# Selected eDiscovery and ESI Case Law from 2023

*Philip J. Favro, ed.*

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Philip J. Favro, ed.[1]

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[1] The editor wishes to recognize the following individuals for their invaluable contributions to this annotated bibliography of eDiscovery and ESI case law: Thomas Y. Allman, Doug Austin, Michael Berman, Ross Gotler, Alison Grounds, the Honorable Sunil Harjani, the Honorable Beth Jantz, the Honorable Iain Johnston, Lidia Kekis, David Lumia, Scott Milner, the Honorable Andrew Peck (ret.), and Kelly Twigger.

**CLOUDS**

*United States ex rel. Fischer v. Community Health Network, Inc.*, No. 1:14-cv-01215-RLY-MKK, 2023 WL 4761664 (S.D. Ind. July 26, 2023). *See* discussion under **Litigation Holds and Preservation** and **Privilege**.

**COOPERATION**

*Lyman v. Ford Motor Co.*, 344 F.R.D. 228 (E.D. Mich. 2023). *See* discussion under **Search**.

*Alvarez v. United States*, 165 Fed. Cl. 385 (2023). *See* discussion under **Sedona Conference Publications**.

**CRIMINAL LAW**

*United States v. Buyer*, No. 22-CR-0397 (RMB), 2023 WL 2495919 (S.D.N.Y. Mar. 14, 2023). In this securities fraud criminal prosecution, the jury convicted Stephen Buyer, a former member of the House of Representatives, on multiple accounts of insider trading. During the trial, the prosecution introduced evidence indicating that Buyer used the encrypted, ephemeral messaging application, Signal, to communicate regarding the illicit transactions. In particular, the court found that a particular communication from Buyer "was timed to 'disappear' within 5 minutes of being sent."

*Sanchez v. Los Angeles Dep't of Transportation*, 39 F.4th 548 (9th Cir. 2022). *See* discussion under **Nontraditional Sources of ESI**.

**DISCOVERY PROCESS**

*Laba v. JBO Worldwide Supply Pty Ltd*, No. 20-CV-3443-AKH-KHP, 2023 WL 4985290 (S.D.N.Y. July 19, 2023). *See* discussion under **Sanctions—Other FRCP Provisions**.

*LKQ Corp. v. Kia Motors Am., Inc.*, No. 21 C 3166, 2023 WL 4365899 (N.D. Ill. July 6, 2023). In this patent infringement matter involving claims over car parts, the court denied plaintiff's motion to compel defendant to meet its ESI obligations memorialized in the court's ESI disclosure order. In connection with that order, the court addressed the legal standards for authorizing "discovery on discovery." Regarding those standards, the court concluded that Rule 26(g) provided the appropriate vehicle for "discovery on discovery" and reasoned that such discovery is an appropriate "sanction when a court finds an attorney has violated the signature requirement in Rule 26(g)." In so doing, the court also found that Rule 26(b)(1) was inapplicable, as it pertained only to substantive discovery regarding claims and defenses. In addition, the court held that Rule 37 was inapposite since it only dealt "with the consequences of a failure to preserve and/or disclose, and does not necessarily address a party's initial concern that an opponent's discovery production process was inadequate." As for the burden of proof, the court examined persuasive case authority but ultimately found *The Sedona Principles, Third Edition* provided the most pertinent guidance, particularly Principle 6 with its directive that the requesting party establish by "specific and tangible evidence" that the responding party materially failed to meet its reasonable inquiry duty. Finally, the court observed that courts should "select the narrowest discovery tool possible to avoid side-tracking the discovery process" and thereby ensure "discovery on discovery" is consistent with the aims of Rule 1. Applying these standards to the instant dispute, the court held that plaintiff had not met its burden of proof since defendant had

complied with the court's ESI disclosure order. This included (among other things) identifying pertinent custodians, discussing how it conducted searches for relevant information, and issuing litigation hold instructions. *See* discussion under **ESI Protocols** and **Privilege**.

*Fed. Trade Comm'n v. Roomster Corp.*, No. 22-CV-7389 (CM)(SN), 2023 WL 4409484 (S.D.N.Y. June 1, 2023). In response to plaintiff's motion for spoliation sanctions, the court ordered defendants to produce various items on which plaintiff could rely to establish that defendant had a "culpable state of mind" when it failed to preserve messages from its Slack collaboration tool. Those items included counsel's litigation hold instruction to defendant and "all of Defendants' routine document destruction protocols and policies to better understand whether the lost information was a product of ordinary business practices or something more nefarious." *See* discussion under **Privilege** and **Sanctions—Rule 37(e)**.

**ESI PROTOCOLS**

*LKQ Corp. v. Kia Motors Am., Inc.*, No. 21 C 3166, 2023 WL 4365899 (N.D. Ill. July 6, 2023). In this patent infringement matter involving claims over car parts, the court discussed how plaintiff's motion for "discovery on discovery" may have been obviated had the parties proactively entered into an ESI protocol at the outset of discovery. In their "Joint Initial Status Report," the parties represented that they did "not anticipate any electronic discovery disputes at this time," which the court colloquially characterized as "[f]amous last words." The parties began producing documents shortly thereafter without an ESI protocol, which eventually led to plaintiff filing a motion seeking entry of an ESI protocol. The court denied the motion, finding that entering an ESI protocol in the middle of discovery was not the right course of action. Instead, the court ordered the parties to provide certain disclosures regarding their discovery efforts. This led to disputes over (among other things) the production of ESI from defendant's custodians and the adequacy of its search methodologies, culminating in a subsequent motion to compel defendant to meet its ESI obligations memorialized in the court's ESI disclosure order. In response, the court once again rejected plaintiff's request for discovery relief. The court determined that defendant's disclosures regarding custodians and search methodologies were not unduly vague and found that defendant had complied with its disclosure obligations. In so doing, the court observed that plaintiff could have better addressed these issues proactively with an ESI protocol rather than reactively through motion practice: "[Plaintiff's] complaints serve as a cautionary tale of what may result when parties fail to agree to an ESI protocol before initiating discovery. Without definitions that the parties agreed to for custodians and search methodologies, the Court will not impose more stringent requirements now after substantial document production has occurred." *See* discussion under **Discovery Process** and **Privilege**.

*In re Meta Pixel Healthcare Litig.*, No. 22-cv-03580-WHO (VKD), 2023 WL 4361131 (N.D. Cal. June 2, 2023). In this multidistrict litigation in which the parties submitted two disputed provisions in their proposed ESI protocol to the court for its consideration, the court held that the ESI protocol should not include a requirement that defendant produce all hyperlinked documents in family relationships. In making this determination, the court reasoned that the technology proposed by plaintiffs for preserving the family relationships between hyperlinked documents and the "underlying ESI" would not be workable within defendant's information ecosystem. Even though linked documents would not be considered the same as traditional attachments for family production purposes, the court opined that defendant would nonetheless need to maintain intact the family relationships between certain linked documents and the underlying ESI in which the links appear. The court directed the parties to handle those instances "on a case-by-case basis" and cautioned against making them

"routine." Regarding the other dispute, which focused on disclosing certain metadata in connection with a threaded email production, the court ordered defendant to produce "the metadata for the most inclusive message" and ensure that the produced metadata include "all of the same participants for all earlier messages in the email thread." Plaintiffs had asserted that defendant should be required to produce additional metadata and argued that defendant produced such metadata in other litigation. While acknowledging that it had produced the additionally requested metadata in a prior lawsuit, defendant countered that it would be unduly burdensome for it to produce the requested metadata in this instance given the "customized work" it would entail. The court ultimately agreed with defendant since the benefits of the additionally requested metadata would not exceed the review and production burdens.

*Garner v. Amazon.com, Inc.*, No. 2:21-CV-00750-RSL, 2023 WL 3568055 (W.D. Wash. May 19, 2023). *See* discussion under **Search**.

