

The E-Discovery Digest

A periodic publication on notable decisions relating to key discovery topics

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Decisions Protecting Against Disclosure

Request for *In Camera* Review of Properly Logged Privileged Documents Denied

Crabtree v. Experian Info. Sols., Inc., No. 1:16-cv-10706, 2017 WL 4740662 (N.D. Ill. Oct. 20, 2017)

Magistrate Judge M. David Weisman of the U.S. District Court for the Northern District of Illinois rejected the plaintiff's request to conduct an *in camera* review of documents related to an internal investigation conducted at the request of in-house counsel that were included on the defendant's privilege log. According to the court, the "[p]laintiff is not entitled to an *in camera* review [of the defendant's privileged documents] simply because he requested one." And because the plaintiff "presented nothing beyond speculation to challenge Defendant's contention that the disputed entries are appropriately designated," judicial review of the contested documents was inappropriate.

In its ruling, the court rejected the plaintiff's argument that communications between nonlawyers were improperly withheld because privilege does not extend to communications that do not involve an attorney. The court found that the defendant had made a viable claim for privilege protection because the privilege log descriptions for the documents made clear that they: (1) relate to the investigation "launched and conducted at the request of the legal Department and *for the Legal Department*" and/or (2) "reflect[] and contain [] communications used to *facilitate the provision of legal advice* and/or services." Further, the court noted that the privilege log provided "enough information about each communication to show why privilege attaches without simultaneously destroying privilege by sharing too much." The court also rejected the plaintiff's argument that a second set of documents was not privileged because the documents involved "business communications" rather than legal ones. As the court explained, the attorney-client privilege protects an attorney's "legal advice about a business decision." Because the privilege log made clear that the documents at issue contained discussions about the legal implications of certain business actions, the defendant's claim of privilege was upheld without the need for review.

Memorandum Documenting Meeting Between Nonlawyers Entitled to Work-Product Protection

Carr Plaintiff v. Lake Cumberland Reg'l Hosp., No. 15-138-DL-B-HAI, 2017 WL 5490916 (E.D. Ky. Nov. 15, 2017)

Judge David L. Bunning of the U.S. District Court for the Eastern District of Kentucky sustained the defendant hospital's objection to a magistrate judge's order finding that a memorandum was not protected by the attorney-client privilege or the work-product doctrine. The plaintiff brought a medical negligence action against the hospital as well as the doctor who performed the plaintiff's bariatric surgery. The memorandum at issue memorialized a conversation involving the doctor and the hospital's chief nursing officer, chief financial officer and interim CEO. The working title of the memorandum was "Memo at Carol Hendry's Request (Counsel) to describe the contents of 2/11/10 meeting." There was no author identified on the document and no indication that the memorandum was actually sent to Hendry, the hospital's in-house lawyer. The magistrate judge held that neither attorney-client privilege nor work-product protection applied to the memorandum because it revealed only communications between nonlawyer hospital employees and the plaintiff's doctor, who was potentially adverse to the hospital in connection with the litigation.

In reviewing the magistrate judge's report, the district court agreed that because there was no indication that the memorandum was communicated to an attorney or another representative of the hospital for the purposes of legal representation, the hospital had not made a sufficient showing to prove that the memorandum was protected by the attorney-client privilege. The court, however, found that the document was protected from disclosure under the work-product doctrine. According to the court, an affidavit submitted by the hospital's interim CEO sufficiently established that the memorandum was prepared in anticipation of litigation related to surgeries performed at the hospital, and that it was prepared by one of the three hospital representatives present at the meeting. Thus, the court held that the memorandum met the requirements for work-product protection set forth in Rule 26(b)(3).

