record' for purposes of the request." His analysis was informed by criteria from the DOJ's Office of Information Policy ("OIP"), which included, without limitation, the requester's intent, the scope of the request, maintaining the integrity of the released documents, efficiency, cost, and resource allocation. Applying these criteria, and focusing on a literal reading of the language in the FOIA request, Judge Cooper concluded that the defendant's definition of a record as a single text message was reasonable. For example, he observed that the plain language of the request clearly limited its intent and scope to single messages. Specifically, he noted that the request, as drafted, "sought only the specific text messages

that hit on one of the listed terms—not text threads, text conversations, or text discussions." Indeed, the request lacked any language requesting "messages pertaining to, about, or concerning one of the four referenced terms" and, moreover, the only reference to threads appeared in a sentence that mentioned email threads. As to the other OIP criteria and the plaintiff's alternative argument for single messages plus surrounding messages for context, Judge Cooper stated that none would change his determination that the defendant's definition was reasonable. Based on this analysis, Judge Cooper held that while the plaintiff might have "drafter's remorse" about its FOIA request, the defendant's interpretation of the request, and its resulting production of individual text messages, was reasonable.

### EDITOR'S NOTE

*This decision is noteworthy for a couple of reasons. First, it reminds of the importance of well-crafted discovery requests. Here, the plaintiff's requests suffered from a lack of clarity (failed to explain that the scope went beyond individual messages with search term hits) and typos (mentioned email threads in a set of requests that was limited to texts). Second is Judge Cooper's response to the plaintiff's argument for "context-based" productions. Context-based productions are the subject of an as-yet-unresolved debate about how text messages should be produced. Judge Cooper appeared to acknowledge context-based productions as a potentially viable option, but – with the exception of noting the inherently complex nature of text messages and the challenges with determining "where one text-message record ends and another begins" – he side-stepped the issue, relying on a literal reading of the language in the plaintiff's FOIA request to avoid weighing in definitively on the issue.*



## IN RE INSULIN PRICING LITIGATION

#Modern-Attachments; #Hyperlinked-Attachments;  
#ESI-Protocols; #Proportionality

In **In re Insulin Pricing Litigation**, 2024 WL 2808083 (D.N.J. May 28, 2024), United States Magistrate Judge Rukhsanah L. Singh ruled on the parties' respective and competing ESI protocols. Judge Singh's ruling implicated several relevant discovery disputes. Most specifically, Judge Singh agreed with the defendants that "modern" or hyperlinked documents contained within other documents are "not the same as traditional attachments." The underlying multidistrict litigation relates to anticompetitive insulin pricing. Both parties submitted their competing ESI protocols and briefing to the court. The plaintiffs supplemented their briefing with two expert declarations. The defendants produced eight declarations, including from multiple, prominent eDiscovery vendors, in support of the position that "[n]o Defendant has tools to automatically or comprehensively collect hyperlinked documents like traditional attachments, nor is there a way to automatically or accurately create family collections during the collection or review process." The defendants also submitted a letter regarding supplementary authority, noting that the Northern District of California recently modified an ESI Protocol Order that had previously required that hyperlinked documents be produced as "family" to transmitting messages.

The plaintiffs argued that the defendants should produce hyperlinked documents with any affiliated family group. The defendants countered that the plaintiffs' proposal was technologically infeasible and would create undue burden disproportionate to the needs of the case. The plaintiffs responded to the defendants' declarations and argued that the parties should meet and confer to discuss the feasibility of producing hyperlinked attachments. The defendants resisted, arguing that the purpose of any such meet and confer would be "discovery on discovery."

Judge Singh agreed with the defendants, stating, "[i]n sum, each defendant proffers that it is not feasible, [not] practicable or unduly burdensome to produce hyperlinked documents in family groups, particularly when attempting to produce, in a family group, the 'as sent' version(s) or any linked document." Judge Singh ultimately ruled that "hyperlinks are not the same as traditional attachments. The Court ultimately must determine whether commercially available tools that may be used to maintain family relationships in the context of hyperlinks are feasible in the data environments or systems used by each producing party subject to the ESI Protocol and, if feasible, if the use of such tools are proportional to the needs of the case and not unduly burdensome." Judge Singh found that the "[d]efendants have sufficiently proffered that such tools are either not feasible whatsoever or unduly burdensome to apply to their respective data environments," and thus adopted the defendant's proposed language.

### EDITOR'S NOTE

*This is a decision that we hope will provide litigants and courts with guidance on the handling of modern or hyperlinked attachments. Notably, the defendants obtained a number of declarations supporting their position that maintaining family relationships for hyperlinks would be infeasible, unduly burdensome, and disproportionate. Our view is that consideration of the proportionality factors is imperative when deciding disputes regarding the handling of modern attachments. Currently, eDiscovery software does not provide an "easy button" to collect hyperlinked attachments while maintaining family relationships. Accordingly, this decision is cognizant of this current reality. As technology advances, we expect burden arguments to be weakened. However, for now, this ruling is clear that hyperlinked attachments are not portions of "traditional" document families*

## JONES V. RIOT HOSPITALITY GROUP LLC

#Rule37e; #Sanctions; #Spoliation; #Terminating-Sanctions; #Intent-to-Deprive; #Text-Messages

In **Jones v. Riot Hospitality Group LLC**, 95 F.4th 730 (9th Cir. 2024), United States Circuit Judge Andrew Hurwitz, writing for the Ninth Circuit Court of Appeals, affirmed the district court’s dismissal of the plaintiff’s case as a sanction for intentional spoliation of text messages pursuant to Federal Rule of Civil Procedure 37(e)(2). The plaintiff was a former employee of the defendants who sued the defendants for Title VII violations and common law tort claims but failed to preserve and produce relevant text messages exchanged with her co-workers and witnesses. The district court ordered the parties to jointly retain a third-party forensic specialist to extract the messages from the plaintiff’s and the witnesses’ phones, but the plaintiff and her counsel repeatedly violated the court’s orders to produce the messages to the defendants.

