# Selected eDiscovery and ESI Case Law from 2021-22

*Philip J. Favro, ed.*



# Table of Contents

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Philip J. Favro, ed.[1]

## CLOUDS

*Fast v. GoDaddy.com LLC*, --- F.R.D. --- , 2022 WL 325708 (D. Ariz. Feb. 3, 2022). The court imposed sanctions against plaintiff under Rule 37(e)(1) after determining that she failed to take reasonable steps to preserve relevant information on her iPhone 12. Plaintiff asserted that she preserved relevant information on her phone up until the time it was purportedly stolen during the litigation. Defendants contested this assertion, arguing that relevant information was lost from the phone because plaintiff failed to timely back up its data to her iCloud account. District Judge David Campbell agreed with defendants, finding that plaintiff had a continuing preservation duty and that she failed to regularly back up the contents of her iPhone. While plaintiff argued that she lacked sophistication to enable an iCloud backup and "did the best she could," Judge Campbell rejected this argument. Judge Campbell cited the 2015 advisory committee note to Rule 37(e), which observed that a court "should consider a party's sophistication in determining whether the party took reasonable steps to preserve ESI." Based on plaintiff's repeated written representations regarding her technical skills (*e.g.*, "I'm the smartest person technically in the room"), Judge Campbell held that plaintiff *had* the sophistication to back up her phone and that failing to do so constituted a failure to take reasonable steps to preserve relevant ESI. *See* discussion under **Ephemeral Messaging**, **Ethics**, **Litigation Holds** and **Preservation**, **Sanctions—Other FRCP Provisions**, **Sanctions—Rule 37(e)**, **Social Media**, and **Text Messages**.

*Prudential Def. Sols., Inc. v. Graham*, No. 20-11785, 2021 WL 4810498 (E.D. Mich. Oct. 15, 2021). The court held that defendants failed to take reasonable steps to preserve relevant smartphone communications and imposed sanctions on defendants pursuant to Rule 37(e). Among other things, the court found that defendant Jake Graham ("Graham") removed *all* data associated with the Apple iPhone his employer issued to him by wiping both his phone and his corresponding iCloud account to protect the personal information he had on the phone. In addition, Graham lost (or had stolen) a new iPhone he subsequently acquired and then—"just to be safe"—wiped his iCloud account again to protect his personal information. Sarcastically characterizing this and defendants' other spoliation as "a remarkable run of bad luck," the court criticized Graham for repeatedly wiping the data from his iCloud account, characterizing iCloud as "the very mechanism that would have allowed him to wipe his phone of private or personal information while properly preserving data relevant to this litigation." Regarding his spoliation of data from the second iPhone, the court opined that Graham could have taken any number of more effective steps to safeguard information on his phone other than wiping his iCloud account, such as activating the "Find My iPhone" geolocation feature; using the iPhone "Activation Lock;" "requiring an Apple ID and password to reactivate the iPhone;" or deactivating "Apple Pay" and disabling the availability of other financial data. *See* discussion under **Sanctions—Rule 37(e)**.

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## COOPERATION

*Kinon Surface Design v. Hyatt Int'l Corp.*, No. 19 C 7736, 2022 WL 787956 (N.D. Ill. Mar. 15, 2022). In connection with cross-motions for discovery relief in this copyright infringement action, the court highlighted the need for cooperation to better ensure a "somewhat satisfactory" resolution of their discovery disagreements. Plaintiffs sought 19 categories of documents and ESI at the close of discovery, requests that Magistrate Judge Jeffrey Cole determined to be either lacking in relevance or disproportionate to the needs of the case given information plaintiffs already obtained from defendants. While Judge Cole granted several aspects of defendants' motion to compel further responses to various interrogatories and document requests, he did so only after admonishing the parties against reflexive motion practice on discovery issues. Judge Cole reasoned that judicial discretion—which occupies a range rather than a point on the spectrum of decision-making—could result in a viable order against a party whose positions are arguably meritorious and "right" under the circumstances. Rather than gambling on the outcome, Judge Cole encouraged the parties to consider cooperative advocacy resulting in a "negotiated outcome" to better secure sought-after discovery relief. *See* discussion under **Proportionality**.

*Robinson v. De Niro*, No. 19-CV-9156 (KHP), 2022 WL 229593 (S.D.N.Y. Jan. 26, 2022). In connection with denying defendants' motion to compel, the court chided the parties for not engaging in more cooperative advocacy. The court observed that the parties "appear to have lost sight of the fact that zealous representation does not require motions to be filed on every minutiae of discovery" and that their mutual distrust had blinded them from recognizing the potential for informally resolving disputes such as defendants' motion to compel. *See* discussion under **Proportionality**.

## CROSS-BORDER

*In re Valsartan, Losartan, & Irbesartan Prod. Liab. Litig.*, No. MDL 19-2875(RBK/KW), 2021 WL 3604808 (D.N.J. Aug. 12, 2021), *aff'd*, No. MDL 2875 (RBK), 2021 WL 6010575 (D.N.J. Dec. 20, 2021). The court affirmed a report and recommendation issued by the court-appointed special master, Thomas I. Vanaskie (ret.), regarding the production of 20 documents from the People's Republic of China that several defendants argued were protected from disclosure by the Chinese State Secrets Law. After evaluating the five factors from the Supreme Court's *Aérospatiale* decision, along with two additional factors from *Wultz v. Bank of China, Ltd.*, 910 F. Supp. 2d 548, 553 (S.D.N.Y. 2012), the court ordered defendants to produce the 20 documents to plaintiffs, subject to various restrictions on the circulation and disclosure of those documents.

## CRIMINAL ESI

*United States v. Confer*, No. 20-13890, 2022 WL 951101 (11th Cir. Mar. 30, 2022). *See* discussion under **Ephemeral Messaging**.

*United States v. Devion Marquette Cumbie*, --- F.4th ---, 2022 WL 802769 (8th Cir. Mar. 17, 2022). *See* discussion under **ESI Evidence**.

*Sec. & Exch. Comm'n v. Xia*, No. 21-cv-5350, 2022 WL 377961 (E.D.N.Y. Feb. 8, 2022). *See* discussion under **Text Messages**.

*Matter of Search of Info. that is Stored at Premises Controlled by Google LLC*, No. 21-SC-3217 (GMH), 2021 WL 6196136 (D.D.C. Dec. 30, 2021). *See* discussion under **Nontraditional Sources of ESI**.

## DISCOVERY PROCESS

*Vasoli v. Yards Brewing Co., LLC*, No. CV 21-2066, 2021 WL 5045920 (E.D. Pa. Nov. 1, 2021).

In this employment discrimination action, defendants unilaterally selected 27 search terms and a date range to identify relevant, responsive ESI. After this search proved demonstrably inadequate in later depositions, the court ordered defendants to make available for a Rule 30(b)(6) deposition a representative who could testify regarding how defendants conducted their search for relevant information. In response, defendants argued that such a deposition would intrude on privileged communications and attorney work product. The court found defendants' position unavailing and reasoned that "the practical steps taken by an attorney and/or her client to identify responsive documents do not necessarily encroach on the thought processes of counsel. Instead, the steps used to identify responsive documents go to the underlying facts of what documents are responsive to Plaintiffs' documents requests."

## EPHEMERAL MESSAGING

*United States v. Confer*, No. 20-13890, 2022 WL 951101 (11th Cir. Mar. 30, 2022). In the context of a motion to suppress, the U.S. Court of Appeals for the Eleventh Circuit discussed the ephemeral features associated with Snapchat and the measures that a law enforcement officer took to bypass those features to preserve text messages and images that the accused exchanged with the officer. In particular, the Eleventh Circuit mentioned the ephemeral nature of content generally exchanged over Snapchat; that the Snapchat application would alert the accused if the officer used his smartphone's screenshot feature to capture message content; and that the officer used a digital camera to bypass the screenshot warning and thereby capture the accused's messages.