*In re StubHub Refund Litig.*, No. 20-MD-02951-HSG-TSH, 2023 WL 3092972 (N.D. Cal. Apr. 25, 2023). The court ordered defendant to make a family production of emails and hyperlinked documents referenced in those messages pursuant to the parties' ESI protocol. The court observed that the ESI protocol provided for family productions and required the production of information linked to "internal document sources" (i.e., cloud repositories such as SharePoint, Google Drive, etc.) "as separate, attached documents" in family relationships. Further clarifying the issue, the ESI protocol specifically defined "child" documents to include "hyperlinks to internal or nonpublic documents," along with traditional attachments. Given these circumstances, the court found defendant's noncompliance with the ESI protocol—to which it agreed and which the court had subsequently entered as an order—improper and ordered compliance accordingly. Alternatively, the court indicated defendant could seek an order modifying the ESI protocol. *See* discussion under **Rule 34 Requests, Responses, and Productions**.

*In re Apache Corp. Sec. Litig.*, No. 4:21-CV-00575, 2023 WL 5322444 (S.D. Tex. Apr. 10, 2023). *See* discussion under **Sedona Conference Publications**.

**ETHICS**

*Rapp v. NaphCare Inc.*, No. 3:21-CV-05800-DGE, 2023 WL 4624470 (W.D. Wash. July 19, 2023). In this prisoner litigation, the court modified its previous order of default judgment and instead issued a permissive adverse inference instruction against defendant for eliminating video footage relevant to plaintiff's claims. In doing so, the court discussed counsel's obligation to assist the client with preserving relevant evidence. Among other things, the court observed that counsel must take actionable steps to help the client preserve relevant evidence beyond just issuing a litigation hold notice: "Counsel cannot just implement a litigation hold and then sit on his hands, hoping that parties retain and produce all relevant information." In this instance, the court indicated that defendant's counsel had apparently done just that, i.e., issued a hold that requested preservation of relevant video footage, but then neglected to take follow up steps to ensure defendant actually kept the footage in question. *See* discussion under **Sanctions—Rule 37(e).**

*Rossbach v. Montefiore Med. Ctr.*, 81 F.4th 124 (2d Cir. 2023). *See* discussion under **Sanctions—Other FRCP Provisions** and **Sanctions—Rule 37(e)**.

*Mata v. Avianca, Inc.*, --- F. Supp. 3d ---, 2023 WL 4114965 (S.D.N.Y. 2023). In this now notorious litigation in which plaintiff's counsel (among other things) cited and discussed phony cases and citations obtained using the generative artificial intelligence application ChatGPT, the court dismissed the plaintiff's case and issued a variety of sanctions under Rule 11 against his counsel. Those sanctions included imposing a $5,000 sanction against plaintiff's counsel and requiring that counsel provide "each judge falsely identified" as the respective authors of the fabricated case law with a copy of the instant court's order.

*AliveCor, Inc. v. Apple, Inc.*, No. 21-CV-03958-JSW, 2023 WL 4335293 (N.D. Cal. June 2, 2023). *See* discussion under **Sanctions—Rule 37(e)**.

**FORM OF PRODUCTION**

*Lubrizol Corp. v. Int'l Bus. Machines Corp.*, No. 1:21-CV-00870-DAR, 2023 WL 3453643 (N.D. Ohio May 15, 2023). *See* discussion under **Workplace Collaboration Tools**.

**FEDERAL RULE OF EVIDENCE 502**

*United States v. Google, LLC*, Case No. 20-cv-3010 (APM) (D.D.C. June 28, 2023), ACF No. 608 ("Order). *See* discussion under **Privilege**.

**INFORMATION GOVERNANCE**

*Ramirez v. Paradies Shops, LLC*, 69 F.4th 1213 (11th Cir. 2023). In this action where appellant (Ramirez) filed a putative class action against appellee (Paradies) seeking damages arising from Paradies's alleged failure to take appropriate steps to safeguard personally identifiable information ("PII") belonging to Ramirez and Paradies's other current and former employees, the U.S. Court of Appeals for the Eleventh Circuit reversed in part the district court's dismissal of Ramirez's claims. In particular, the 11th Circuit found that Ramirez had stated a tort claim of negligence under Georgia law since Ramirez had adequately pleaded the existence of a special relationship between Ramirez (and similarly situated current and former employees) and Paradies, together with "a foreseeable risk of harm" that arose from that relationship. The 11th Circuit agreed with Ramirez that the data breach that Paradies suffered—a ransomware attack—was, as pleaded, reasonably foreseeable given Paradies's alleged failure to implement "adequate security measures despite industry warnings and advice on how to prevent and detect ransomware attacks." In reaching this determination, the court factored in the "size and sophistication" of the company—an enterprise with over 10,000 employees and more than $1 billion in revenue—in concluding that Paradies "could have foreseen being the target of a cyberattack." While the district court had criticized Ramirez's pleadings for failing to properly allege foreseeability, the 11th Circuit adopted a more lenient approach, opining that "data breach cases present unique challenges for plaintiffs at the pleading stage considering the circumstances." Among other things, the 11th Circuit reasoned that a party such as Ramirez would not be able "to plead with exacting detail every aspect of Paradies's security history and procedures that might make a data breach foreseeable," particularly since companies maintain confidential "the details of its security procedures and vulnerabilities." Moreover, because the issue of "reasonable foreseeability" of a cyberattack was a question "for a jury's determination," the 11th Circuit was reluctant to dismiss Ramirez's negligence claim against Paradies at the pleadings stage. Nevertheless, the 11th Circuit did affirm dismissal of Ramirez's claim for breach of implied contract against Paradies and signaled that Ramirez might face

an uphill battle surviving a summary judgment challenge ("[g]etting past summary judgment may prove a tougher challenge").

**LITIGATION HOLDS AND PRESERVATION**

*United States ex rel. Fischer v. Community Health Network, Inc.*, No. 1:14-cv-01215-RLY-MKK, 2023 WL 4761664 (S.D. Ind. July 26, 2023). In this False Claims Act litigation where the government filed a complaint in intervention against one of the defendants (Community Health Network, Inc. or "CHN"), the court authorized relator to take depositions of CHN employees to determine the nature and extent of CHN's preservation efforts while forbidding relator from discovering CHN's written litigation hold notices. In connection with its ruling, the court examined CHN's efforts to preserve either or both Microsoft 365 emails and OneDrive data from 11 of its former employees. In particular, the court found that CHN failed to keep emails or OneDrive ESI from seven custodians, either because CHN did not issue hold notices to the particular custodians or did not place "IT holds" on the emails or OneDrive data. The data at issue was wiped out 30 days after the former employees or board members left CHN**,** pursuant to the "Microsoft 'retention policy.'" For the seven custodians at issue, the court found that the lost emails or OneDrive data would have been preserved "[h]ad an IT hold been in place when [they] left" the company. *See* discussion under **Privilege**.

*Jennings v. Frostburg State Univ.*, No. CV ELH-21-656, 2023 WL 4567976 (D. Md. June 27, 2023). In an action involving a former biology professor's claims for wrongful termination against the defendant university, the court found that defendants failed to preserve relevant text messages and other data from the university dean's and provost's phones. In response to the professor's motion for spoliation sanctions, the court found that the duty to preserve triggered once the professor filed a charge with the EEOC. In connection with this finding, the court observed that under Fourth Circuit precedent, the trigger date for a preservation duty is typically a fact-specific inquiry. Nevertheless, the court cited instances where the duty to preserve had ripened upon notice of filing an EEOC charge, "'the receipt of a demand letter, a request for evidence preservation, a threat of litigation, or a decision to pursue a claim.'" In contrast, the court reasoned that a dispute or "'vague or far-off possibility' of litigation [are] insufficient to trigger the duty to preserve." The failure of defendants to preserve the contents of the phones at issue—they wiped the phones after the dean and provost left the university—demonstrated that defendants failed to preserve relevant information. While finding that defendants' failure to place a litigation hold on the phones was grossly negligent, it was—standing alone—insufficient to meet Rule 37(e)'s "intent to deprive" requirement and justify the issuance of severe sanctions. *See* discussion under **Sanctions—Rule 37(e)**.