The Ninth Circuit rejected the plaintiff’s arguments that she did not act with the intent to deprive the defendants of the use of the messages in the litigation, as required by Rule 37(e)(2) to support the awarded sanction of dismissal. The Court held that the district court did not clearly err in finding that the plaintiff intentionally deleted a significant number of messages and collaborated with others to do so. The Court noted that “[b]ecause intent can rarely be shown directly, a district court may consider circumstantial evidence in determining whether a party acted with the intent required for Rule 37(e)(2) sanctions. Relevant considerations include the timing of destruction, affirmative steps taken to delete evidence, and selective preservation.” Here, the Court found that there was “ample circumstantial evidence that [the plaintiff] intentionally destroyed a significant number of text messages” to support the district court’s finding that the plaintiff “affirmatively selected certain text messages for deletion while otherwise preserving text messages sent around the same time.”

The Ninth Circuit also rejected the plaintiff’s arguments related to prejudice—specifically, that district court erred by finding that the defendants had been prejudiced by the loss of the messages, and that the district court’s award of terminating sanctions was “greater than necessary to cure the prejudice” (citing Rule 37(e)(1)). The Court found that prejudice is not a prerequisite finding necessary to support sanctions under Rule 37(e)(2), and that even though dismissal is explicitly authorized where intent to deprive has been found, the district court nevertheless did consider lesser sanctions, and its rejection of those lesser sanctions was not an abuse of discretion.

## KEAN V. BRINKER INTERNATIONAL, INC.

#Rule37e; #Sanctions; #Spoliation; #Intent-to-Deprive; #Email; #Curative-Measures

In **Kean v. Brinker International, Inc.**, 2024 WL 1815346 (M.D. Tenn. April 25, 2024), Judge Aleta A. Trauger addressed the plaintiff’s motion for sanctions based on the defendants’ alleged spoliation of evidence. The plaintiff, who claimed he was terminated because of his age in violation of federal law, argued that the defendants failed to preserve emails, documents memorializing complaints about the plaintiff, and performance appraisals from his supervisors. The defendants denied the accusations of spoliation and asserted that they took reasonable steps to preserve electronic information and that the plaintiff suffered no prejudice from the absence of any documents.

Judge Trauger granted the motion in part and denied it in part, finding that the plaintiff had established that he suffered some prejudice from the loss of potentially relevant emails that the defendants failed to preserve or produce. Among the documents requested by the plaintiff in discovery were emails related to the defendant’s decision to terminate the plaintiff’s employment. Judge Trauger found that, despite having a duty to preserve information for the litigation, the defendant failed to

preserve emails for employees who were key to the termination decision. However, the defendant did preserve and produce a “Team Member Relations” (“TMR”) report compiled and maintained by the defendant’s Human Resources department which captured key portions of emails between employees related to the termination decision (although not full email threads or “all” emails between employees). Judge Trauger declined to find that the defendant destroyed the emails with intent to deprive the plaintiff of their use in the case. She reasoned that the “[w]hile they appear to have been very cavalier with respect to their document-retention policies, there is insufficient evidence to support an inference that [the defendant] acted intentionally to deprive the plaintiff of documents in this litigation.” Further, she concluded that the TMR Report appeared to capture the substance of the emails relating to his termination, mitigating the prejudice the plaintiff claimed and the need for curative measures under Rule 37(e) (1). Judge Trauger therefore ordered the defendants to reimburse the plaintiff for the costs and attorney’s fees associated with the motion, but declined to impose any other sanctions, such as granting summary judgment, excluding the TMR Report, or instructing the jury to presume that the lost emails were unfavorable to the defendants.

Judge Trauger also found that there was insufficient evidence to support the plaintiff’s claim of spoliation regarding the complaint documentation and the plaintiff’s performance appraisals. The judge noted that the plaintiff had not presented any basis for concluding that the complaint documents ever existed or were destroyed by the defendants, and that their absence was likely to hurt the defendants more than the plaintiff in proving the reason for his termination. She further noted that the performance appraisals were not maintained or destroyed at a time when the defendants were on notice of potential litigation, and that the plaintiff was not actually prejudiced by their loss, since he had a witness who could testify to their positive content.

## KING V. BROADBAND OF INDIANA, LLC

#Motion-to-Compel; #Privilege; #Control-Group; #Waiver

In **King v. Broadband of Indiana, LLC**, 2024 WL 406637 (S.D. Ind. Feb. 2, 2024), United States Magistrate Judge Mark J. Dinsmore granted the plaintiff’s motion to compel the production of documents on the defendant’s privilege log. The case arose out of an automobile accident that occurred in Illinois. The plaintiff alleged the accident was caused by an employee of the defendant who was acting in the scope of his employment with the defendant. The documents at issue are communications between the defendant’s insurance company and an employee of the defendant named Mandy Hobson (“Hobson”). Hobson’s signature line identifies her as the defendant’s “Corporate Office Manager.” The defendant withheld the documents on the basis of Illinois’ insured-insurer privilege and asserted this privilege as the basis for its objection to the plaintiff’s motion.

Judge Dinsmore acknowledged that Illinois’ insured-insurer privilege extends the attorney-client privilege to “communications between an insured and its insurer,” and noted that its application is appropriate when a party asserting the privilege proves: “(1) the identify of the insured, (2) the identity of the insurance carrier, (3) the duty to defend a lawsuit, and (4) that a communication was made between the insured and an agent of the insurer.” For the first factor, the defendant identified itself as the insured and, moreover, implicitly assumed that all its employees are also insureds/clients. Judge Dinsmore, however, found fault with this assumption, specifically noting that it failed under the control group test, and ultimately relied on this flaw to find the documents at issue were not privileged.

Judge Dinsmore noted that under Illinois law, corporations seeking to invoke the attorney-client privilege must “show that the employee involved falls within the control group of the corporation, as defined in Consolidated Coal.” He explained that the control group test creates two tiers of corporate

employees who may be protected by the privilege: (1) “the decision-makers, or top management;” and (2) “employees who directly advise top management, and upon whose opinions and advice the decision-makers rely.” To support a claim that Hobson, the employee involved in the subject communications, was a member of the defendant’s control group, the defendant offered an affidavit from its owner where he stated that Hobson is the company’s Corporate Office Manager; is tasked with various payroll, hiring, and HR-related matters; and is a trusted advisor upon whose advice and opinions he relies. Judge Dinsmore determined that while this demonstrated the owner’s reliance on Hobson for hiring and HR-related advice, it fell far short of establishing Hobson as a member of the defendant’s control group. As such, Judge Dinsmore concluded that Hobson’s communications with the insurance agent were not privileged and granted the plaintiff’s motion to compel.