*Fast v. GoDaddy.com LLC*, --- F.R.D. --- , 2022 WL 325708 (D. Ariz. Feb. 3, 2022). District Judge David Campbell imposed sanctions against plaintiff for improperly disposing of relevant messages from Telegram, an ephemeral messaging application. Judge Campbell found that the circumstances surrounding plaintiff's use of Telegram to communicate with a former colleague ("Mudro"), who was helping plaintiff marshal evidence to support her discrimination claims against GoDaddy, suggested their messages would have reflected relevant, responsive information. For example, after plaintiff began using Telegram, plaintiff did not exchange messages with Mudro on Facebook Messenger (their preferred medium for communication) for five consecutive days. Nor were there Facebook Messenger messages between plaintiff and Mudro discussing the "stuff" plaintiff previously indicated she wanted to share with Mudro over Telegram. Finally, no messages were ever found on plaintiff's Telegram account. While plaintiff argued that the lack of messages ("no messages here yet") suggested she never communicated with Mudro on Telegram, Judge Campbell disagreed. In particular, the court spotlighted the automated disposition feature Telegram offers its users—"A hallmark of Telegram is that a user can delete sent and received messages for both parties"—and held that these collective details, supported by the testimony of defendant's forensics expert, met Rule 37(e)(2)'s intent-to-deprive requirement. The court additionally found plaintiffs' actions—deleting relevant text messages—prejudiced defendant and that Rule 37(e)(1) sanctions were likewise appropriate to remedy

that harm. *See* discussion under **Clouds**, **Ethics**, **Sanctions—Other FRCP Provisions**, **Sanctions—Rule 37(e)**, **Social Media**, and **Text Messages**.

*Pable v. Chicago Transit Auth.*, No. 19 CV 7868, 2021 WL 4789028 (N.D. Ill. Sept. 13, 2021). The court refused to enter an order directing plaintiff to disable the "disappearing messages" feature on the Signal ephemeral messaging application on his mobile phone. Defendant had sought this relief through motion practice, arguing that plaintiff—who brought a whistle-blower lawsuit against defendant—had not properly preserved relevant text messages exchanged with his former supervisor over Signal and that disabling the ephemerality feature was essential to ensuring plaintiff satisfied his common law duty to preserve. Magistrate Judge Heather McShain rejected this argument, holding (among other things) that such an order would not be an effective means of preserving relevant Signal messages. Judge McShain observed that plaintiff's messages would not be retained irrespective of the sought-after order if the "disappearing messages" function was enabled on the former supervisor's Signal application. Nor could the court bind the former supervisor by such an order, as Judge McShain noted that he was not a party to the litigation.

## ESI EVIDENCE

*United States v. Devion Marquette Cumbie*, --- F.4th ---, 2022 WL 802769 (8th Cir. Mar. 17, 2022). The U.S. Court of Appeals for the Eighth Circuit affirmed the trial court's refusal to admit a certain text message as evidence in the criminal prosecution of defendant over his production of child pornography and extortion. The text message at issue was purportedly a communication from defendant's former roommate to defendant's wife in which the former roommate claimed responsibility for defendant's crimes. Defendant attempted to introduce the text message at trial multiple times despite the fact that the message was clearly hearsay without an applicable exception. The trial court rejected these attempts and additionally found the message was both "unreliable" and "untrustworthy" given the existence of evidence that defendant's wife got possession of the roommate's phone and sent the message to herself. The Eighth Circuit agreed, holding that the "proffered evidence demonstrated that [defendant's wife] sent the text message to herself to support [defendant's] trial defense."

*Weinhoffer v. Davie Shoring, Inc.*, 23 F.4th 579, 580 (5th Cir. 2022). In *Weinhoffer*, the U.S. Court of Appeals for the Fifth Circuit held that a trial court committed reversible error when it admitted a paper printout of an auction ("Auction") website's terms and conditions that was not properly authenticated and did not satisfy the hearsay rule's business records exception. At trial, the court allowed defendant to present a paper printout of the Auction's terms and conditions over the trustee's objection, finding that subpoenaed testimony from the Auction's office manager satisfied Federal Rule of Evidence ("FRE") 901's sufficiency standard. The Fifth Circuit disagreed and instead found the office manager did not have sufficient "direct knowledge" to authenticate the paper printout, since the Auction's terms and conditions were hosted by a third party ("Proxbid"), and the office manager was unfamiliar with Proxbid's recordkeeping procedures. That same lack of familiarity with Proxbid's recordkeeping practices likewise doomed defendant's assertion that the office manager was a "custodian or another qualified witness" whose testimony could satisfy the business records exception to the hearsay exclusion rule. *See* FED. R. EVID. 803(6)(D). Finally, the Fifth Circuit found that it was reversible error for the trial court to take judicial notice of the terms and conditions reflected on an archived copy of the Auction's webpage retrieved from the Wayback Machine "because a private internet archive falls short of being a source whose accuracy cannot reasonably be questioned as required by [FRE] 201."

*Carolina v. JPMorgan Chase Bank NA*, No. CV-19-05882-PHX-DWL, 2021 WL 5396066 (D. Ariz. Nov. 17, 2021). In connection with an order granting defendants' motion for summary judgment, the court held that an email was properly authenticated as evidence under FRE 901(b)(4) given its "distinctive characteristics." Those characteristics included the following: The email header of a forwarded copy of the message; "detailed signatures" from defendant JPMorgan Chase Bank's employees who were involved in the email string; plaintiff's former employee identification number; and a discussion memorializing various events confirmed by other admissible evidence. The court reasoned that as "all of this corroborating evidence has itself been separately found to be authenticated, the 'appearance, contents, [and] substance . . . of the item, taken together with all of the circumstances,' authenticate this exhibit under Rule 901(b)(4)."

## ESI PROTOCOLS

*In re Actos Antitrust Litig.*, ---F.R.D.---, 2022 WL 949798 (S.D.N.Y. Mar. 30, 2022). The court held that defendants had improperly used email threading to produce only the most inclusive messages from relevant email threads because they did so without disclosing or otherwise reaching an agreement with plaintiffs beforehand regarding their use of email threading. Magistrate Judge Stewart Aaron found that the method of email threading defendants used—which suppressed all but the most inclusive messages—violated Rule 34 because it impaired plaintiffs' "ability to conduct searches of the emails for senders and recipients." In particular, Judge Aaron observed that plaintiffs would have reduced ability to conduct searches by date range, and defendants' production had deprived plaintiffs from being able to identify certain email recipients, including, but not limited to, those who may have been blind carbon-copied on unproduced "lesser included" messages. Judge Aaron ultimately ordered defendants to produce responsive "earlier-in-time emails" that defendants had suppressed and, citing *The Sedona Principles, Third Edition*, generally encouraged litigants to negotiate "a comprehensive ESI protocol" to address issues such as email threading. *See* discussion under **Privilege Logging**.