*Miramontes v. Peraton, Inc.*, No. 3:21-CV-3019-B, 2023 WL 3855603 (N.D. Tex. June 6, 2023). In this employment discrimination matter, plaintiff sent defendant (his former employer) a preservation demand letter shortly after his termination and approximately four months before he filed suit. In his letter, plaintiff requested that defendant preserve information relating to his claims, including text messages and other communications. Defendant communicated a litigation hold instruction to plaintiff's former supervisor and apparently shared plaintiff's preservation demand letter with him as well. However, defendant's hold instruction directed him to preserve emails and not text messages. Moreover, plaintiff's former supervisor only read the first paragraph of the demand letter and apparently did not see plaintiff's request to keep relevant text messages. After discovering that his former supervisor deleted relevant text messages, plaintiff sought and obtained spoliation sanctions against defendant. The court found that defendant had control over the former supervisor's text messages, that it failed to take reasonable steps to preserve them, and that defendant's elimination of

this evidence was in bad faith. As a sanction, the court denied defendant's motion for summary judgment and allowed plaintiff the opportunity to serve additional written discovery requests on defendant. *See* discussion under **Possession, Custody, or Control**.

### NONTRADITIONAL SOURCES OF ESI

*Sanchez v. Los Angeles Dep't of Transportation*, 39 F.4th 548 (9th Cir. 2022). In this action designed to test the constitutionality of defendant's program of collecting real time data regarding the location and use of motorized scooters, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court's dismissal of plaintiff's complaint. The court found that plaintiff did not have a reasonable expectation of privacy because he "knowingly and voluntarily disclosed location data to the e-scooter operators." In connection with this finding, the court pointed to the privacy policies that the motorized scooter companies like Lyft had promulgated and to which plaintiff had agreed, which provided that "'location data' will be collected, stored by the rental company, and shared with government authorities to 'comply with any applicable . . . local law or regulation.'" In addition, the court observed that plaintiff had a "diminished expectation of privacy" in the motorized scooter location and use data, which—by itself and unlike cell phones—would not reveal a user's identity.

### POSSESSION, CUSTODY, OR CONTROL

*Rattie v. Balfour Beatty Infrastructure, Inc.*, No. 22-CV-05061-RS (LJC), 2023 WL 5507174 (N.D. Cal. Aug. 25, 2023). In this action involving employment related claims, plaintiff failed to establish that defendant had possession, custody, or control over relevant text messages on its employees' personal phones. To establish possession, custody, or control for purposes of his motion to compel, plaintiff needed to establish that defendant's employees used their personal phones for work purposes. Plaintiff was unable to do so, particularly in the face of defendant's representation that it "issues work phones to its management employees, and that they are expected to use these devices for work-related communications." The court also observed that plaintiff neglected to issue a subpoena to obtain the messages from defendant's employees.

*Miramontes v. Peraton, Inc.*, No. 3:21-CV-3019-B, 2023 WL 3855603 (N.D. Tex. June 6, 2023). In the context of a motion for spoliation sanctions, the court held that defendant had "control" over relevant text messages that plaintiff's former supervisor deleted from his personal phone. Defendant had argued that it did not have control over the text messages at issue because the former supervisor had used his personal phone to send the messages. In particular, defendant asserted that it could only have control over those messages "if it has a legal right to obtain them on demand." While observing that this argument had "intuitive appeal," the court rejected its application and reasoned that "the realities of modern business require a fact-specific approach." While defendant did not issue phones to its employees nor ostensibly require that they use them for business, the court found that defendant's "employees regularly conducted business on their cell phones." If the court were to adopt defendant's argument regarding possession, custody, or control, defendant "could effectively shield a significant amount of its employees' business communications from discovery simply by allowing its employees to conduct business on their personal phones." Given these circumstances, the court concluded that defendant had control over the texts from the former supervisor's personal phone that defendant had failed to preserve. The court went on to impose sanctions on defendant for failing to preserve the relevant text messages. *See* discussion under **Litigation Holds and Preservation**.

*Fed. Trade Comm'n v. Am. Future Sys., Inc.*, No. 2:20-CV-02266-JHS, 2023 WL 3559899 (E.D. Pa. Mar. 28, 2023), *report and recommendation adopted as modified*, 2023 WL 3559319 (E.D. Pa. May 17, 2023). The court affirmed a special master's recommendation that defendant American Future Systems ("AFS") be ordered to produce relevant Slack messages from certain of its employee custodians that were within its possession, custody, or control. AFS had argued that it should not be compelled to produce relevant Slack messages because they were in the possession or control of Slack and not AFS. Relying on *Laub v. Horbaczewski*, No. CV 17-6210-JAK (KSX), 2020 WL 7978227 (C.D. Cal. Nov. 17, 2020), AFS maintained that it could not access Slack messages given the nature of its Slack account. The special master rejected these assertions, finding that AFS both owned the Slack data pursuant to Slack's service level agreement and generally maintained control over such information. Even though a user's access to data may depend on the type of Slack account, the special master reasoned that this was not determinative for purposes of possession, custody, or control: "Slack provides all customers with the ability to request data in certain circumstances . . . Thus, the level of Slack account—whether free (access to most recent 90 days of messages) or paid (full message history available 'at your fingertips')—is irrelevant to the determination of whether AFS has control over Slack data." In addition, the special master criticized and distinguished *Laub*, finding that *Laub* failed to consider that all Slack account holders may "export data in certain legal circumstances." Finally, the special master overruled AFS's relevance and proportionality objections, finding that the sought-after Slack messages may be highly relevant and that AFS would not be unduly burdened by having to review and produce Slack messages from certain of its custodians. *See* discussion under **Sanctions—Other FRCP Provisions**.

**PRIVACY**

*Ramirez v. Paradies Shops, LLC*, 69 F.4th 1213 (11th Cir. 2023). *See* discussion under **Information Governance**.

*Sanchez v. Los Angeles Dep't of Transportation*, 39 F.4th 548 (9th Cir. 2022). *See* discussion under **Nontraditional Sources of ESI**.

**PRIVILEGE**

*Lyman v. Ford Motor Co.*, 344 F.R.D. 228 (E.D. Mich. 2023). *See* discussion under **Search**.

*United States ex rel. Fischer v. Community Health Network, Inc.*, No. 1:14-cv-01215-RLY-MKK, 2023 WL 4761664 (S.D. Ind. July 26, 2023). In this False Claims Act litigation where the government filed a complaint in intervention against one of the defendants (Community Health Network, Inc. or "CHN"), the court previously authorized relator to obtain "discovery on discovery" relating to (among other things) CHN's measures to preserve relevant ESI. Relator next sought a discovery order requiring CHN to produce both its litigation hold notices and witnesses to testify about its preservation efforts. Relator argued that CHN's three categories of hold notices—oral holds to custodians, written holds to custodians, and "IT holds" designed to retain electronic data from noncustodial sources of relevant ESI—should be produced to ameliorate the harm allegedly caused by CHN's spoliation. The court disagreed, finding that CHN's outside counsel prepared the holds after consulting with its in-house counsel, who then distributed the hold notices to affected custodians. The court also held that CHN did not waive the privilege covering the hold notices by disclosing certain nonprivileged contents from the notices to the government, to wit, the custodians who received the hold notices, the dates on which the holds were issued, and "the extent of data covered

by the legal hold notices and IT holds." Finally, the court held that relator's preliminary showing of spoliation of relevant OneDrive and Microsoft 365 emails from seven custodians did not justify the production of the hold notices. Compelling the production of the hold notices would not ultimately benefit relator since CHN's preservation problems arose from its failure to issue hold notices that could have resulted in the preservation of the relevant data from the seven custodians. Instead, the court allowed relator to take depositions to ascertain the nature and extent of CHN's preservation efforts without delving into privileged matters. *See* discussion under **Litigation Holds and Preservation**.