## EDITOR’S NOTE

*The two major tests for determining who can assert attorney-client privilege in the corporate context include the “control group” test and the “subject matter” (sometimes “need to know”) test. The control group test is the minority approach and is very restrictive. Specifically, it provides that the privilege only applies to top management in a corporation. It is currently followed in only seven (7) states: Maine, New Hampshire, South Dakota, Oklahoma, Alaska, Hawaii, and Illinois. Notably, Illinois applies a modified version of the control group test. Specifically, it expands the control group to include two tiers of employees: (1) top management and (2) those who regularly advise top management. The subject matter test, which is the majority approach, provides that within the corporate environment, the attorney-client privilege applies well beyond the control group’s corporate management limitation and, in fact, can potentially apply to communications with any corporate employee.*

## LUBRIZOL CORP. V. IBM CORP.

#Motion-to-Compel; #Rule502d; #Privilege; #Waiver

In **Lubrizol Corp. v. IBM Corp.**, 2024 WL 941686 (N.D. Ohio Feb. 8, 2024), United States District Judge Dowdell Armstrong resolved two motions related to the plaintiff’s allegations of spoliation by the defendant. The plaintiff alleged that the defendant had deleted emails and other ESI for several key personnel who worked on a failed software project, and that the defendant had failed to timely implement a litigation hold until after the complaint was filed even though it reasonably anticipated litigation much earlier. The defendant argued that the deletions were the result of observing its routine document retention policies and that it did not reasonably anticipate litigation before the complaint was filed. The plaintiff moved to compel the defendant to produce documents and information regarding its spoliation claim, while the defendant moved for an order under Federal Rule of Evidence 502(d) that would allow it to intentionally produce some privileged spoliation-related materials without waiving its claims of privilege over others—specifically, in response to the plaintiff’s RFP seeking “all documents and communications concerning the preparation, implementation, institution, application, and dissemination by [the defendant] of document preservation and litigation holds.”

Judge Armstrong first addressed the defendant’s request for a Rule 502(d) Order. He asserted that the court was empowered to enter such an order “on its own initiative and without the consent of the parties.” However, under the circumstances, he was not inclined to grant an order having the scope that the defendant requested, which would allow the defendant to selectively and intentionally produce certain privileged documents without incurring a subject matter waiver. Judge Armstrong admitted it was “unclear whether a court has the authority to enter a Rule 502(d) order that covers intentional, rather than inadvertent, disclosures of privileged documents and information,” and acknowledged that some courts had reached the opposite conclusion. Ultimately, Judge Armstrong concluded that,



whether or not he has authority to grant enter such an order, he viewed the order the defendant proposed as “not appropriate in scope and [...] not likely to narrow and refine the parties’ arguments” under the circumstances, and denied the request.

Judge Armstrong next turned to the plaintiff’s motion to compel. With respect to an interrogatory asking the defendant to “identify” relevant communications, Judge Armstrong reasoned that the defendant could not refuse to respond entirely on the basis of privilege as “the mere fact that a party communicated with counsel is not privileged,” and the interrogatory did not seek the substance of any communication. And although the defendant objected that responding would be burdensome because there are “numerous” communications to review and identify on a log, Judge Armstrong held that the defendant did not carry its burden to provide more details about the burden and why it was undue. Judge Armstrong next found that the defendant had waived its claims of privilege over documents concerning its decisions related to when and what to preserve for the case. Agreeing with the plaintiff, Judge Armstrong held that, under the law of the forum state (Ohio), the defendant had impliedly waived privilege over the subject matter of the documents in question because it had voluntarily placed information from privileged communications concerning its preservation decisions “at issue” in the litigation. Judge Armstrong found that the defendant waived privilege over the subject matter of its decisions when to execute a litigation hold and what custodians to place on hold when it wrote a letter to the plaintiff responding to the plaintiff’s allegations of spoliation and asserted “that it did not reasonably anticipate litigation at the time the relevant documents were allegedly deleted ‘given the amounts at stake (under \$10 million), the parties’ longstanding relationship, and the contractual provisions for resolving disputes of the nature now at issue.’” Judge Armstrong accordingly ordered the defendant to produce the requested documents, but allowed the defendant to redact privileged information as to other subjects,

such as its lawyers’ assessments of the merits of the case, prior to production.

## EDITOR’S NOTE

*This is a troubling decision that we believe stands against the weight of authority on implied, or “at-issue,” waiver. Judge Armstrong essentially found—arguably only under Ohio law—that simply recounting the factors considered when making a fundamentally legal judgment in response to an allegation suffices to put the subject matter of communications with attorneys about that judgment “at-issue” in a litigation. Neither the plaintiff nor the court alleged that IBM actually placed the content of any of those communications “at issue,” such as by making a selective disclosure of some correspondence with attorneys. Other courts have found that “to find waiver, a court must conclude that there has been disclosure of protected communications,” and that a court should “not infer a waiver merely because a party’s disclosure covers ‘the same topic’ as that on which it had sought legal advice” or includes statements that reflect “legal conclusions that only a lawyer could make.” In re Fluor Intercontinental, Inc., 803 F. App’x 697, 700-02 (4th Cir. 2020).*

## NAGY V. OUTBACK STEAKHOUSE

#Rule37e; #Spoliation; #Sanctions; #Adverse-Inference

In **Nagy v. Outback Steakhouse**, 2024 WL 712156 (D.N.J. Feb. 21, 2024), United States Magistrate Judge Douglas E. Arpert granted the plaintiff’s Rule 37(e)(2) motion for sanctions and ordered an adverse inference jury instruction regarding the lost evidence. In the underlying action, the plaintiff sued the defendant for injuries sustained after falling in the defendant’s restaurant. The manager on duty at the time of the incident reported it to the defendant’s third-party claims administrator, but he did not preserve the video footage, and it was overwritten seven days later in accordance with the defendant’s retention period. The only preserved video evidence

relating to the incident was two video clips the manager provided to the claims administrator, one with 19 seconds of footage and one with 27 minutes (five minutes before the fall and 22 minutes after). The plaintiff sought a finding of spoliation for failure to preserve more video footage from before the fall and an order of an adverse inference jury instruction.