*Raine Grp. LLC v. Reign Cap., LLC*, No. 21-cv-1898, 2022 WL 538336 (S.D.N.Y. Feb. 22, 2022). In this action involving trademark infringement and unfair competition, Magistrate Judge Katharine Parker evaluated a variety of disputed provisions for which the parties requested inclusion in an ESI protocol. Among other things, defendant requested that the ESI protocol declare that "each party has an independent obligation to conduct a reasonable search in all company files and to produce nonprivileged and responsive documents to pending document requests." Defendant also argued that the ESI protocol should assert that "both parties have an independent obligation to search all files from all employees that could reasonably contain responsive documents to the parties' document requests." Judge Parker rejected the proposed provisions, finding them unnecessary given that the parties' search obligations are memorialized by Rule 26(g)'s reasonable inquiry requirement. Judge Parker also held that provisions seeking to impose an obligation to search "all company files" or "all files from all employees" went beyond the scope of the Rules. Instead, the Rules require parties to first identify sources with relevant information in their possession, custody, or control and then determine the best way to preserve, collect, and search that information. As part of their effort to conduct a reasonable search, Judge Parker observed that parties may decide to remove sources of relevant information that could be superfluous or inaccessible and may impose a date range limiting the production of relevant information, all while encouraging parties to be cooperative regarding these and other discovery duties.

## ETHICS

*Fast v. GoDaddy.com LLC*, --- F.R.D. --- , 2022 WL 325708 (D. Ariz. Feb. 3, 2022). The court expressed concern regarding the actions of plaintiff's lawyer during the discovery process given both the prolific and blatant nature of plaintiff's spoliation of ESI. *See* discussion under **Clouds**, **Ephemeral Messaging**, **Sanctions—Other FRCP Provisions**, **Sanctions—Rule 37(e)**, **Social Media**, and **Text Messages**. Even though the court did not impose sanctions on the lawyer, District Judge David Campbell observed that counsel "had an affirmative obligation to ensure that his client conducted diligent and thorough searches for discoverable material and that discovery responses were complete and correct when made."

*Ondigo LLC v. intelliARMOR LLC*, No. CV 20-1126, 2022 WL 798627 (E.D. Pa. Mar. 16, 2022). The court found that defendant and its counsel failed to conduct a reasonable search for relevant information after defendant turned over previously unproduced relevant emails in response to a request from the court for such information *after* the completion of a bench trial. Given the speed at which defendant was able to identify and produce the emails in question, the court held that the certification defendant's counsel made pursuant to Rule 26(g) when counsel previously signed the client's discovery responses was not reasonable and accordingly imposed sanctions on defendant. *See* discussion under **Sanctions—Other FRCP Provisions**.

*Nuvasive, Inc. v. Absolute Med., LLC*, No. 6:17-CV-2206-CEM-GJK, 2021 WL 3008153 (M.D. Fla. May 4, 2021). In connection with the court's tentative determination to enter default judgment against defendants, the court found that one of defendants' lawyers failed to take reasonable steps to preserve relevant evidence and also helped defendants as they "*intentionally destroyed* vast amounts of evidence." *See Nuvasive v. Absolute Medical, LLC*, No. 6:17-cv-2206-CEM-GJK (M.D. Fla. Jan. 10, 2022), ECF No. 371) (emphasis in original). That evidence included an entire email domain hosted by Google that defendants shut down after the duty to preserve attached and which their counsel represented "was okay to close." The court expressed concern regarding counsel's advice to close the domain, observing that "a member of the Bar is expected to have significantly more legal sophistication than a litigant" and observed that "advocacy certainly does not include instructing a litigant that it is acceptable to destroy evidence." In setting a show-cause hearing to determine why defendant's counsel should not be sanctioned, the court declared that "[c]onduct such as that engaged in here must not, can not and will not be tolerated." *See* discussion under **Sanctions— Rule 37(e)** and **Text Messages**.

*Mod. Remodeling, Inc. v. Tripod Holdings, LLC*, No. CV CCB-19-1397, 2021 WL 3852323 (D. Md. Aug. 27, 2021). The court refused to impose sanctions on counsel for defendants despite their widespread spoliation of relevant emails, text messages, and other ESI. *See* discussion under **Sanctions—Rule 37(e)** and **Text Messages**. Plaintiff had argued that Rule 26(g) sanctions were appropriate given that counsel allegedly "took no action to place a litigation hold on their clients' text messages or emails." The court disagreed, observing that "while better practice is for counsel to instruct their clients to preserve their text messages, it is not necessarily their responsibility to ensure their client has done so." In support of its holding on this issue, the court cited *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226 (D. Minn. 2019), which held that the client bore the ultimate responsibility for preserving relevant information.

## FEDERAL RULE OF EVIDENCE 502(d)

*Sleep No. Corp. v. Young*, No. 20-CV-1507 (NEB/ECW), 2021 WL 5644322 (D. Minn. Dec. 1, 2021). The court concluded that nonwaiver order provisions separately memorialized in the parties' Rule 26(f) report (limited to inadvertence), multiple pretrial scheduling orders (limited to inadvertence), a "stipulated e-Discovery order" (unlimited application), and protective order (limited to inadvertence) only provided protection under Federal Rule of Evidence ("FRE") 502(d) for documents the parties inadvertently disclosed in discovery. Based on its determination that the nonwaiver order was limited to inadvertent productions, the court ordered defendants to produce several privileged patent prosecution documents that it held defendants voluntarily disclosed to (and then clawed back from) plaintiff during discovery. In contrast, the court found that defendants could shield various other privileged documents from discovery because the evidence confirmed they were inadvertently produced in discovery. Finally, the court rejected plaintiff's contention that defendants' voluntary production of privileged documents and ensuing waiver had resulted in a subject-matter waiver of defendants' entire portfolio of privileged patent prosecution documents pursuant to FRE 502(a). According to the court, such a finding would be manifestly unfair under the circumstances.

## FORM OF PRODUCTION

*Porter v. Equinox Holdings, Inc.*, No. RG19009052, 2022 WL 887242 (Cal. Super. Mar. 17, 2022). The court held that defendant, in response to plaintiffs' discovery requests, did not need to produce every communication that referenced a linked document in family relationships as a responding party ordinarily would do with emails and attachments. Instead, the court—following *Nichols v. Noom*, 20-cv-3677, 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021), *aff'd*, ECF No. 324 (S.D.N.Y. Apr. 30, 2021)—directed plaintiffs to notify defendant if they are unable to find "key" linked documents referenced in produced communications and ordered defendant, in response, to identify or produce the linked documents at issue from its Google Drive or SharePoint cloud sites.

*Zhulinska v. Niyazov L. Grp., P.C.*, No. 21-CV-1348 (CBA), 2021 WL 5281115, at *4 (E.D.N.Y. Nov. 12, 2021). In this sexual harassment case, plaintiffs filed a motion to compel defendants to produce relevant emails with metadata after defendants represented they would produce PDF versions or printed copies of the requested emails. In response, the court found neither plaintiffs' nor defendants' positions were properly justified. On the one hand, the court indicated that plaintiffs had not established that the metadata they requested was relevant. And yet, the court reasoned that Rule 34 forbade defendants from producing responsive emails in a format that inhibited plaintiffs' ability to search the information. Against this backdrop, the court ordered defendants to produce the emails at issue "in a text-searchable format" and directed the parties to meet and confer regarding an appropriate form of production.

## LITIGATION HOLDS AND PRESERVATION

*Weatherspoon v. 739 Iberville, LLC*, No. CV 21-0225, 2022 WL 824618 (E.D. La. Mar. 18, 2022). The court questioned the steps defendant took to identify and preserve relevant information for the instant litigation. Magistrate Judge Karen Wells Roby observed that the preservation efforts undertaken by defendant and its counsel were limited to an oral litigation hold instruction, which she reasoned was insufficient to safeguard the preservation of relevant information. Judge Roby also noted with disapproval that counsel did not issue a subsequent written hold instruction to defendant or take

follow-up steps to confirm that defendant understood the nature of the relevant information that needed to be preserved. Fearing that relevant text messages, emails, electronic personnel records, and paper documents may have been spoliated (defendant's counsel blamed Hurricane Ida for the loss of relevant paper records), Judge Roby ordered the parties to submit additional briefing to determine the full nature and extent of defendant's preservation efforts and whether unproduced relevant information could still be identified and preserved. *See* discussion under **Rule 34 Objections and Responses**.