*LKQ Corp. v. Kia Motors Am., Inc.*, No. 21 C 3166, 2023 WL 4365899 (N.D. Ill. July 6, 2023). In this patent infringement matter involving claims over car parts, the court denied plaintiff's motion to compel defendant to produce its litigation hold notices to custodians. Plaintiff argued that certain evidence—testimony from two custodians—established that defendant failed to issue a timely litigation hold instruction. The court rejected plaintiff's position, labeling it as "mere speculation" given the sworn testimony from other custodians that defendant issued a litigation hold instruction: "[Plaintiff] has provided no evidence that [defendant] delayed issuing a litigation hold or failed to implement or monitor the hold. Instead, the evidence before the Court is based on speculation and testimony that [defendant] has rebutted in response." *See* discussion under **Discovery Process** and **ESI Protocols**.

*United States v. Google, LLC*, Case No. 20-cv-3010 (APM) (D.D.C. June 28, 2023), ACF No. 608 ("Order"). In connection with the government's motion for sanctions against Google for allegedly spoliating relevant Google Chat messages, the government sought discovery of the litigation hold notices and reminders that Google sent to its custodian employees. The government argued that Google waived any claim of attorney-client privilege over the hold notices and reminders by relying on the privileged communications to oppose the government's spoliation motion. In response, Google maintained that it had not waived the privilege and instead had referenced the hold notices and reminders only in response to government inquiries regarding its preservation practices. The court ultimately agreed with the government and held that Google had waived the privilege under "the common law doctrine of implied waiver" by placing "otherwise privileged matters in controversy." The court observed that "an essential component of Google's efforts to stave off sanctions is that it acted in good faith by instructing its employees how to use and preserve potentially relevant Google Chats. Google cannot shield those instructions from Plaintiffs when it has put them directly at issue." Nevertheless, the court, citing the 2007 amendment committee note to Federal Rule of Evidence 502(a), limited the scope of the waiver to the portions of the hold notices and reminders that addressed preservation of Google Chats. The court also declined to address the government's argument that its prima facie showing that Google spoliated relevant Google Chats should waive any privilege claim encompassing the hold notices and reminders.

*Fed. Trade Comm'n v. Roomster Corp.*, No. 22-CV-7389 (CM)(SN), 2023 WL 4409484 (S.D.N.Y. June 1, 2023). In connection with plaintiff's spoliation motion and its effort to establish that defendants acted with a "culpable state of mind" when they deleted Slack messages, the court ordered defendants to produce the litigation hold instruction that their counsel issued to defendants after receiving plaintiff's Civil Investigative Demand. In ordering the production of the hold notice, the court declared that "the attorney-client privilege does not protect against the production of litigation hold communications." The court also held that defendants—by acknowledging that they had allowed Slack messages to be deleted—"waived their attorney-client privilege with respect to any good faith defense" regarding the spoliation. *See* discussion under **Privilege and Sanctions—Rule 37(e)**.

**PROPORTIONALITY**

*Lubrizol Corp. v. Int'l Bus. Machines Corp.*, No. 1:21-CV-00870-DAR, 2023 WL 3453643 (N.D. Ohio May 15, 2023). *See* discussion under **Workplace Collaboration Tools**.

**RELEVANCE REDACTIONS**

*Kaiser Aluminum Warrick, LLC v. US Magnesium LLC*, 22-CV-3105 (JGK) (KHP), 2023 WL 2482933 (S.D.N.Y. Feb. 27, 2023). In this breach of contract case, plaintiff sued defendant for failing to fulfill a contract to supply magnesium. During discovery, defendant produced some otherwise responsive documents with redactions for relevance. Plaintiff objected and moved the court to require defendant to reproduce the documents in unredacted form, "arguing that redactions for relevance are disfavored when there is a protective order in place, as one is here." Defendant responded that the redacted information was irrelevant and competitively sensitive. The court highlighted that although Federal Rule of Civil Procedure 26(b)(1) expressly excludes irrelevant information from the permissible scope of discovery, courts have generally disallowed relevancy redactions for various reasons. Even so, the court opined that "relevancy redactions can be appropriate in some cases." Addressing these reasons and plaintiff's arguments, the court first found that an attorney—in meeting Rule 26(g)'s reasonable inquiry for responsive and relevant documents requirement—is just as capable of making relevance determinations to portions of documents as to whole documents. Next, the court stated that such redactions could be allowed, even with a protective order in place, as long as the party voluntarily undertakes the expense, timely completes the redactions within the discovery schedule and without prejudicing the other party, clearly explains the reason for the redactions, and is conservative in the number of redactions. Finally, the court explained that additional motion practice concerning relevancy redactions could be deterred if the producing party discusses its intent with the other side and seeks advance permission from the court. Here, however, the court had previously ruled that plaintiff was not entitled to some of the underlying redacted information and, thus, even though defendant had not sought advance permission for the relevancy redactions, denied the request to reproduce this information. Defendant, however, had to unredact certain information related to magnesium production as well as column headers/row descriptors and graph titles previously withheld via block redactions so as "to increase transparency as to the nature of the redactions."

**RULE 34 REQUESTS, RESPONSES, AND PRODUCTIONS**

*In re Meta Pixel Healthcare Litig.*, No. 22-cv-03580-WHO (VKD), 2023 WL 4361131 (N.D. Cal. June 2, 2023). *See* discussion under **ESI Protocols**.

*In re StubHub Refund Litig.*, No. 20-MD-02951-HSG-TSH, 2023 WL 3092972 (N.D. Cal. Apr. 25, 2023). The court ordered defendant to make a family production of emails and hyperlinked documents referenced in those messages pursuant to the parties' ESI protocol. While holding that its production order was ultimately mandated by and consistent with the court-ordered ESI protocol, the court also spotlighted issues with defendant's discovery efforts, deeming them incomplete and its justifications "improvised." The court observed how defendant had conducted searches for relevant information on its Google Drive repository, but produced relevant emails and associated hyperlinked content separately and without preserving family relationships consistent with the ESI protocol. In addition, defendant apparently had not yet conducted searches for relevant content on SharePoint or Tableau, even though these sources were clearly at issue as memorialized in the parties' briefing. While

defendant offered several reasons ("Maybe the document was moved to a different place; maybe email encryption methods have changed, rendering the links untraceable . . . Loss of personnel, a change in document systems, the difficulty of versioning in Google documents") for its noncompliance, the court found all of them meritless in the face of the ESI Protocol's straightforward family production directive. *See* discussion under **ESI Protocols**.

*Hoehl Fam. Found. v. Roberts*, No. 5:19-CV-229, 2023 WL 3271517 (D. Vt. Apr. 13, 2023). The court ordered defendants to produce metadata corresponding to approximately 10,000 non-email documents defendant previously produced, but apparently in a downgraded format. Among other things, plaintiff sought the author, date created, and date modified metadata fields that corresponded with the non-email documents at issue. The court rejected defendants' undue burden arguments, finding that the burden imposed by its production order was not excessive ("[t]his imposes some burden on defendants"). In addition, defendants were obligated to produce the requested metadata pursuant to the parties' stipulated ESI protocol (which the court previously entered as an order). Finally, the court observed that plaintiff sought the metadata in question "for organizing the productions that it . . . received from Defendants" and that "file-system metadata 'makes electronic documents more functional because it significantly improves a party's ability to access, search, and sort large numbers of documents efficiently.'"