Judge Arpert's analysis began with the threshold question of spoliation. Guided by Rule 37(e), he concluded that the defendant had spoliated the video evidence. Specifically, he found that (i) the missing video footage was ESI; (ii) the defendant had a duty to preserve it; (iii) the defendant failed to take reasonable steps to preserve it; and (iv) the missing footage could not be restored or replaced through additional discovery. Supporting this conclusion were Judge Arpert's observations that the defendant was an experienced litigant in slip and fall cases and, therefore, should have reasonably anticipated the likelihood of litigation, should have known its preservation obligations extended beyond five minutes of footage from before the fall, and, moreover, should have had a policy in place to guide its managers on the preservation of critical video evidence.

Having found spoliation, Judge Arpert turned to the question of sanctions and determined that the requested adverse inference sanction was warranted. Here, he relied on Rule 37(e)(2), which required a finding that the defendant intended to deprive the plaintiff of the video footage or, as Judge Arpert phrased it, "that the spoliating party acted in bad faith." The defendant argued there had been no bad faith, claiming that the "manager had preserved what he reasonably believed to be relevant" and that the remaining footage was not intentionally destroyed but, rather, was "automatically overwritten in the normal operation of the . . . camera." Judge Arpert disagreed, finding instead that overwritten footage was intentional. In his estimation, the defendant's failure to provide any guidance on preserving critical video evidence was intentional, essentially creating a policy – by omission – that allowed its destruction. Relying on this, he held that "the video at issue here was

not merely overwritten in the normal course;" rather, "[i]t was affirmatively not preserved . . . and it was allowed to be overwritten." Having found the requisite intent to deprive, Judge Arpert granted the plaintiff's request for an adverse inference jury instruction.

## OKLAHOMA FIREFIGHTERS PENSION AND RETIREMENT SYSTEM V. MUSK

#Motion-to-Compel; #PC&C; #Rule34

In **Oklahoma Firefighters Pension and Retirement System v. Musk**, 2024 WL 188273 (S.D.N.Y. Jan. 18, 2024), United States District Judge Gabriel W. Gorenstein granted the plaintiffs' motion to compel the defendants to produce transcripts of testimony and exhibits from investigations conducted by the SEC. The underlying litigation is a federal securities class action brought by investors who allege fraud in the form of failure to disclose, and further allege that said fraud caused them to suffer significant financial loss. The subject documents were not in the defendants' physical possession. However, SEC regulation 17 C.F.R. § 203.6 provides that persons who submit documentary evidence or testimony to the SEC are entitled to obtain copies of the evidence or a transcript of the testimony upon request if they pay a fee.

The defendants objected to the motion on several grounds, including an assertion that the requested material was not in their possession, custody, or control. They maintained that, instead, the documents were in the possession, custody, and control of the SEC. To support this claim, they relied on a provision in the regulation that allows the SEC to deny transcript requests for good cause. Judge Gorenstein rejected this argument, finding instead that the requested documents were, in fact, in the defendants' control. He began his analysis with a reference to Rule 34, which "requires production of any documents in a party's control." As to what constitutes control, Judge Gorenstein cited to case law that espoused the "legal right" standard as well as

case law that promoted the “practical ability” standard. Relying on this guidance, Judge Gorenstein concluded that while the defendants did not have the documents in their physical possession, the SEC regulation provided the defendants with the “practical ability” to obtain them. And he added, “[t]he fact that permission might be denied does not alter [that] fact.” Moreover, he bolstered his finding that the documents were in the defendants’ control with reference to precedent from numerous other courts who rejected this very same argument.

Judge Gorenstein also rejected the defendants’ remaining arguments as equally unavailing. They included, without limitation, a claim that requiring defendant Musk to request the transcripts would infringe on his First Amendment rights, an assertion that the instant request was akin to requiring the defendants to make a request under FOIA or to subpoena a third party, and an argument that the plaintiffs’ claim of a right to the discovery under Rule 26(b) (1) lacked evidentiary support. Having rejected all of the defendants’ arguments, Judge Gorenstein granted the plaintiffs’ motion to compel.

## EDITOR’S NOTE

*There is currently no singular definition for what constitutes “control” for purposes of Rule 34. Some courts subscribe to the “legal right” test, others follow the “practical ability” test, and still others find control where a party has the legal right, authority, or practical ability to obtain the documents upon demand. Here, by relying on case law from the “legal right” camp as well as case law from the “practical ability” camp, Judge Gorenstein’s decision fits into the third category.*

## IN RE SOCIAL MEDIA ADOLESCENT ADDICTION / PERSONAL INJURY PRODUCTS LIABILITY LITIGATION

#Motion-to-Compel; #Privilege; #Legal-Hold; #Discovery-on-Discovery

In **In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation**, 2024 WL 1808607 (N.D. Cal. Apr. 25, 2024), United States Magistrate Judge Peter Kang granted the plaintiffs’ motion to compel the defendants to provide information relating to the defendants’ litigation holds, including the names of the defendants’ employees who received litigation hold notices in connection with this litigation, their job titles, and the dates the holds went into effect. In this dispute, a Multi-District Litigation over social media platforms’ allegedly addictive design, the plaintiffs claimed that they needed the requested information to be able to compile a complete and accurate list of the defendants’ document custodians. The defendants argued that the information sought was work product protected from discovery and the plaintiffs’ request for same constituted improper “discovery on discovery.”

Judge Kang held that the information the plaintiffs sought—recipient names and titles, and the dates the notices were issued—was “basic identifying information” about the notices and, as such, was not privileged. In reaching this conclusion, he distinguished between this information and the actual notices and their substantive content, which, he noted, may be subject to the attorney-client privilege and/or the work product doctrine. He observed that the defendants’ argument relied on case law concerning the latter and, as such, rejected their argument as misplaced. In addition, he also rejected the defendants’ argument that the plaintiffs’ request constituted impermissible discovery on discovery and that the disclosure of such information is only permitted where document preservation issues are in dispute. For this argument, Judge Kang highlighted the inconsistency in the defendants’ position, noting they appeared to be indicating that this basic infor-

mation was not privileged in the context of preservation disputes, but was privileged in the context of other disputes. As he noted, “[e]ither a document is work product protected from discovery, or it is not.” Moreover, he observed that “this basic information is exactly the same information which would appear on a privilege log for withheld work product.”