*Alabama Aircraft Indus., Inc. v. Boeing Co.*, No. 20-11141, 2022 WL 433457 (11th Cir. Feb. 14, 2022). In affirming the district court's Rule 37(e) sanctions order against defendant The Boeing Company ("Boeing"), the U.S. Court of Appeals for the Eleventh Circuit confirmed that a litigant's duty to preserve relevant evidence arises "when litigation is 'pending or reasonably foreseeable' at the time of the alleged spoliation." Following that standard, the court affirmed the district court's ruling that Boeing should have reasonably foreseen litigation involving plaintiff before deleting relevant emails that resulted in the issuance of the adverse inference instruction against Boeing. The court observed there was no clear error in the district court's finding for, among other reasons, Boeing had previously determined that it could "expect an ugly, lengthy legal battle" if it terminated its business relationship with plaintiff. Once Boeing did so, the litigation Boeing anticipated with plaintiff became a reality, and it failed to take reasonable steps thereafter to preserve the emails in question. *See* discussion under **Sanctions—Rule 37(e)**.

*Fast v. GoDaddy.com LLC*, --- F.R.D. --- , 2022 WL 325708 (D. Ariz. Feb. 3, 2022). *See* discussion under **Clouds**.

*La Belle v. Barclays Cap. Inc.*, 340 F.R.D. 74 (S.D.N.Y. Jan. 2022). *See* discussion under **Sanctions—Rule 37(e)**.

*Medidata Sols., Inc. v. Veeva Sys., Inc.*, No. 17 CIV. 589, 2021 WL 4902462 (S.D.N.Y. Sept. 22, 2021). The court held that defendant took reasonable steps to satisfy its preservation duty despite suffering the loss of relevant data. In this trade secret dispute, defendant issued "a companywide litigation hold" to preserve relevant ESI on various information systems and computer devices. In an effort to limit the scope of preservation, defendant declined to search for relevant ESI that its employees might have in their personal repositories or devices and disclosed this to plaintiffs. Plaintiffs offered no objections and then adopted the same approach for their discovery responses. Two and a half years into the litigation, defendant's counsel learned that an employee had hundreds of thousands of documents belonging to plaintiffs on a personal hard drive at his home. Defendant immediately informed the employee that he must hold the documents, notified plaintiffs about the development, and jointly arranged with plaintiffs for a service provider to take possession of and then analyze the employee's personal hard drive. Nevertheless, the employee undertook certain actions in the meantime that eliminated "file metadata," which could have shown which of plaintiffs' documents he accessed for his work and the dates and times when he did so. With critical evidence for their claims now gone, plaintiffs sought an adverse inference instruction against defendant. In response, the court denied the sanctions motion, holding that defendant took proper steps to hold relevant ESI, including "general and individualized litigation holds." In addition, the court detailed the suitability of defendant's subsequent remedial measures to identify and preserve relevant ESI in the employee's personal possession. The court reasoned that plaintiffs had no evidence suggesting defendant instructed the employee to disobey the hold and eliminate the relevant file metadata. Indeed, the evidence reflecting defendant's remedial actions— which allowed for the recovery of "many details of specific instances

when [the employee] accessed" plaintiffs' documents—all suggested otherwise. Finally, the court dismissed plaintiffs' assertion that defendant should have been more proactive at the outset of the litigation in identifying the documents in the employee's personal possession. With the benefit of "hindsight," the court reasoned that such a decision now, of course, made perfect sense. But without such hindsight and viewed from the perspective of a typical litigant in this situation, the court held that defendant's "actions are consistent with the normal discovery process in complex civil litigation, in which general document holds are imposed on party employees, and then a huge number of attorney hours are expended reviewing millions of documents from dozens of custodians."

*Prudential Def. Sols., Inc. v. Graham*, No. 20-11785, 2021 WL 4810498 (E.D. Mich. Oct. 15, 2021). *See* discussion under **Clouds** and **Sanctions—Rule 37(e)**.

## METADATA

*Arconic Corp. v. Novelis Inc.*, No. CV 17-1434, 2022 WL 409488 (W.D. Pa. Feb. 10, 2022). In this trade secret action, plaintiff filed a recusal motion against District Judge Joy Flowers Conti and argued that metadata memorialized in Microsoft Word documents from several of her orders purportedly identified the court-appointed special master as the author of those orders. Because the documents' metadata appeared to indicate that the special master had authored orders affirming reports and recommendations issued by the special master, plaintiff asserted that Judge Conti abdicated her duty to independently review those reports and recommendations. In response, Judge Conti rejected plaintiff's assertion, confirmed that she authored the orders affirming the special master's reports and recommendations, and explained that the "author" metadata field is not evidence of the actual preparer of a document, does not support a reasonable inference that the court abandoned its role, or provide a basis for recusal. *See also Raiser v. San Diego Cty.*, No. 19-CV-00751-GPC, 2021 WL 4751199 (S.D. Cal. Oct. 12, 2021) (denying a recusal motion on similar grounds against District Judge Gonzalo P. Curiel).

*Zhulinska v. Niyazov L. Grp., P.C.*, No. 21-CV-1348 (CBA), 2021 WL 5281115, at *4 (E.D.N.Y. Nov. 12, 2021). *See* discussion under **Form of Production**.

## NONPARTIES

*In re Pork Antitrust Litig.*, No. 18-CV-1776 (JRT/HB), 2022 WL 972401 (D. Minn. Mar. 31, 2022). The court ordered several nonparty employees of defendant Hormel Foods Corporation ("Hormel") to produce certain relevant text messages in response to plaintiffs' subpoenas in this antitrust lawsuit against large U.S. pork producers. Given the financial burden that the production order would impose on the subpoenaed employees, the court directed plaintiffs and Hormel to equally bear the costs of imaging, extraction, conversion, and storage of data from the employees' phones. *See* discussion under **Possession, Custody, or Control**.

*Trellian Pty, Ltd. v. adMarketplace, Inc.*, No. 19-cv-5939(JPC)(SLC), 2021 WL 363965 (S.D.N.Y. Feb. 3, 2021). *See* discussion under **Relevance Redactions**.

## NONTRADITIONAL SOURCES OF ESI

*Matter of Search of Info. that is Stored at Premises Controlled by Google LLC*, No. 21-SC-3217 (GMH), 2021 WL 6196136 (D.D.C. Dec. 30, 2021). In this criminal case, the court granted the government's geofence warrant application, which asked Google to leverage its tracking capability of mobile devices to identify cell phones that were in an area at specified times when crimes occurred. This type of warrant is known as a "reverse-location" warrant; meaning that when "the perpetrator of the crime is unknown to law enforcement, the warrant identifies the geographic location where criminal activity happened and seeks to identify cell phone users at that location when the crime occurred." While the government obtained CCTV footage, which showed the suspects using cell phones as they engaged in criminal activity, and provided dates, times, and the location of the criminal activity, the government was unable to identify the suspects. Accordingly, the government requested a warrant from the court seeking a total of 185 minutes of geofence data ("split into segments ranging from 2 to 27 minutes on 8 specified days over a roughly five-and-a-half month period") for a specified 875 square meter geofence area in a further attempt to identify the suspects. The court approved the government's geofence warrant because the government met its burden of showing a crime occurred within the proposed geofences at the specified times and properly limited the scope of the geofence area and timeframe. Moreover, while "the geofences may reveal the location information of non-suspects[, this did] not render the government's warrant unreasonable given that the geofences and the two-step protocol ha[d] been crafted to minimize privacy concerns to the greatest degree possible while also preserving 'the fundamental public interest in implementing the criminal law.'" For example, per the court's "two-step" protocol, the government had to receive permission from the court before Google could reveal the identifiable information associated with the location data.