**SANCTIONS—OTHER FRCP PROVISIONS**

*Rossbach v. Montefiore Med. Ctr.*, 81 F.4th 124 (2d Cir. 2023). In this matter before the U.S. Court of Appeals for the Second Circuit, plaintiff sought appellate review of the district court's order dismissing plaintiff's wrongful termination claims. In its order of dismissal, the district court held that plaintiff perpetrated a fraud on the court by introducing as evidence a fabricated text message. There were several indicia suggesting plaintiff fabricated the text message at issue, including the presence of the "heart eyes" emoji, whose size and colors were not consistent with those that should have been apparent on plaintiff's iPhone 5, the device on which she claimed to receive the message. The district court had likewise found dismissal of plaintiff's claims appropriate under Rule 37(e)(2) since plaintiff destroyed relevant, responsive information on both her iPhone 5 and her iPhone X. Furthermore, the district court imposed monetary sanctions jointly and severally on plaintiff, her counsel, and counsel's law firm in the amount of $157,026.27. The sanctions the district court imposed on counsel and his firm were pursuant to its inherent authority and 28 U.S.C. § 1927. In supporting its sanctions award, the district court emphasized counsel's failure to undertake any investigation at the outset of the litigation to confirm the integrity of the fraudulent text message. The district court also found that counsel could have accomplished this by examining the evidence on plaintiff's iPhone 5 and her iPhone X, which counsel failed to do. On appeal, plaintiff challenged the district court's dismissal order, along with other related rulings. The Second Circuit rejected all but one of plaintiff's arguments, calling them "meritless." Only on the issue of monetary sanctions against plaintiff's counsel and his law firm did the Second Circuit vacate the district court's decision, holding that the district court should have applied a standard of bad faith rather than negligence or recklessness. The Second Circuit remanded the matter to the district court to determine whether plaintiff's counsel's conduct satisfied

the bad-faith standard for the issuance of sanctions under the court's inherent authority and 28 U.S.C. § 1927. *See* discussion under **Sanctions—Rule 37(e)**.

*In re Loc. TV Advert. Antitrust Litig.*, No. 18 C 6785, 2023 WL 5659926 (N.D. Ill. Aug. 31, 2023). *See* discussion under **Search**.

*Laba v. JBO Worldwide Supply Pty Ltd*, No. 20-CV-3443-AKH-KHP, 2023 WL 4985290 (S.D.N.Y. July 19, 2023). In this litigation over plaintiff's claimed contractual right to a finder's fee from defendant in connection with an international business arrangement, the magistrate judge issued a report and recommendation to the district court that it impose pursuant to its inherent authority monetary and other sanctions against plaintiff and his counsel for fabricating evidence. The sanctions recommendation arose after plaintiff asserted and then produced in discovery purported copies of the parties' finder's fee agreement that included a digital signature from defendant's chief executive officer. While there were several fundamental problems with the signature, the magistrate judge particularly spotlighted plaintiff's inability to produce an email to which the purportedly signed agreement was attached. Although plaintiff argued the email was deleted, the magistrate judge found this assertion to be too convenient: "[Plaintiff] provides no explanation for why some emails from 2019 were not deleted and could be produced but the most important email – the one from JBO attaching the agreement signed by Liebenberg – could not be produced." The magistrate judge ultimately concluded that the digital signature was a fabrication, finding by clear and convincing evidence that plaintiff and his counsel submitted false written and oral testimony regarding the phony signature and committed a fraud on the court by doing so. The magistrate judge recommended that plaintiff and his counsel, jointly and severally, pay defendant $142,331 in attorney fees and $49,033 in costs. In addition, the magistrate judge recommended that the district court order plaintiff's counsel to attend five hours of continuing legal education courses; two hours on ethics, along with three hours on "ESI discovery and spoliation of ESI." Regarding the sanctions she recommended against counsel, the magistrate judge , citing *Rossbach v. Montefiore Med. Ctr.*, No. 19-CV-5758 (DLC), 2021 WL 3421569 (S.D.N.Y. Aug. 5, 2021), reasoned that counsel failed to undertake a reasonable investigation regarding the evidence supporting plaintiff's claims including the authenticity of the digital signature and the issue of the purportedly lost email with the executed finder's fee agreement.

*Fed. Trade Comm'n v. Am. Future Sys., Inc.*, No. 2:20-CV-02266-JHS, 2023 WL 3559899 (E.D. Pa. Mar. 28, 2023), *report and recommendation adopted as modified*, 2023 WL 3559319 (E.D. Pa. May 17, 2023). In connection with a report and recommendation that the court order defendant American Future Systems ("AFS") to produce relevant Slack messages from certain of its employee custodians, the special master recommended that AFS not be sanctioned under Rule 37(a)(5) for its previous failure to produce relevant Slack messages. However, the special master did express multiple times the "troubling" and "egregious" nature of AFS's conduct. Such conduct included: (1) AFS's failure to disclose its Slack communication system in response to a court order directing AFS to identify "each relevant electronic system that has been in place at all relevant times;" (2) AFS's failure to turn over Slack messages in response to document requests that specifically requested disclosure of relevant communications; (3) AFS's "unwillingness to take investigative steps" to retrieve relevant Slack messages; and (4) the inexplicable ignorance of AFS's designated "e-discovery liaison" to obtain information regarding Slack's data retention policies that could impact the availability of relevant messages for production. Despite the foregoing, the special master concluded that an award of monetary sanctions against AFS would be "unjust" given the "evolving nature of new technologies" such as Slack and AFS's reliance on *Laub v. Horbaczewski*, No. CV 17-6210-JAK (KSX), 2020 WL 7978227 (C.D. Cal. Nov. 17, 2020). *See* discussion under **Possession, Custody, or Control**.

**SANCTIONS—RULE 37(e)**

*Skanska USA Civil Southeast Inc. v. Bagelheads, Inc.*, 75 F.4th 1290 (11th Cir. 2023). In a case of first impression regarding the application of Rule 37(e)(2), the U.S. Court of Appeals for the Eleventh Circuit held that the intent-to-deprive standard is the same as "bad faith in other spoliation contexts" and affirmed an order imposing two adverse inferences and an award of fees and costs against Skanska. Regarding its interpretation of Rule 37(e)(2), the 11th Circuit observed that the "phrase 'intent to deprive' naturally requires that the spoliator has a 'purpose of hiding adverse evidence' from other parties," which is how existing 11th Circuit law construed the meaning of bad faith. The court then reasoned that such an interpretation was consistent with the 2015 committee note on the Rule 37(e) amendment, which provides that severe sanctions under Rule 37(e)(2) should not issue on a finding of negligence or gross negligence. After making these determinations regarding the Rule, the 11th Circuit affirmed the district court's finding that Skanksa, whose construction barges damaged the Pensacola Bridge during Hurricane Sally in 2020, spoliated relevant ESI with an intent to deprive by failing to preserve "cell phone data" including text messages. The court reasoned that a finding of bad faith was relatively easy under the circumstances given Skanska's "egregious" and "utter failure to implement even the most basic data-protection safeguards." For example, Skanska "did not back up the relevant employees' cell phones" and neglected to disable "its ordinary cell phone data destruction policies." The result was that relevant data was lost from five Skanska custodian phones: "Two phones were deliberately reset according to Skanska's ordinary employee departure procedures when their owners left the company. Another was somehow 'disabled' and became inaccessible after the owner left Skanska. Yet another was allegedly lost overboard. And still another had all text messages deleted under disputed circumstances." Finally, the 11th Circuit rejected Skanska's argument that Rule 37(e)(2) sanctions were inappropriate because Skanska had not engaged in an "affirmative act" to eliminate relevant evidence. Under the express provisions of the Rule, the court held that bad faith could be implied from circumstantial evidence reflecting a failure to act. Moreover, the 11th Circuit explained that a failure to act could be "just as harmful as affirmative acts of destruction."

*Rossbach v. Montefiore Med. Ctr.*, 81 F.4th 124 (2d Cir. 2023). In this matter before the U.S. Court of Appeals for the Second Circuit, plaintiff sought appellate review of the district court's order dismissing plaintiff's wrongful termination claims. In its order of dismissal, the district court held (among other things) that dismissal of plaintiff's claims was appropriate under Rule 37(e)(2) since plaintiff destroyed relevant, responsive information on both her iPhone 5 and her iPhone X in connection with her fabrication of a purported text message. On appeal, plaintiff challenged the district court's finding of spoliation, arguing that her conduct at issue—damaging her iPhone after dropping it on the ground and trading in her iPhone X—did not satisfy the requisite "intent to deprive" standard. The Second Circuit disagreed and held that the appropriate standard of intent for imposing sanctions against plaintiff was negligence under *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002). The Second Circuit then found that plaintiff's "failure to preserve her iPhones and their data, and [her counsel's] failure to ensure that his client did so, demonstrated a disregard of their discovery obligations." These failures were sufficient to meet the *Residential Funding* negligence standard. *See* discussion under **Sanctions—Other FRCP Provisions**.