Having reached these conclusions, Judge Kang ordered the defendants to provide the plaintiffs with the information they requested.

## IN RE SOCIAL MEDIA ADOLESCENT ADDICTION / PERSONAL INJURY PRODUCTS LIABILITY LITIGATION

#Motion-to-Compel; #Proportionality; #Rule26;  
#Scope-of-Discovery; #Search-Terms

In **In re Social Media Adolescent Addiction-Personal Injury Products Liability Litigation**, 2024 U.S. Dist. LEXIS 11467 (N.D. Cal. June 28, 2024), a Multi-District Litigation over social media platforms’ allegedly addictive design, United States Magistrate Judge Peter Kang resolved a dispute between the plaintiffs and defendant Snap regarding two Requests for Production (“RFPs”). The RFPs seek communications with any other defendant(s) and/or Apple related to social media platforms, age verification, parental controls, and age-appropriate design. The plaintiffs moved to compel the defendant to respond to the RFPs, specifically by running an additional search term across its data collection and producing responsive and non-privileged documents. The defendant argued that existing terms were sufficiently broad to capture the documents sought by the RFPs and, as such, the instant request was not proportional. In addition, it claimed that running the term caused its system to crash and, therefore, argued that it was overly burdensome. The plaintiff argued that no other requests specifically seek communications with the co-defendants and informed the court that no other defendant had refused to run the search term and, in

addition, that the defendant refused to provide statistics on potential search term variations.

Judge Kang observed that the dispute did not turn on arguments over relevance, but rather focused on proportionality and burden. As to proportionality, he rejected the defendant’s argument that existing terms would suffice and instead found that the plaintiffs’ proposal of one additional search term—which requested documents not covered by other requests—was proportional to the needs of the case. As to the burden claim, after expressing disappointment in the parties’ failure to meaningfully explore alternate phrasing for the term (e.g., replacing the w/25 proximity connector with w/15), Judge Kang resolved the dispute by ordering the parties to submit declarations from their respective eDiscovery vendors. He ordered that the declaration from the defendant’s eDiscovery vendor should include details about running the search term and the resulting crash, attempted fixes and/or modifications to the term and results of same, and communications about such modifications with the defendant’s counsel. He also ordered that the responsive declaration from the plaintiffs’ eDiscovery vendor should attest to whether running a proposed search term can cause a system like the defendant’s to crash, and to explain any attempted modifications to avoid such a crash and whether it communicated same to counsel. Finally, he also provided a list of modified versions of the term and ordered the defendant’s counsel to test them on the defendant’s data set and to file a declaration reporting on the results. Judge Kang advised that after reviewing the declarations, he would instruct the parties further as to the instant dispute.

### EDITOR’S NOTE

*Judge Kang’s order underscores the importance of meaningful meet and confer discussions between the parties to resolve discovery disputes. Here, had there been a meaningful dialogue between the parties, it could very well have obviated the need for the plaintiffs to move to compel the defendants to*

*perform a search that was, at least potentially, technically infeasible.*

## IN RE STUBHUB REFUND LITIGATION

#Modern-Attachments; #Hyperlinked-Attachments; #ESI-Protocols

In **In re StubHub Refund Litigation**, 2024 WL 2305604 (N.D. Cal. May 20, 2024), United States District Judge Thomas E. Hixson granted the defendant's motion to modify the ESI Order entered in the case. The underlying matter is a putative nationwide class action. In discovery, the parties agreed to, and the court entered, an ESI Order that provided, in pertinent part, that documents should be produced as family complete, and that "families" included emails or other documents "together with any documents referenced therein via links." Its agreement to the terms of the ESI Order notwithstanding, the defendant failed to comply with this requirement.

In an April 2023 order, Judge Hixson, noting that the defendant's document production was in violation of the ESI Order, it hadn't done everything that it could, and it hadn't moved for relief from the protocol, concluded that the best option was to grant the plaintiff's motion and compel the defendant to comply with the terms of the ESI Order. Judge Hixson added that if the defendant was unable to comply, then within 14 days after the deadline to complete document production, the defendant must provide a Rule 30(b)(6) witness to testify as to the defendant's efforts to produce linked documents as attachments, after which the plaintiffs could consider a motion for sanctions. Finally, Judge Hixson stated that this order was without prejudice to the defendant moving to modify the ESI Order, which the defendant did with the instant motion.

In response to the April 2023 order, the defendant spent hundreds of hours and retained an outside vendor to assist in identifying correct versions of hyperlinked attachments and linking them to their par-

ent email in a traditional document family relationship. The plaintiff alleged that this effort had been insufficient and that many emails in the defendant's production "with links" still were not associated with a produced attachment. In opposing the motion, the plaintiffs presented multiple expert declarations to support their motion, which Judge Hixson deemed "underwhelming." He noted that one of the declarations argued merely that the defendant's vendor might be able to locate additional (but not all or most) linked attachments, but did not dispute the defendant's argument that many of the hyperlinks at issue were now broken. Another expert declaration argued that it would be broadly possible for the defendant to comply with the hyperlink requirement in the ESI protocol, but Judge Hixson found this declaration to be "unpersuasive," as it merely "regards something as being technologically possible even if no commercially available software can perform the function"—which the expert likewise did not dispute.

Accordingly, Judge Hixson granted the defendant's motion to modify the ESI Order to remove the pertinent references to grouping hyperlinked documents together with other documents into families. Notably, Judge Hixson stated that "[T]he Court is not going to keep a production requirement in the ESI Order if two-thirds of the time it is impossible to comply with." Judge Hixson also denied the plaintiffs' motion for sanctions pursuant to Rule 37(b)(2) for violating the Order, observing that the defendant's "wrongdoing was stipulating to do something without conducting an adequate investigation into whether it was possible," not "violation of the ESI Order's hyperlink requirement."