## POSSESSION, CUSTODY, OR CONTROL

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

*Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control,"* 17 SEDONA CONF. J. 467 (2016). *See* discussion under **Nonparties.**

## PRIVILEGE LOGGING

*In re Actos Antitrust Litig.*, ---F.R.D.---, 2022 WL 949798 (S.D.N.Y. Mar. 30, 2022). In this "complex antitrust class action," the court signaled its approval of categorical privilege logs. In doing so, the court reasoned that categorical logs must disclose "information about the nature of the withheld documents sufficient to enable the receiving party to make an intelligent determination about the validity of the assertion of the privilege." While encouraging the parties to meet and confer regarding the parameters for the categorical log, the court indicated that certain positions the parties had adopted regarding those parameters were not appropriate. For example, defendants as the responding parties would not be permitted to log only threaded emails that suppressed all but the most inclusive messages in an email thread. *See* discussion under **ESI Protocols**. Nor could plaintiffs insist that defendants limit the log's categories to emails with the same recipients and subject matter, since categorical logs do not require such a restrictive limitation.

*Sec. & Exch. Comm'n v. Xia*, No. 21-cv-5350, 2022 WL 377961 (E.D.N.Y. Feb. 8, 2022). *See* discussion under **Text Messages**.

*Vegas Sun, Inc. v. Adelson*, No. 2:19-cv-01667-GMN-VCF, 2022 WL 292976 (D. Nev. Feb. 1, 2022). In evaluating a dispute over whether plaintiff could claim as privileged certain communications with lay persons, the court-appointed special master directed plaintiff to submit a representative sample of 30 documents for his evaluation rather than the entire set of 383 documents. After reviewing the sample documents, the special master concluded the documents were privileged and properly withheld from discovery. The court subsequently affirmed this finding and rejected defendants' objection that the special master's findings were improper because plaintiff supposedly "cherry picked" the sample documents. The court found that plaintiff submitted a proper representative sample consistent with the special master's required specifications.

*Rekor Systems, Inc. v. Loughlin*, No. 19-CV-7767 (LJL), 2021 WL 5450366 (S.D.N.Y. Nov. 22, 2021). The court in *Rekor* found that plaintiff's categorical log satisfied Rule 26(b)(5)'s requirements because it disclosed "the persons who are on the communications, the date range of the communications, the document types, and the basis of privilege." For example, one category reflected communications between plaintiff and its lawyers regarding a specific property lease. Other categories revealed documents relating to plaintiff's sale of certain business entities and the activities of its attorneys regarding those transactions. In summary, the categorical log memorialized enough information to allow defendants to assess plaintiff's privilege claims.

*U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, No. 18-CV-4044 (BCM), 2021 WL 4973611 (S.D.N.Y. Oct. 25, 2021). The court in *U.S. Bank* held that "proportionality is an issue in evaluating privilege logs, just as it is with respect to other aspects of discovery." In adopting this view, the court observed generally that categorical logs further proportionality objectives by reducing the burdens of preparing document-by-document logs. In addition, the court specifically invoked proportionality to curtail certain aspects of defendants' logging obligations, finding they would be "disproportionately burdensome." For example, the court would not order defendants to memorialize in their categorical

log (as plaintiff requested) "the representational history of every law firm," given the complexities of that litigation.

*Orthopaedic Hosp. v. Encore Med., L.P.*, No. 319CV00970JLSAHG, 2021 WL 5449041 (S.D. Cal. Nov. 19, 2021). *See* discussion under **Sanctions— Other FRCP Provisions**.

## PROPORTIONALITY

*Kinon Surface Design v. Hyatt Int'l Corp.*, No. 19 C 7736, 2022 WL 787956 (N.D. Ill. Mar. 15, 2022). The court held in this copyright infringement lawsuit that plaintiff's document requests ran afoul of Rule 26(b)(1) proportionality standards. In addressing proportionality considerations, the court emphasized the first ("the importance of the issues at stake in the action") and last ("whether the burden or expense of the proposed discovery outweighs its likely benefit") as being particularly determinative of plaintiff's discovery motion. The court also drew upon Chief Justice John G. Roberts' directive that parties and the court ascertain whether there is an "actual need" for the requested discovery. Against this backdrop, and considering that plaintiff already obtained relevant information in response to two prior rounds of document requests that focused on the same topic as the instant set of discovery, the court found plaintiff's discovery disproportionate and denied its motion to compel. *See* discussion under **Cooperation**.

*Robinson v. De Niro*, No. 19-CV-9156 (KHP), 2022 WL 229593 (S.D.N.Y. Jan. 26, 2022). In a lawsuit involving famed actor Robert De Niro and his "loan-out" company, the court denied De Niro's motion to compel production of relevant documents from plaintiff. De Niro filed the motion after determining that plaintiff had failed to identify an email account belonging to her that contained relevant information. While criticizing plaintiff for failing to disclose the existence of the email account, the court nonetheless found the omission to be harmless since the relevant information De Niro sought was accessible from another source that plaintiff had already produced in discovery. Under these circumstances, the court found it would be disproportionate to the needs of the case for plaintiff to reproduce the information in question. *See* discussion under **Cooperation**.

*U.S. Bank Nat'l Ass'n v. Triaxx Asset Mgmt. LLC*, No. 18-CV-4044 (BCM), 2021 WL 4973611 (S.D.N.Y. Oct. 25, 2021). *See* discussion under **Privilege Logging**.

## RELEVANCE REDACTIONS

*U.S. Risk, LLC v. Hagger*, No. 3:20-CV-00538-N, 2022 WL 209746 (N.D. Tex. Jan. 24, 2022). The court generally forbade defendant from producing relevant phone records with redactions. Defendant had argued that it should be permitted to redact data from the phone records reflecting where the parties were located during a particular communication. The court rejected this argument, finding instead that "piecemeal redactions to responsive documents based on relevance are disfavored under the discovery rules." The court generally ordered defendant to produce the relevant records without redactions, making a limited exception that allowed defendant to redact "irrelevant call and text activity specific" to defendant's family members.

*Trellian Pty, Ltd. v. adMarketplace, Inc.*, No. 19-cv-5939(JPC)(SLC), 2021 WL 363965 (S.D.N.Y. Feb. 3, 2021). The court held that Resilion, LLC ("Resilion"), a nonparty and one of defendant's direct competitors, should be allowed to produce in response to a subpoena several categories of relevant

documents with redactions to prevent the disclosure to defendant of irrelevant and competitively sensitive information. Defendant had argued that the general proscription against relevance redactions should be dispositive of Resilion's request and that, in any event, Resilion could safeguard the unredacted content by designating responsive records "attorney eyes only" under the court's protective order. The court disagreed with these positions, finding that the "commercially sensitive" nature of the requested information, the competitive relationship between Resilion and defendant, and Resilion's status as a nonparty all weighed in favor of allowing Resilion to redact irrelevant information. The court also found that the existence of the protective order was a non sequitur since the content Resilion sought to redact was irrelevant, and defendant had no right to obtain that information through discovery.