*Mendez v. Wal-Mart Stores E., LP*, 67 F.4th 1354 (11th Cir. 2023). In this negligence action in which the U.S. Court of Appeals for the Eleventh Circuit affirmed an order of summary judgment for defendant Walmart, the Eleventh Circuit also upheld a district court's order rejecting plaintiff's request for an adverse inference against Walmart. The Eleventh Circuit agreed with the district court that Walmart's

failure to preserve certain video footage of plaintiff's alleged slip and fall was negligent and did not merit the issuance of an adverse inference instruction. In addition, the Eleventh Circuit indicated that plaintiff did not suffer prejudice from the lost video footage since the camera was not positioned to capture footage of the area where she fell, nor the area with spilled liquids on which she apparently slipped.

*Leonard v. St. Charles Cnty. Police Dep't*, 59 F.4th 355 (8th Cir. 2023). In this action involving *Monnell* claims against defendants, the U.S. Court of Appeals for the Eighth Circuit affirmed a district court order of summary judgment in favor of defendants and upheld its denial of plaintiff's motion for spoliation sanctions pursuant to Rule 37(e). The Eighth Circuit agreed with the district court that plaintiff had failed to offer evidence demonstrating that defendants deleted relevant evidence with an intent to deprive since "the system automatically overwrote older recordings to make room for new ones."

*Fowler v. Tenth Planet, Inc.*, --- F. Supp. 3d ---, 2023 WL 3569816 (D. Md. 2023). The district court affirmed a magistrate judge ruling that denied defendants' motion for spoliation sanctions for the loss of plaintiff's relevant text messages. The district court found that defendants failed to establish by clear and convincing evidence the existence of an "intent to deprive" or prejudice. The magistrate judge easily determined that plaintiff failed to take reasonable steps to preserve relevant text messages on his phone: "it was not reasonable to simply maintain those text messages only on his phone without at least verifying that they were being backed up to a cloud service or otherwise taking affirmative steps to create a copy given the not uncommon occurrence of a phone getting damaged, lost, or stolen." However, defendants could not show that the lost messages would have benefited them; the evidence was inconclusive and therefore insufficient to show that the lost messages were "essential" to their defenses. Finally, plaintiff's failure to back up his text messages on another medium was not evidence of an "intent to deprive" or sufficient to demonstrate prejudice under Rule 37(e)(1).

*Rapp v. NaphCare Inc.*, No. 3:21-CV-05800-DGE, 2023 WL 4624470 (W.D. Wash. July 19, 2023). In this prisoner litigation, the court modified its previous sanctions order of default judgment and instead issued a permissive adverse inference instruction against defendant for eliminating video footage relevant to plaintiff's claims. In connection with that ruling, the court discussed the standard for determining whether the deleted evidence was relevant to the claims or defenses. The court explained that relevance is broadly construed under the Federal Rules of Civil Procedure and that plaintiffs (as the moving party) need not advance "a specific theory of the deleted evidence's relevance" to establish relevance. Instead, the "[s]poliated evidence need only be relevant to a party's claims or defenses—it does not need to be a smoking gun to merit the imposition of sanctions." In this instance, the court indicated that plaintiffs' theory of relevance was sufficient even though it was based on "shaky foundations." *See* discussion under **Ethics**.

*Jennings v. Frostburg State Univ.*, No. CV ELH-21-656, 2023 WL 4567976 (D. Md. June 27, 2023). In an action involving a former biology professor's claims for wrongful termination against the defendant university, the court denied the professor's motion for spoliation sanctions under Rule 37(e) against defendants. In particular, the court found the professor did not satisfy the rule's "intent to deprive" requirement in connection with the loss of relevant text messages and other data from the university dean's and provost's phones. The court observed that Rule 37(e) had "clarified" the scienter requirement for sanctions with respect to ESI. Quoting extensively from *Fowler v. Tenth Planet, Inc.*, --- F. Supp. 3d ---, 2023 WL 3569816 (D. Md. 2023), the court contrasted Rule 37(e) with pre-2015 authority where "under the talisman of 'inherent authority,' a court was free to grant or deny any

potential sanction based on any state of mind from negligence to intentional bad faith." Turning to the specific facts at hand, the court found that the professor had merely shown that defendants failed to preserve relevant information from the phones at issue when they wiped the phones after the dean and provost left the university. This did not meet the "intent to deprive" requirement since courts treat a failure to "to implement a litigation hold as constituting gross negligence." *See* discussion under **Litigation Holds and Preservation**.

*Miramontes v. Peraton, Inc.*, No. 3:21-CV-3019-B, 2023 WL 3855603 (N.D. Tex. June 6, 2023). *See* discussion under **Litigation Holds and Preservation** and **Possession, Custody, or Control**.

*AliveCor, Inc. v. Apple, Inc.*, No. 21-CV-03958-JSW, 2023 WL 4335293 (N.D. Cal. June 2, 2023). The parties' dispute over deleted communications resulted in plaintiff filing a Rule 37(e) motion for sanctions and seeking severe and curative measures from the court. In its motion, plaintiff argued that defendant did not take reasonable steps to preserve a departed employee's relevant emails by failing to issue a timely litigation hold and by neglecting to disengage its auto-deletion policy that eliminated the custodian's emails. The court agreed with plaintiff's arguments, observing that defendant inexplicably waited four months after plaintiff filed its antitrust lawsuit—triggering defendant's preservation duty—before issuing a litigation hold. The court also noted that the hold instruction did not encompass information from the departed employee. These problems, coupled with defendant's failure to suspend its email auto-deletion practice, resulted in the court determining that defendant did not take reasonable steps to preserve relevant emails. While deeming such conduct to be "irresponsible and careless, and perhaps even grossly negligent," the court refused to enter a finding that the loss of the relevant emails was intentional and denied plaintiff's motion for Rule 37(e)(2) sanctions. In addition, the court held that Rule 37(e)(1) sanctions were inappropriate because plaintiff had failed to establish that it would be prejudiced by the loss of the former employee's emails. The court examined the legal standards surrounding the establishment of prejudice under Rule 37(e)(1), observing that prejudice requires the movant to "only come forward with plausible, concrete suggestions as to what [the destroyed] evidence might have been." The court found that plaintiff could not meet that standard since it only offered conclusory statements that the lost evidence was "among the hottest in the case," did not provide "concrete evidence about the particular nature of the deleted emails," and instead assumed that the lost ESI included relevant statements regarding plaintiff's antitrust claims. While denying the motion for sanctions, the court expressed concern regarding "the lack of candor exhibited by [defendant] and its counsel," finding that they were not entirely forthcoming regarding the nature and extent of the spoliation at issue "until under oath in a deposition."

*Fed. Trade Comm'n v. Roomster Corp.*, No. 22-CV-7389 (CM)(SN), 2023 WL 4409484 (S.D.N.Y. June 1, 2023). In response to plaintiff's spoliation motion arising from defendants' failure to preserve messages from its Slack collaboration tool, the court cited Rule 37(e)(2)'s intent-to-deprive standard as the controlling authority for determining whether it should impose sanctions. However, the court next declared that it must rely on the three-factor test that the U.S. Court of Appeals for the Second Circuit promulgated in *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) to establish whether a jury instruction should issue to address the spoliation of ESI. While acknowledging that Rule 37(e) had superseded *Residential Funding*, the court opined that it had done so "on other grounds." The court also indicated that plaintiff must satisfy the *Residential Funding* test by a preponderance of the evidence, relying on pre-2015 amendment case law. After articulating these standards, the court observed that defendants acknowledged that they failed to disable their ordinary information "retention and destruction policies," and the court authorized additional discovery to

determine whether defendants acted with a "culpable state of mind" when they allowed Slack messages to be deleted. *See* discussion under **Discovery Process** and **Privilege**.