### EDITOR'S NOTE

*This is a cautionary tale about overbroad ESI protocols. ESI gained prominence after the 2006 Amendments to the Federal Rules in response to an absence of case law on many topics related to the production of ESI. Over time, these protocols have become extensive (often quite extensive) and also attempt to shift the parties' rights and obligations as*



*they exist under Rules 26 and 34. If parties enter into an ESI protocol, they should anticipate the court will hold them to their bargain. This case also highlights the fact that discovery issues involving modern attachments remain in flux. Kudos, however, to the defendants for coming forward with sufficient factual and expert information from which the judge could revisit his initial ruling. Kudos also for Judge Hixson for his willingness to entertain the additional facts and come to a reasonable and pragmatic conclusion.*

## TWO CANOES LLC V. ADDIAN, INC.

#Rule37e; #Spoliation; #Sanctions; #Adverse-Inference; #Prejudice; #WeChat

In **Two Canoes LLC v. Addian, Inc.**, 2024 WL 2939178 (D.N.J. April 30, 2024), United States Magistrate Judge José R. Almonte issued a report and recommendation on the plaintiff's motion for sanctions based on the defendant's alleged spoliation of evidence. The plaintiff claimed that the defendant failed to preserve relevant WeChat messages between its principal, Wolworth, and his contact in China, Fisher, who supplied the allegedly counterfeit 3M masks that were the subject of the litigation. The defendant argued that no relevant WeChat messages existed after its duty to preserve for the litigation arose, and that it took reasonable steps to preserve other forms of electronic communication with Fisher.

Judge Almonte applied Federal Rule of Civil Procedure 37(e) to the plaintiff's motion. He found that the defendant had a duty to preserve WeChat messages from November 5, 2020, when it was sued by 3M in a related case, until October 2021, when Wolworth's phone broke and was discarded. He also found that the defendant lost relevant WeChat messages during that period, based on Wolworth's deposition testimony that he communicated with Fisher about 3M products via WeChat. He further found that the defendant failed to take reasonable steps to preserve the WeChat messages,

as Wolworth did not back them up or attempt to recover them from his broken phone, despite knowing that they would not automatically transfer to a new phone. Finally, he found that the WeChat messages could not be restored or replaced from other sources, as Fisher was unresponsive to a subpoena and the messages were deleted from WeChat's servers after a certain time.

However, Judge Almonte did not find that the plaintiff suffered prejudice or that the defendant acted with the intent to deprive the plaintiff of the information's use in the litigation. He reasoned that the plaintiff had not shown how the missing WeChat messages would impair its trial strategy, especially since the defendant had produced other forms of communication with Fisher, such as emails and text messages. He also reasoned that the defendant's conduct did not rise to the level of bad faith, as the defendant had implemented a litigation hold, attempted to back up its data, and engaged a professional vendor to examine its devices. He noted that the defendant's efforts to preserve or recover the WeChat messages may have been futile given the technological limitations of the application. Judge Almonte therefore recommended that the plaintiff's motion for sanctions be granted in part and denied in part. He recommended that the plaintiff be allowed to inquire about Wolworth's intent at trial so that the court may then consider whether sanctions are appropriate depending on whether the plaintiff suffered prejudice or the defendant acted in bad faith. He recommended that the plaintiff's request for an adverse inference against the defendant at the summary judgment stage be denied without prejudice.

## IN RE UBER TECHNOLOGIES, INC., PASSENGER SEXUAL ASSAULT LITIGATION

#Modern-Attachments; #Hyperlinked-Attachments; #ESI-Protocols; #Motion-to-Compel

In *In re Uber Technologies, Inc., Passenger Sexual Assault Litigation*, 2024 WL 1772832 (N.D. Cal.

April 23, 2024), United States District Judge Lisa J. Cisneros resolved a dispute between the parties regarding the operative ESI Protocol to be entered in the case. The underlying matter is a multidistrict litigation regarding allegations of sexual assault purportedly committed by Uber drivers. The parties agreed that the Protocol would require the defendant to produce as attachments to emails or chat messages any files transmitted by means of a hyperlink. After reviewing the defendant's production, the plaintiffs determined that some of the hyperlinked documents produced were not the same versions linked in the messages at the time those messages were sent and moved the court to compel the defendant to produce the contemporaneous versions of hyperlinked documents. Judge Cisneros previously ordered the defendant to investigate a process for collecting contemporaneous versions of hyperlinked attachments and for the parties to meet and confer to find a potential solution or submit any remaining disputes to the court, prompting the instant motion.

The defendant noted it used Google Vault to archive documents and had made the investigation Judge Cisneros ordered. The defendant found that “no technical scalable solution is available to automate the process of collecting contemporaneous versions of hyperlinked documents.” The defendant's investigation determined that Google Vault does not automatically capture the real-time version of a hyperlinked document embedded in a Gmail or Google Chat message, but only the current version of the document at the time it is exported. Accordingly, if a hyperlinked document was further edited after the communication, the subsequent edits would be captured as part of the document exported from Vault. Accordingly, a manual process would be required to “identify a historic version of a hyperlinked Google Drive document contemporaneous with the email communication.”

The plaintiffs argued that the defendant should use a proposed “proof-of-concept” process to automatically identify contemporaneous hyperlinked docu-

ments. The defendant, via supporting declarations, countered that the proposed process would not resolve the issue because the process was applicable to Google Drive (an active environment) and not Google Vault (an archive environment), and in either event would require the defendant to develop a new software application. The defendant also argued that collecting and producing the contemporaneously hyperlinked documents would be unduly burdensome.

Judge Cisneros held that the court would “not order [the defendant] to expend potentially significant time and resources to develop such a program in order to produce discovery in this MDL, as the program's effectiveness is not assured.” However, Judge Cisneros did not fully accept the defendant's burden arguments because the defendant chose to use Google Vault for storage and export, despite its widely known technical limitations. Judge Cisneros therefore ordered that the plaintiffs may identify up to 200 hyperlinked documents that the defendant would manually locate, review, and produce, and that the defendant may seek relief as to specific requested documents as disproportional.