## RULE 34 REQUESTS FOR PRODUCTION OF DOCUMENTS

*Schmelzer v. Ihc Health Services, Inc.*, No. 2:19-cv-00965-TS-JCB (D. Utah Feb. 10, 2022), ECF No. 98 (Order Denying Plaintiff's Short Form Motion To Compel Discovery). The court denied plaintiff's motion to compel defendants to produce responsive documents and imposed monetary sanctions on plaintiff's counsel pursuant to Rule 26(g) for serving "overbroad discovery requests" that were inconsistent with Rule 34's "reasonably particularity requirement." The court found the requests to be problematic because they sought "all documents" including "correspondence of any kind" relating to or regarding various items that "potentially sweep in an astounding amount of paper documents, voice mail messages, texts, and emails . . . but have nothing to do with the claims and defenses in this action."

## RULE 34 OBJECTIONS AND RESPONSES

*Weatherspoon v. 739 Iberville, LLC*, No. CV 21-0225, 2022 WL 824618 (E.D. La. Mar. 18, 2022). In this Title VII action, the court struck general and boilerplate objections (except attorney-client privilege objections) that defendant interposed in response to plaintiff's document requests. In particular, Magistrate Judge Karen Wells Roby reasoned that vague, ambiguous, and overbroad objections (like those defendant asserted in its general objections and in response to plaintiff's particular requests) are "not really an objection at all" and fall well short of what the Rules require in terms of a substantive response. Judge Roby also took issue with defendant's "not reasonably calculated to lead to the discovery of admissible evidence" objection, which she found "improper" given the amendments to the scope of discovery under Rule 26(b)(1) over six years ago. According to Judge Roby, the correct objection—when properly substantiated—is "not relevant." *See* discussion under **Litigation Holds and Preservation**.

## SANCTIONS— OTHER FRCP PROVISIONS

*Annie Oakley Enter., Inc. v. Amazon.com, Inc.*, No. 1:19-CV-1732-JMS-MJD, 2022 WL 456660 (S.D. Ind. Feb. 15, 2022). In this "unnecessarily contentious" trademark infringement litigation, the court issued multiple orders awarding defendant monetary sanctions in the amounts of $86,448.50 and $54,444. The court issued these orders after finding plaintiffs opposed multiple rounds of discovery motion practice without substantial justification. In the latter order, the court determined that plaintiffs' counsel should pay the entire $54,444 award and observed that counsel "adopted a 'never-say-die' approach to this litigation [that had] not served him well" and was "not in the best interests of his clients."

*Fast v. GoDaddy.com LLC*, --- F.R.D. --- , 2022 WL 325708 (D. Ariz. Feb. 3, 2022). The court imposed sanctions against plaintiff for, among other things, her production of modified and fabricated versions of relevant Facebook Messenger messages in response to defendants' discovery requests in violation of Rule 26(e)(1)(A)'s mandatory supplementation requirement. *See* discussion under **Text Messages**. Pursuant to Rule 37(c)(1)(B), the court ordered that defendants be permitted to apprise the jury at trial of plaintiff's discovery misconduct relating to the modified and fraudulent messages. *See* discussion under **Clouds, Ephemeral Messaging, Ethics, Sanctions—Rule 37(e), Social Media** and **Text Messages**.

*Schmelzer v. Ihc Health Services, Inc.*, No. 2:19-cv-00965-TS-JCB (D. Utah Feb. 10, 2022), ECF No. 98 (Order Denying Plaintiff's Short Form Motion To Compel Discovery). *See* discussion under **Rule 34 Requests for Production of Documents**.

*Orthopaedic Hosp. v. Encore Med., L.P.*, No. 319CV00970JLSAHG, 2021 WL 5449041 (S.D. Cal. Nov. 19, 2021). The court awarded monetary sanctions in favor of defendant and against plaintiff in the amount of $149,519.61 for the reasonable expenses and fees defendant incurred engaging in motion practice to address deficiencies relating to plaintiff's privilege log. Magistrate Judge Allison Goddard held that the imposition of monetary sanctions under Rule 37(a)(5)(A) was appropriate since plaintiff was unwilling to address improper privilege log claims and other deficiencies, such as redactions of nonprivileged content and "completely inaccurate" log descriptions, during the meet-and-confer process.

*Ondigo LLC v. intelliARMOR LLC*, No. CV 20-1126, 2022 WL 798627 (E.D. Pa. Mar. 16, 2022). After concluding that defendant and its counsel failed to produce relevant emails in advance of a bench trial (*see* discussion under **Ethics**), the court issued an evidence preclusion sanction under Rule 37(c) and imposed monetary sanctions on defendant pursuant to Rule 26(g).

## SANCTIONS—RULE 37(e)

*Paul v. W. Express, Inc.*, No. 6:20CV00051, 2022 WL 838121 (W.D. Va. Mar. 21, 2022). In a case where a Kia automobile was destroyed before inspection and downloading of data from the vehicle's electronic information systems, an insurer sought dismissal or an adverse inference instruction against plaintiff. The court denied the insurer's motion without prejudice, emphasizing that while the lost Kia data "may have been the only source" for the evidence that could establish when the Kia was fully stopped at the time of the accident, "it is also possible that similar evidence could be obtained through fact witnesses, photographs, data downloads from the other parties cars, post-accident report and accident reconstruction." As the parties were still conducting discovery, the court found the issue of whether sanctions should be imposed was premature, since the insurer could still obtain other evidence during discovery that serves the same purpose as the lost Kia data.

*Alabama Aircraft Indus., Inc. v. Boeing Co.*, No. 20-11141, 2022 WL 433457 (11th Cir. Feb. 14, 2022). In this litigation between aerospace companies, the trial court informed the jury that certain ESI had been deleted, was unavailable as evidence, and that "it is for you to decide what happened and why it happened." If the jury found that defendant The Boeing Company ("Boeing") anticipated litigation and had deleted the missing ESI with an intent to deprive, the court further informed the jury that "you may infer that the lost information was unfavorable to Boeing." If the jury did not "make the necessary findings and draw the permissible inference," it could not make the inference. In contrast,

if the jury did make the necessary findings, the court indicated to the jury that "it is for you to decide what force and effect to give it in light of all of the evidence in the case" since "you are the judge of the facts as to what happened in this case, including what happened to these electronic documents, and why it happened." After the jury returned a unanimous verdict against Boeing on the merits, Boeing argued on appeal that it was an error for the court to read the adverse-inference instruction to the jury. The U.S. Court of Appeals for the Eleventh Circuit found no abuse of discretion since it was Boeing that had asked the court to "instruct the jury to make the finding the district court had already made—that Boeing acted with the intent to deprive" before drawing the inference. The Eleventh Circuit held that the instruction "correctly stated the law and did not mislead the jury." It also reasoned that the trial court could have "imposed an even harsher sanction, allowing the jury to simply draw the adverse inference," noting that the advisory committee note provided that such a finding "may be made by the court" when ruling on a pretrial motion or when deciding whether to give an adverse inference at trial. *See* discussion under **Litigation Holds and Preservation**.