*Alvarez v. United States*, 165 Fed. Cl. 385 (2023). In this Fair Labor Standards Act action in the Federal Court of Claims, the court found that the government spoliated relevant video footage and issued a preclusion sanction against the government pursuant to the Claims Court's analog to Rule 37(e)(1). *See* discussion under **Sedona Conference Publications**.

*Minnie Rose LLC v. Yu*, No. 15-CV-1923, 2023 WL 2386608 (S.D.N.Y. Mar. 7, 2023). The court determined in this civil fraud dispute that plaintiff failed to establish that defendants destroyed relevant bank statements with the "intent to deprive" required by the Rule 37(e)(2) and denied its motion for spoliation sanctions. In reaching this determination, the court observed that it evaluated the Rule 37(e)(2) intent element through four "non-exclusive factors." Those factors include the following: "(1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator." Drawing upon those factors to assess the spoliation, the court found that the lack of an affirmative act of spoliation, defendants' record of cooperation, and the inconsequential nature of the lost bank statements collectively weighed against a finding that defendants acted with the requisite intent to merit severe sanctions such as dismissal of their claims or an adverse inference.

**SEARCH**

*Lyman v. Ford Motor Co.*, 344 F.R.D. 228 (E.D. Mich. 2023). In this putative consumer class action against Ford, the court issued made several succinct findings on a variety of disputed discovery issues in response to plaintiffs' motion to compel. First, the court observed that electronic discovery generally requires cooperation and transparency between the parties. Next, the court expressed disapproval of custodial self-collection of relevant information, opining that "counsel must test the accuracy of the client's response to document requests to ensure that all appropriate sources of data have been searched and that responsive ESI has been collected—and eventually reviewed and produced." Finally, the court held that Ford's "search protocol," i.e., its methodology for identifying responsive documents, was not protected from discovery by the attorney-client privilege. The court ordered Ford to engage in "transparent and cooperative discussions about the search terms and search methodology" with plaintiffs and to search for and produce responsive documents among four custodians.

*Deal Genius, LLC v. O2COOL, LLC*, --- F. Supp. 3d ---, 2023 WL 4556759 (N.D. Ill. 2023). In this patent infringement matter involving claims and counterclaims of invalidity and infringement, defendant argued that plaintiff should review and produce relevant documents from the hits on a particular search term that defendant proposed in connection with plaintiff's elusion testing process. While defendant argued that the additional search term would yield relevant documents, plaintiff maintained that the request was inappropriate since it lacked a sufficient causal link to the documents plaintiff produced after reviewing a random sample of documents from the null set (i.e., the documents that did not hit on any of the search terms, together with the documents the producing party deemed not responsive after reviewing the search term hits). The court-appointed special master rejected plaintiff's position, holding that the search term targeted information that was both relevant

and proportional under the circumstances. In particular, the special master found plaintiff's position to be inapposite given Rule 26(b)(1)'s directive on relevance and a previously issued discovery order requiring the production of relevant information. The special master also concluded that the search term—which yielded 50 total hits, with 18 unique hit documents—was proportional given defendant's showing of relevance and plaintiff's inability to demonstrate that the burdens of reviewing and producing the information outweighed the benefits of its production. Finally, the special master concluded that the results of plaintiff's elusion testing—which yielded a 0.08% elusion rate—were "misleading and standing alone, [are] not determinative of whether [plaintiff] should be obligated to conduct additional searches for relevant information." Instead, the special master pointed to the results of a search term plaintiff agreed to run subsequent to finishing its review of the null set sample. The results of running that term—which yielded 28 hits, all of which plaintiff deemed relevant—emphasized the need for plaintiff to run additional search terms to identify relevant information that may have eluded the original search queries. *See* discussion under **Sedona Conference Publications**.

*In re Loc. TV Advert. Antitrust Litig.*, No. 18 C 6785, 2023 WL 5659926 (N.D. Ill. Aug. 31, 2023). In this putative antitrust class action asserting that certain broadcast television companies conspired to fix the prices of television advertising, the court ordered defendant Nexstar Group to produce "highly relevant" documents it had neither disclosed nor produced in discovery. Nexstar had argued that it was under no obligation to either disclose or produce the documents at issue—certain "white papers" it had submitted to the U.S. Department of Justice in connection with a planned merger with a competitor that plaintiffs alleged pertained to issues relevant to the case—because they did not hit upon the search terms memorialized in the parties' search term agreement negotiated at the outset of discovery. While the search term agreement was designed to address defendants' concerns that plaintiffs' discovery requests were overly broad and unduly burdensome, the court found that it did not abrogate Nexstar's obligation to search for and produce the white papers. Nor did the search term agreement relieve Nexstar of its duty to disclose whether it had withheld the documents from discovery. Even though the search terms may not have hit on the white papers, the court determined that the documents fell squarely within the ambit of plaintiffs' request, were proportional to the needs of the case, and that there was only a "minimal" production burden. Given these circumstances, the court held that the parties' search term agreement did not circumscribe Nexstar's duty to produce discoverable information or otherwise satisfy "its discovery obligations under the Federal Rules of Civil Procedure." Finally, the court ordered Nexstar to "pay for plaintiffs' reasonable expenses and costs, including attorney's fees," pursuant to Rule 37(a)(5)(A), finding that its opposition to plaintiff's motion to compel—premised largely on the parties' search term agreement—was not substantially justified.

*United States ex rel. Gill v. CVS Health Corp.*, No. 18 C 6494, 2023 WL 4106267 (N.D. Ill. June 20, 2023). In this False Claims Act litigation, the court issued an order resolving a dispute between the parties regarding the use of certain search term connectors. Relator had proposed that a particular search term be augmented with the use of "and" as a connector. In contrast, defendant countered by suggesting that "within ten words" was a more appropriate connector. The court rejected the parties' respective positions, opining that relator's proposed use of "and" would return too many hit documents while defendant's use of "within ten words" would yield too few documents. Regarding relator's position, the court reasoned that using "and" as a connector is "the discovery equivalent of playing Hungry Hungry Hippos – little better than grabbing blindly for documents," and would be disproportionate to the needs of the case. In contrast, the court observed that defendant's "within ten words" proposal was "too narrow" and would be appropriate only if relator had "a very good idea of what is among the documents [he is] searching." Upon reviewing the facts of the dispute, the court

concluded that a search term calculated to gather information within a paragraph would be most appropriate and ordered defendant to use a "within 200" words connector.

*Garner v. Amazon.com, Inc.*, No. 2:21-CV-00750-RSL, 2023 WL 3568055 (W.D. Wash. May 19, 2023). This matter involves a now familiar fact pattern of a responding party seeking to use technology-assisted review ("TAR") after agreeing to or being ordered to use search terms in connection with its review process. *See*, *e.g.*, *In re Valsartan, Losartan, & Irbesartan Prod. Liab. Litig.*, 337 F.R.D. 610 (D.N.J. 2020); *Livingston v. City of Chicago*, No. 16 CV 10156, 2020 WL 5253848 (N.D. Ill. Sept. 3, 2020); *Bridgestone Americas, Inc. v. Int'l Bus. Machines Corp.*, No. 3:13-1196, 2014 WL 4923014 (M.D. Tenn. July 22, 2014); *Progressive Cas. Ins. Co. v. Delaney*, No. 2:11-CV-00678-LRH, 2014 WL 3563467 (D. Nev. July 18, 2014). In *Garner*, the court in an earlier discovery order directed defendant Amazon to run 38 search queries that plaintiffs had proposed against 36 Amazon custodians. After doing so, Amazon identified a grand total of 2,036,172 documents. Given the number of documents at issue, Amazon informed plaintiffs that it intended to use TAR and committed to "discuss these tools with Plaintiffs before beginning review." In response, plaintiffs rejected Amazon's proposed use of TAR. Among other things, plaintiffs argued that it was "too late" in discovery to use TAR, that it contravened both the parties' agreement to use search terms and the court's discovery order on search terms, and that using TAR would improperly "reduce the document pool further and will certainly not reveal documents that the application of search terms has precluded." The court rejected all of these positions. On the issue of timing, the court noted that plaintiffs' position was unavailing since the parties had just stipulated to extend the discovery cutoff date. The court then determined that the ESI protocol (previously entered as a court order) contemplated the use of TAR and found *Progressive* to be inapposite where the ESI protocol was silent on TAR. The court further distinguished *Progressive* because unlike the responding party in *Progressive* who "refused to provide details regarding its TAR proposal to the requesting party," Amazon offered to confer on its TAR process, which plaintiffs "refus[ed] to discuss." Next the court indicated that the ESI protocol clearly empowered the parties to use "TAR to filter, not just locate, documents," clarified that nothing in the ESI protocol forbade Amazon from using TAR after running search terms, and accordingly held "that the use of search terms is not, standing alone, a bar to using technology to further refine the production." Finally, while acknowledging that plaintiffs may have "valid" concerns regarding the low number of responsive documents Amazon identified (2,564 after reviewing over 1.8 million of the 2,036,172 documents), the court refused to impugn Amazon's TAR process as the source of those concerns. The court pointed to the elusion testing Amazon conducted on the unreviewed 224,924 documents, reasoning that Amazon had likely hit 100 percent recall on its production of responsive documents given that it failed to identify any responsive documents during its review of the null set sample (1,527 documents) and considering that it had manually reviewed nearly 90 percent of the overall document population.