## UNITED STATES EX REL GILL V. CVS HEALTH CORP.

#Motion-to-Compel; #Privilege; #Privilege-Logs; #Waiver;  
#In-Camera

In **United States ex rel. Gill v. CVS Health Corp.**, 2024 WL 406510 (N.D. Ill. Feb. 2, 2024), United States Magistrate District Judge Jeffrey Cole denied plaintiffs' motion to compel defendant CVS to produce 20,790 documents listed on its privilege log, arguing that CVS has waived privilege as to these documents because the privilege log entries were insufficient and untimely.

The underlying False Claims Act litigation has been contentious, including three motions to compel discovery filed by both parties after the close of fact discovery. Magistrate Judge Cole highlighted that

plaintiffs filed a 180-page, 828-paragraph Complaint, and then subsequently propounded nine sets of requests for production, noting that because of this breath, responses will take time to prepare and a privilege log will take even more time.

Plaintiffs argued that CVS waived privilege as to 20,790 documents listed on its 1,859-page privilege log because it was untimely and not complete. Plaintiffs alleged, and Magistrate Judge Cole agreed, that CVS's privilege log was untimely and incomplete, specifically noting that more than 1,000 privilege log entries did not include any description of the document or information being withheld, attorneys conferring privilege were not identified on the log, more than 7,000 entries did not include the privilege CVS was asserting, and certain documents being withheld were not included on the log.

Judge Cole rejected plaintiffs' arguments regarding timeliness, noting that there were numerous previous opportunities for plaintiffs to move to compel the defendants to produce a proper privilege log, but plaintiffs did not do so. Accordingly, Judge Cole found that "plaintiff's failure to file its motion on time operates as a waiver of any issues he may have had with the defendants' failure to provide their privilege log in a timely manner."

Judge Cole also took issue with the parties purported efforts to meet and confer. Specifically, Judge Cole found that the parties had one meet and confer regarding the disputed privilege log entries, along with a substantial letter-writing campaign. Judge Cole did not find that these efforts to meet and confer to come to a resolution were sufficient given the scope of the privilege log at issue and accordingly ordered the parties to engage in a meaningful meet and confer to narrow their dispute, noting that "angry letters back and forth don't count."

## ZAGG, INC. V. ICHILEVICI

#Motion-to-Compel; #Discovery-on-Discovery; #Self-Collection; #Text-Messages

In **ZAGG, Inc. v. Ichilevici**, 2024 WL 557899 (S.D. Fla. Jan. 30, 2024), United States Magistrate Judge Lisette M. Reid granted in part and denied in part a motion to compel and a motion for extension of discovery deadline filed by the plaintiff. The plaintiff is a manufacturer and seller of screen protectors and other products that sued the defendants for trademark infringement and other claims. By its motion, the plaintiff sought to compel the production of additional financial documents and the deposition testimony of a witness knowledgeable about them, arguing that the defendant's Rule 30(b)(6) witness (its CEO, also a named defendant in the case) had been "entirely unprepared" for his deposition and could not answer questions about the defendant's finances. The plaintiff also objected to the defendants' production as inadequate, arguing that the production was predicated on a search by the CEO alone without supervision or review by counsel. The plaintiff also sought to depose a newly identified logistics vendor used by the defendants. Because the close of discovery had already passed, the plaintiff also sought an extension of the deadline in order to accommodate its requested relief.

Judge Reid denied the plaintiff's request for additional financial documents and a related deposition. Judge Reid reasoned that the 30(b)(6) witness's testimony did not evince that he was "entirely unprepared," but only that he would have to make inquiry to answer certain questions, which Judge Reid viewed as permissible since "a Rule 30(b)(6) deposition is not a memory test." He also found that the request for additional financial documents was unsupported, as the documents fell outside the time period covered by the plaintiff's discovery requests and the witness's testimony indicated no responsive data would be found in the documents.

With respect to the plaintiff's request that the defendant's counsel perform a supplemental search

for documents responsive to its discovery requests, Judge Reid found that the defendant's "self-collection" approach to discovery insufficient. He observed that the CEO testified that he had not given his attorneys access to certain highly relevant data sources and could not recall the terms he used to search for responsive documents. Judge Reid also noted that the CEO testified "that business with vendors is done in-person, over the phone, and via text message," and yet the defendant had not produced any texts messages nor certain responsive emails the plaintiff received from a third party. Judge Reid held that "[c]learly, counsel for [the defendant] should have supervised its clients in the collection of ESI" and ordered its counsel to perform a supplemental search and produce any responsive documents located. Judge Reid also allowed the plaintiff to notice the deposition of the newly identified logistics vendor based on the vendor's facially relevant activity on the defendants' behalf. To accommodate his orders, Judge Reid ordered a "slight" extension of discovery, subject to further discussion with the parties about the time required to complete the production and deposition.

# Index of Topical Tags

## A

Adverse-Inference 5, 6, 14, 21, 26

## C

Control-Group 19

Curative-Measures 18

## D

Discovery-on-Discovery 10, 12, 15, 23, 28

## E

Email 7, 16, 18

ESI-Protocols 8, 10, 17, 25, 26

## F

Forensic-Exam 7

Form-of-Production 16

## H

Hyperlinked-Attachments 17, 25, 26

## I

In-Camera 8, 13, 27

Intent-to-Deprive 18

## L

Legal-Hold 9, 23

## M

Modern-Attachments 17, 25, 26

Motion-to-Compel 7, 8, 9, 10, 11, 12, 13, 15, 19, 20, 22, 23, 24,  
26, 27, 28

## P

PC&C 6, 22

Prejudice 26

Preservation 9

Privilege 8, 9, 19, 20, 23, 27

Privilege-Log 8, 27

Proportionality 11, 13, 17, 24

## R

Relevance-Redactions 13

Rule26 7, 13, 24

Rule34 7, 16, 22

Rule37b 8, 15

Rule37e 5, 6, 14, 18, 21, 26

Rule502d 20

## S

Sanctions 5, 6, 8, 14, 18, 21, 26

Scope-of-Discovery 11, 13, 24

Search-Terms 11, 12, 24

Self-Collection 28

Slack 13

Social-Media 11

Spoilation 5, 6, 14, 18, 21, 26

## T

Terminating-Sanctions 18

Text-Messages 5, 6, 14, 16, 18, 28

## W

Waiver 8, 19, 20, 27

WeChat 26



# About Winston & Strawn eDiscovery and Legal Solutions

Winston & Strawn's eDiscovery & Information Governance Practice is one of the U.S.'s largest and most experienced. We have built a full-service consulting practice to support our clients and case teams in these complex areas—both domestically and globally. Our team features highly experienced partners and e-discovery attorneys, project managers, and technologists, across all our offices. We bring years of experience navigating difficult e-discovery issues in the context of complex litigations, high-stakes government and regulatory investigations (e.g., SEC, DOJ, HHS, OIG), and large-scale collections and reviews of electronically stored information (ESI) for Fortune 500 clients.