*Fast v. GoDaddy.com LLC*, --- F.R.D. --- , 2022 WL 325708 (D. Ariz. Feb. 3, 2022). The court imposed various sanctions on plaintiff pursuant to Rule 37(e)(2) and Rule 37(e)(1) for spoliating various categories of relevant ESI. *See* discussion under **Clouds**, **Ephemeral Messaging**, **Ethics**, **Social Media**, and **Text Messages**. District Judge David Campbell issued an adverse inference instruction under Rule 37(e)(2) arising from plaintiff's deletion of relevant Facebooks posts, together with the relevant Telegram messages and "unsent" Facebook Messenger messages exchanged with plaintiff's former colleague. Pursuant to Rule 37(e)(1), Judge Campbell directed plaintiff to compensate defendants for their attorney fees and costs incurred in connection with their motion for sanctions; ordered a forensic examination of plaintiffs' electronic devices; and permitted defendants to "issue up to four additional third-party subpoenas." *See* discussion under **Sanctions—Other FRCP Provisions**.

*Marksman Sec. Corp. v. P.G. Sec., Inc.*, No. 19-62467-CIV, 2021 WL 6498217, at *6 (S.D. Fla. Oct. 12, 2021), *report and recommendation adopted in part*, 2021 WL 5832329 (S.D. Fla. Dec. 8, 2021). Defendants' deactivation of their Instagram account did not merit sanctions under FRCP 37(e) in this trademark infringement case. While plaintiff satisfied the predicate elements of Rule 37(e), the court ultimately found that defendants' actions did not constitute an intent to deprive, as they deleted the account after misconstruing their counsel's advice to "stop the account." Nor did defendants' actions result in prejudice to plaintiff. The court explained that the Instagram account was a parody, had little if any relevant information, and what harm (if any) plaintiff may have suffered was ameliorated by the fact that it had "requisite information required to establish its claims."

*Garcia v. Alka*, No. 19 CV 5831, 2022 WL 180750 (N.D. Ill. Jan. 20, 2022). In a motion filed shortly before trial on his Section 1983 action and related claims, plaintiff asked the court to issue Seventh Circuit Civil Pattern Instruction 1.20 to the jury at the close of evidence to address the loss of certain reports that two defendant police officers prepared regarding their use of force against plaintiff. The instruction at issue is designed to supply the jury with a structure "for drawing an adverse inference from missing evidence." The court ultimately declined to adopt the instruction because it required a predicate showing of bad faith—*i.e.*, "hiding adverse information"—which plaintiff had failed to establish. In response, plaintiff suggested that the instruction be modified such that the jury could draw an adverse inference if they found defendants were "at fault" in connection with the loss of the reports. Magistrate Judge Jeffrey Cummings also rejected that argument, finding it was inconsistent with Rule 37(e)(2), which clearly required a showing of intent or bad faith to warrant the issuance of an adverse inference instruction.

*La Belle v. Barclays Cap. Inc.*, 340 F.R.D. 74 (S.D.N.Y. Jan. 2022). In this unlawful retaliation action against defendant Barclays Capital, Inc.'s ("Barclays"), the plaintiff had argued that defendant should have preserved relevant text messages that his former supervisors exchanged on their personal devices and that sanctions should accordingly issue against Barclays under Rule 37(e) for the loss of those messages. In response, the court found that Barclays did not act unreasonably when it decided not to search for text messages from its employees' personal devices based on a company policy that proscribed work-related communications over personal devices. While observing that it was "better policy" to conduct a "searching inquiry," the court nonetheless found that discovery's "enormous demands" militated against requiring Barclays to search employee personal devices. The court opined that plaintiff could have obviated this problem by specifically requesting that defendant preserve and produce text messages from its employees' personal devices. *See* discussion under **Litigation Holds and Preservation**.

*Prudential Def. Sols., Inc. v. Graham*, No. 20-11785, 2021 WL 4810498 (E.D. Mich. Oct. 15, 2021). The court determined that terminating sanctions on defendant Jake Graham ("Graham") were appropriate pursuant to Rule 37(e)(2) after finding that Graham intentionally spoliated relevant communications from his work-issued iPhone and his personal iCloud account. *See* discussion under **Clouds**. Before issuing an order of default judgment, the court agreed to set a show-cause hearing to address whether such an order would ultimately be appropriate.

*Medidata Sols., Inc. v. Veeva Sys., Inc.*, No. 17 CIV. 589, 2021 WL 4902462 (S.D.N.Y. Sept. 22, 2021). *See* discussion under **Litigation Holds and Preservation**.

*Mod. Remodeling, Inc. v. Tripod Holdings, LLC*, No. CV CCB-19-1397, 2021 WL 3852323 (D. Md. Aug. 27, 2021). In this unfair competition case between business competitors involved wide-ranging accusations of spoliation, the court found that certain defendants deleted relevant data, including emails, text messages, and other ESI, and made tardy productions of other ESI. Pursuant to Rule 37(e)(1), the court imposed monetary sanctions against defendants and provided plaintiff with the option of reopening certain depositions "to ask questions that it has not already had occasion to ask about any documents produced late in the discovery process or after the close of discovery." The court also issued an adverse inference instruction under Rule 37(e)(2) to address defendants' intentional spoliation of emails and text messages. *See* discussion under **Ethics** and **Text Messages**.

*Nuvasive, Inc. v. Absolute Med., LLC*, No. 6:17-CV-2206-CEM-GJK, 2021 WL 3008153 (M.D. Fla. May 4, 2021). The court determined that defendants engaged in widespread spoliation of relevant ESI, including an entire email domain, separate email accounts, and text messages. The spoliated ESI was crucial to the determination of the disputed issues in this breach-of-contract and unfair competition case. Indeed, the court held that defendants deleted "nearly all of the evidence that would potentially resolve [the disputed] issues," and they did so intentionally. The defendants' actions easily satisfied Rule 37(e)(2)'s "intent to deprive" requirement as they deactivated their former company's email domain after the duty to preserve attached (*see* discussion under **Ethics**); eliminated email accounts belonging to two individual defendants after the court entered a preliminary injunction; and deleted various text messages from their smartphones (s*ee* discussion under **Text Messages**). All of which led the court to issue a mandatory adverse inference instruction to remediate the harm caused by defendants' spoliation. The court subsequently signaled its intention to enter default judgment against defendants. *See Nuvasive v. Absolute Medical, LLC*, No. 6:17-cv-2206-CEM-GJK (M.D. Fla. Jan. 10, 2022), ECF No. 371. The court did so in response to plaintiff's motion to vacate an arbitration award

due to defendants' alleged fraud during the arbitration hearing and their repeated attempts to conceal that fraud following the award. During a defendant's (Hawley) video testimony in the arbitration proceeding, Hawley received text messages from another defendant (Soufleris) telling Hawley how to testify. The court also noted that in no less than four motions, defendants and their counsel sought to have the court "enforce their fraudulently obtained arbitration award and to use that award to legally bar most of the remaining claims in this case," which constituted an attempt to commit fraud on the court. These findings, together with the court's prior determination that defendants spoliated ESI, left the court with little choice but to consider default judgment as an appropriate sanction. Before doing so, the court set a show-cause hearing that would allow defendants to demonstrate why the court should not enter default judgment and award plaintiff its fees and costs. The court additionally ordered one of defendants' lawyers to show cause why he should not be held jointly and severally liable for any monetary sanctions awarded to plaintiff. *See* discussion under **Ethics**. Final determination of these issues has been stayed pending appeal by defendants to the U.S. Court of Appeals for the Eleventh Circuit.