*Alivecor, Inc. v. Apple, Inc.*, No. 21-CV-03958-JSW, 2023 WL 2224431 (N.D. Cal. Feb. 23, 2023). In this antitrust lawsuit, the parties disputed whether plaintiff made a substantially complete production of responsive ESI. Defendant argued that plaintiff's production was incomplete due to plaintiff's "flawed TAR algorithm," which purportedly resulted in the overproduction of nonresponsive data and the underproduction of responsive materials. Plaintiff disagreed, asserting that any problems with its production stemmed from defendant's overly broad discovery requests and search terms. In response, defendant asserted that it "conducted 'several tests to assess the accuracy of [Plaintiff's] TAR algorithm,' which it argues showed the 'algorithm cannot reliably distinguish between responsive and unresponsive documents.'" The court rejected defendant's argument, finding that defendant neglected to substantiate its position with any hard information "such as a declaration from the attorney who performed the test" or "examples of documents from those tests that . . . should have been flagged as

responsive but were not." Citing *Winfield v. City of New York*, No. 15-CV-05236-LTS-KHP, 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017), the court observed that the standard for discovery was reasonableness and not perfection, and that it would not scrutinize plaintiff's TAR process in the absence of evidence demonstrating problems with that process.

**SEDONA CONFERENCE PUBLICATIONS**

*Deal Genius, LLC v. O2COOL, LLC*, --- F. Supp. 3d ---, 2023 WL 4556759 (N.D. Ill. 2023). In an order requiring plaintiff to produce relevant hit documents in response to a search term proposed by defendant in connection with plaintiff's elusion testing process, the special master cited to *The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition*, 21 SEDONA CONF. J. 263 (2020) and The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141 (2017). *See* discussion under **Search**.

*Alvarez v. United States*, 165 Fed. Cl. 385 (2023). In this FLSA action in the Federal Court of Claims, the court repeatedly cited *The Sedona Principles, Third Edition* regarding the need for parties to adopt reasonable and proportional measures to preserve relevant ESI, the importance of cooperation in discovery, and an evaluation of prejudice for purposes of Rule 37(e). *See* discussion under **Sanctions—Rule 37(e)**.

*Chaverra v. U.S. Immigration and Customs Enforcement*, No. CV 18-289 (JEB), 2023 WL 6291642 (D.D.C. July 31, 2023). In its order approving the use of sampling in connection with the government's response to a Freedom of Information Act request, the court cited *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 15 SEDONA CONF. J. 265, 302 (2014) in support of its determination.

*LKQ Corp. v. Kia Motors Am., Inc.*, No. 21 C 3166, 2023 WL 4365899 (N.D. Ill. July 6, 2023). In connection with its analysis of plaintiff's "discovery on discovery" motion, the court determined that *The Sedona Principles, Third Edition* provided the most pertinent guidance for determining the burden of proof on the instant motion. In particular, the court highlighted Sedona Principle 6, which recommends that the requesting party establish by "specific and tangible evidence" that the responding party materially failed to meet its reasonable inquiry duty. *See* discussion under **Discovery Process**, **ESI Protocols** and **Privilege**.

*In re Apache Corp. Sec. Litig.*, No. 4:21-CV-00575, 2023 WL 5322444 (S.D. Tex. Apr. 10, 2023). In this securities fraud action, the court discussed Sedona Principle 6 from *The Sedona Principles, Third Edition* in support of its decision to deny plaintiffs' motion to compel defendant to enter into an ESI protocol with search and production provisions.

**TEXT MESSAGES & EPHEMERAL MESSAGES**

*Skanska USA Civ. Se. Inc. v. Bagelheads, Inc.*, 75 F.4th 1290 (11th Cir. 2023). *See* discussion under **Sanctions—Rule 37(e)**.

Fowler v. Tenth Planet, Inc., --- F. Supp. 3d ---, 2023 WL 3569816 (D. Md. 2023). *See* discussion under **Sanctions—Rule 37(e)**.

*Jennings v. Frostburg State Univ.*, No. CV ELH-21-656, 2023 WL 4567976 (D. Md. June 27, 2023). *See* discussion under **Litigation Holds and Preservation** and **Sanctions—Rule 37(e)**.

*Miramontes v. Peraton, Inc.*, No. 3:21-CV-3019-B, 2023 WL 3855603 (N.D. Tex. June 6, 2023). *See* discussion under **Litigation Holds and Preservation** and **Possession, Custody, or Control**.

*United States v. Buyer*, No. 22-CR-0397 (RMB), 2023 WL 2495919 (S.D.N.Y. Mar. 14, 2023). *See* discussion under **Criminal Law**.

**WORKPLACE COLLABORATION TOOLS**

*Fed. Trade Comm'n v. Roomster Corp.*, No. 22-CV-7389 (CM)(SN), 2023 WL 4409484 (S.D.N.Y. June 1, 2023). *See* discussion under **Discovery Process**, **Privilege**, and **Sanctions—Rule 37(e)**.

*Fed. Trade Comm'n v. Am. Future Sys., Inc.*, No. 2:20-CV-02266-JHS, 2023 WL 3559899 (E.D. Pa. Mar. 28, 2023), *report and recommendation adopted as modified*, 2023 WL 3559319 (E.D. Pa. May 17, 2023). *See* discussion under **Possession, Custody, or Control** and **Sanctions—Other FRCP Provisions**.

*Lubrizol Corp. v. Int'l Bus. Machines Corp.*, No. 1:21-CV-00870-DAR, 2023 WL 3453643 (N.D. Ohio May 15, 2023). In this breach of commercial contract litigation, plaintiff sought an order compelling defendant IBM to produce contextual messages from Slack, its collaboration and chat platform. In particular, plaintiff requested that IBM produce an entire Slack discussion of 20 or fewer total messages that included a relevant communication and, for "a Slack channel containing more than 20 total messages," plaintiff argued that IBM should produce "the 10 messages preceding or following any responsive Slack message." In response, IBM argued that the production of contextual messages was not appropriate given their unresponsiveness and the undue burden such a production obligation would impose. The court ultimately rejected those arguments and granted plaintiff's requested remedy. In addition, the court made the obligations under its order reciprocal and directed plaintiff to likewise produce contextual messages from its Microsoft Teams platform. In so doing, the court made several key findings. First, the court determined that Slack communications were analogous to text and email messages and rejected IBM's argument that Slack messages, with their individualized JSON format, were instead similar to paper documents. Second, the court reasoned that the extant protective order would ameliorate the harm arising from the production of irrelevant message content. And finally, the court found that IBM failed to substantiate its undue burden assertion, as it did not disclose the number of additional messages it would have to produce, nor advance metrics regarding the estimated time, manpower, or costs it would incur if required to comply with plaintiff's contextual message production request.