## E-DISCOVERY SERVICES ACROSS THE EDRM

Clients often want their primary outside counsel to own the eDiscovery process in order to minimize risk and reduce overall e-discovery costs. Our “People, Process & Technology” approach focuses on eliminating volume at every stage of the Electronic Discovery Reference Model (EDRM). To promote efficiency, reduce cost, and provide the best available service, the eDiscovery Group has internalized all aspects of the EDRM behind our own firewall and uses its own staff, with a technology stack that leverages best-in-class technology, to include Relativity, Nuix, Brainspace, Lineal Amplify, and Exolution. Our AI-driven approach to e-discovery and managed review is designed to leverage the latest technology to address the ever-growing volume and complexity of ESI.

## WINSTON LEGAL SOLUTIONS – MANAGED REVIEW

We have created our own managed review capability in the form of Winston Legal Solutions (WLS). A captive advisory team specializing in managed review and staffed by our highly experienced, lower-cost review attorneys, WLS employs cutting-edge AI and a process-oriented approach to address the single largest cost component in litigation—the review of ESI. We deliver high-quality document review services at lower project costs than the outsourced review model. Our attorneys have years of experience designing and conducting large, complex reviews, including multidistrict litigation (MDL) and complex class cases. We also conduct foreign-language reviews and can offer specialized, case-specific reviewers to address complicated and/or technical areas, such as those arising in patent cases.

## WINSTON LEGAL SOLUTIONS – LEGAL SERVICES

Winston is recognized as one of the leading litigation and transactional firms in the United States. We have extended that practice to provide top-quality legal services across an array of routine litigation- and transaction-related tasks and do so at rates competitive with the alternative legal services sector. We recognized the need for a right-staffing offering that provides clients with a lower-cost, competitive option that they can use for such work. That's why we created Winston Legal Solutions (WLS). Our WLS team is comprised of Winston direct-hired legal services attorneys. Our WLS attorneys work closely with our broader litigation and transactional teams to deliver top-quality legal services at highly competitive rates.

## Exemplar Litigation Services

### FACT

#### DEVELOPMENT

- Analyze opposing party production
- Prepare fact timelines
- Support investigations
- Analyze key players
- Develop issue modules

### DISCOVERY

- Draft, respond to, review, analyze interrogatories
- Draft, respond to, review, analyze requests for production
- Prepare fact sheet / census creation and analysis
- Litigation Hub – implement and manage repositories for all work product

### DEPOSITION SUPPORT

- Prepare responses to third-party subpoenas
- Build witness kits
- Draft notices and subpoenas
- Review, analyze, and summarize deposition transcripts

### MOTIONS

- Conduct legal research
- Check cites and facts
- Create record appendix

## Exemplar Transactional Legal Services

### CONTRACTS

- Contract reviews
- Routine drafting of contracts and amendments
- Buy-/sell-side NDA reviews
- Contract lifecycle management
- Contract advisory (e.g., develop playbooks, templates, etc.)

### DUE DILIGENCE

- M&A due diligence
- Post-transaction integration/diligence
- Divestiture diligence
- Contract terms summaries
- Real estate lease abstracts
- Deal matrices and terms summaries
- Identify, flag, and confirm key terms

### REGULATORY

- Regulatory forms completion (e.g., Forms D, ADV, Blue Sky filings, 83(b) elections, etc.)
- Subscription agreements and investment questionnaires
- Regulatory and risk compliance audit

### GENERAL CORPORATE

- Securities support (e.g., closing memos)
- IP support (e.g., Supplement in-house legal functions (e.g., secondment)
- Legal research
- Routine and commodity legal services

“Winston has one of the most impressive e-discovery practices in the world. They have top tier e-discovery consulting and document/data review as well as one of the best e-discovery advocacy practices.”

THE LEGAL 500

## CONSULTING SERVICES

LITIGATION RESPONSE PROGRAMS	CROSS-BORDER TRANSFERS	NATIONAL E-DISCOVERY COUNSEL	CENTRALIZED WRITTEN DISCOVERY	INFORMATION GOVERNANCE PROGRAMS
Design and implement litigation-response programs to include gap analyses, guidelines, managing RFI/RFP, tool selection and implementation, and education	With seasoned professionals in various jurisdictions and across our international offices, we have unparalleled experience in handling multinational litigation and working through international data protection and privacy and compliance issues regarding data transfers	Single resource to develop and implement corporate e-discovery processes, develop preservation best practices, manage the Rule 26(f) process, and draft/argue complex motions, including defending sanctions and spoliation claims	Develop, implement, and manage centralized written discovery programs to ensure consistency and reduce costs across litigation portfolios	Ability to design and implement information-governance programs to include policies, schedules, education, and compliance
CLOUD MIGRATION	INVESTIGATIONS	THIRD-PARTY SUBPEONA RESPONSE PROGRAM	DEFENSIBLE DELETION	SOCIAL MEDIA/ EPHEMERAL COMMUNICATIONS
Transition data to Cloud-based solutions and providers to ensure data integrity and continuity	Uniquely suited to assist clients and teams in internal investigations	Design and implement process for response to third-party subpoenas	Manage elimination of electronic information that is redundant or outdated in a manner consistent with legal and regulatory hold obligations	Understand whether and how to adopt newer forms of social media and ephemeral communications in alignment with legal and IG obligations

## CONTACT

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

### JOHN ROSENTHAL

+1 (202) 282-5785  
jrosenthal@winston.com

### SCOTT COHEN

+1 (212) 294-3558  
scohen@winston.com

### MARCIA BOBB

+1 (713) 814-9213  
mbobb@winston.com