## SOCIAL MEDIA

*Fast v. GoDaddy.com LLC*, --- F.R.D. --- , 2022 WL 325708 (D. Ariz. Feb. 3, 2022). In this discrimination lawsuit featuring widespread and brazen spoliation, District Judge David Campbell imposed sanctions against plaintiff for deleting relevant posts from three of her Facebook accounts. During her deposition, plaintiff acknowledged that she deleted a specific post directly relevant to the claims and defenses, along with "anything out there"—including comments, posts, and likes—"like that." Given the relevance of the deleted posts, plaintiff's knowledge that the deleted posts "could be useful" for defendants' positions in the litigation, plaintiff's decision to eliminate the posts rather than use the Facebook archiving function, and the implausible nature of plaintiff's justifications for deleting the posts ("they contained incorrect information or could adversely influence prospective employers"), the court found that plaintiff's actions satisfied Rule 37(e)(2)'s intent-to-deprive standard and caused defendant to suffer prejudice within the meaning of Rule 37(e)(1). *See* discussion under **Clouds**, **Ephemeral Messaging**, **Ethics**, **Sanctions—Other FRCP Provisions**, **Sanctions—Rule 37(e)**, and **Text Messages**.

*Warner Bros. Ent. Inc. v. Random Tuesday, Inc.*, No. CV 20-2416-SB (PLAX), 2021 WL 6882166 (C.D. Cal. Dec. 8, 2021). In this trademark and copyright infringement suit, plaintiff sought production of relevant Facebook messages from defendants. Defendants had apparently delayed producing those messages due to "technical challenges" associated with their attempt to "download" relevant messages from Facebook. After observing that those technical challenges had been addressed, the court ordered one of the defendants to produce relevant Facebook messages "in readable format" and instructed plaintiff to work with defendants and their electronic discovery service provider "to resolve any difficulties in production."

*Marksman Sec. Corp. v. P.G. Sec., Inc.*, No. 19-62467-CIV, 2021 WL 6498217, at *6 (S.D. Fla. Oct. 12, 2021), *report and recommendation adopted in part*, 2021 WL 5832329 (S.D. Fla. Dec. 8, 2021). *See* discussion under **Sanctions—Rule 37(e)**.

## TEXT MESSAGES

*Sec. & Exch. Comm'n v. Xia*, No. 21-cv-5350, 2022 WL 377961 (E.D.N.Y. Feb. 8, 2022). In this criminal enforcement action by the SEC, the court found that the work-product doctrine did not apply to communications made to third-party investors over WeChat. In his privilege log, an individual defendant (Xia) asserted that several communications he exchanged with a subset of investors "within a WeChat group of 214 individuals" in preparation for a certain show-cause hearing constituted work product. The court rejected Xia's claim of work product on multiple grounds, including that the communications were with third parties and lacked the confidentiality required for work-product protection to attach. As the court explained, the functionality of WeChat prevented Xia from knowing precisely *who* was in the WeChat group: "Defendants are unable to identify the name of every individual in the WeChat group, because an individual can be invited into the group by another individual already in the group without disclosing his or her name." Under these circumstances, the court determined it would be "patently frivolous" to suggest the communications were sufficiently confidential.

*Fast v. GoDaddy.com LLC*, --- F.R.D. --- , 2022 WL 325708 (D. Ariz. Feb. 3, 2022). Plaintiff exchanged hundreds of relevant messages with a former colleague ("Mudro") on Facebook Messenger regarding plaintiff's strategy for pursuing her discrimination claims against defendants, without producing those messages in discovery. Over three years into the litigation, plaintiff finally produced Facebook Messenger messages involving Mudro that she previously withheld from discovery. Rather than produce all relevant messages, plaintiff used Facebook Messenger's "unsend" feature to recall 109 messages she previously sent to Mudro. Plaintiff's action effectively prevented Mudro from producing the original, unaltered messages in response to a GoDaddy subpoena. Nevertheless, Mudro produced timestamps indicating the dates when she received the 109 "unsent" messages from plaintiff, the contents of which were no longer accessible and replaced by the wording "this message has been unsent." After GoDaddy filed its motion for sanctions against plaintiff, plaintiff finally produced 108 of the 109 "unsent" messages in their original, complete form just days before Mudro's scheduled deposition—with one notable exception: Plaintiff permanently deleted a message memorializing an analysis she conducted with Mudro evaluating the strength of evidence supporting her claims. Judge Campbell concluded that plaintiff's elimination of this key message resulted in prejudice to GoDaddy under Rule 37(e)(1). Moreover, all of the circumstances surrounding plaintiff's deletion of the message—including the implausibility of plaintiff's explanation for the message's deletion (it was purportedly a personal message to her husband)—satisfied Rule 37(e)(2)'s intent-to-deprive standard. The court also found that plaintiff violated Rule 26(e) by withholding 487 relevant Facebook messages in response to defendants' discovery requests until after discovery closed and only in response to defendants' motion for sanctions against plaintiff. Plaintiff additionally violated Rule 26(e) by producing various Facebook Messenger messages with "undisclosed modifications" to the original wording of those messages, together with a fraudulently created Facebook Messenger message. *See* discussion under **Clouds**, **Ephemeral Messaging**, **Ethics**, **Sanctions—Other FRCP Provisions**, **Sanctions—Rule 37(e)**, and **Social Media**.

*Mod. Remodeling, Inc. v. Tripod Holdings, LLC*, No. CV CCB-19-1397, 2021 WL 3852323 (D. Md. Aug. 27, 2021). In this unfair competition case between business competitors involved wide-ranging accusations of spoliation, the court determined that certain defendants failed to preserve relevant text messages because they did not disable the 30-day automated disposition feature on their smartphones. Citing *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226 (D. Minn. 2019), the court reasoned that those

defendants could have easily disabled the automated disposition feature that eliminated relevant text messages and that the failure to do so was both unreasonable and evidence of "intent to deprive" under Rule 37(e)(2). In addition, the court found that defendant Kimball selectively deleted other relevant text messages as evidenced by the existence of "tapback" messages. The "tapback" feature, available on devices running Apple iOS software and "which allows users to like or to emphasize a text message," will duplicate the recipient's text message when tapped on devices outside the Apple iOS ecosystem. To address the harm caused by the spoliation, the court issued an adverse inference instruction that would inform the jury that certain defendants deleted relevant text messages that were unfavorable to them. *See* discussion under **Ethics** and **Sanctions—Rule 37(e)**.

*Nuvasive, Inc. v. Absolute Med., LLC*, No. 6:17-CV-2206-CEM-GJK, 2021 WL 3008153 (M.D. Fla. May 4, 2021). As part of defendants' widespread spoliation of ESI, the court found that three of the individual defendants eliminated relevant text messages from their smartphones. One defendant (Soufleris) asserted that the automated disposition feature on his phone deleted text messages after 30 days. The other defendants (Hawley and Miller) indicated they lost text messages after replacing their phones or deleting message strings to conserve memory on their devices. The court found these assertions to be lacking merit given evidence suggesting that defendants had selectively eliminated text messages during the six-month period leading up to the filing of the lawsuit: "A new phone or auto-delete function would delete all text messages prior to a certain date, not just messages within a timeframe crucial to the issues in this litigation." All of which led the court to conclude that defendants destroyed the relevant messages with "an intent to deprive." *See* discussion under **Ethics** and **Sanctions— Rule 37(e)**.

## WORKPLACE COLLABORATION TOOLS

*Warner Bros. Ent. Inc. v. Random Tuesday, Inc.*, No. CV 20-2416-SB (PLAX), 2021 WL 6882166 (C.D. Cal. Dec. 8, 2021). In this trademark and copyright infringement suit, plaintiff sought production of relevant Slack messages from defendants. Defendants had apparently delayed producing those messages due to "technical challenges" associated with their attempt to "download" relevant messages from Slack. After observing that those technical challenges had apparently been resolved, the court ordered one of the defendants to produce relevant Slack messages "in readable format" and instructed plaintiff to work with defendants and their electronic discovery service provider "to resolve any difficulties in production."