Decisions Ordering Disclosure

Inclusion of Lawyer as One of Several Recipients of an Email Did Not Convert the Email Into a Privileged Communication

Texas Brine Co., LLC v. Dow Chem. Co., No. 15-1102, 2017 WL 5625812 (E.D. La. Nov. 21, 2017)

Magistrate Judge Janis van Meerveld of the U.S. District Court for the Eastern District of Louisiana found that several emails listed on the plaintiffs' privilege log were not protected by the attorney-client privilege, despite the fact that in-house counsel were listed as co-recipients on the communications. In response to the defendant's second challenge to the plaintiffs' privilege log — after the plaintiffs had already been given an opportunity to revise their privilege log descriptions — Magistrate Judge van Meerveld conducted an *in camera* review of a number of email communications involving in-house counsel. For each of the emails, the plaintiffs' privilege log asserted that the communication was made "in anticipation of potential administrative enforcement action ... or suit from or against adjoining property owner." The court found that the documents did not, on their face, appear to be privileged and that the plaintiffs' "generic reference[s] to the possibility of some kind of unspecified legal or regulatory action" on the privilege log "is not enough to convert an email between non-lawyers that merely copies an in house attorney and discusses technical and business matters into a privileged communication." In order to sufficiently assert a claim of privilege, the plaintiffs were required to demonstrate on the privilege log that the emails "implicated a specific legal investigation or analysis and a specific request of counsel" or submit affidavits or other evidence to that effect. Because the plaintiffs had done neither, the court held that the majority of the documents challenged were not privileged and must be produced.

Documents Incorporating Advice of Counsel, but Not Prepared by or Sent to Counsel, Not Necessarily Privileged

In re Premera Blue Cross Customer Data Sec. Breach Litig., No. 3:15-md-2633-SI, 2017 WL 4857596 (D. Or. Oct. 27, 2017)

Judge Michael H. Simon of the U.S. District Court for the District of Oregon found that drafts of documents containing or referencing business, technical or public relations information

were not protected by attorney-client privilege just because they incorporated the advice of counsel. The documents at issue included drafts of press releases and notices to be sent to customers following a data breach. According to the defendant, all of the documents were subject to privilege protection because they had either been drafted with counsel's guidance or had been sent to counsel for the purpose of obtaining legal advice about their content. The court disagreed, explaining that "[t]he focus of the privilege must be the purpose for which a document was created" and "[t]he primary purpose of drafting press releases, notices to customers, and similar documents was not to communicate with counsel or prepare for litigation." For instance, the court noted that the documents were not prepared at counsel's request to inform counsel of the underlying facts of the breach so that counsel could provide legal advice. They were merely drafts of business-related documents that happened to have been reviewed or contributed to by counsel. The court did, however, find that the drafts of the documents that specifically included edits or redlines by an attorney communicating his or her legal advice were entitled to protection.

Spoliation Decisions

Decisions Imposing Sanctions

Spoliation Evidence Regarding Both Electronic and Nonelectronic Information Could Be Presented to Jury Under the Applicable Tests

U.S. Equal Emp't Opportunity Comm'n v. GMRI, Inc.,
No. 15-20561-CIV-LENARD/GOODMAN, 2017 WL 5068372
(S.D. Fla. Nov. 1, 2017)

Magistrate Judge Jonathan Goodman of the U.S. District Court for the Southern District of Florida addressed the Equal Employment Opportunity Commission's (EEOC) request for spoliation sanctions based on the allegation that the defendant intentionally destroyed paper applications, interview booklets and relevant emails that would have supported the EEOC's allegations of intentional age discrimination. The EEOC sought several sanctions, including an adverse inference, permission to introduce spoliation evidence at trial and prohibiting the defendant from introducing evidence related to the content of the lost documents. The court noted that, in considering the EEOC's request, it would need to apply U.S. Court of Appeals for the Eleventh Circuit common law to the spoliation allegations related to the loss of paper applications and interview booklets and Rule 37(e)(2) to the spoliation allegations related to the loss of email evidence.

The court found that, under the common law, an adverse inference instruction would only be appropriate if the EEOC could prove that the defendant had a duty to preserve the evidence and that it was crucial to the case. Although the court acknowledged that the defendant had a duty to preserve paper applications and interview booklets, and that their loss likely caused some prejudice, it held that none of the lost evidence was particularly relevant to the EEOC's age discrimination claims given the type of information typically included therein. Moreover, the court noted that the missing documents were clearly not crucial to the EEOC's case because its expert was able to provide a thorough analysis without them. As a result, the court rejected the EEOC's request for a jury instruction with respect to the tangible evidence but permitted the parties to present arguments to the jury regarding the loss and potential relevance of these materials.

With respect to the lost emails, the court applied Rule 37(e) and found that the defendant clearly had a duty to preserve the materials but failed to take reasonable steps to preserve them. The court also noted that the defendant had conceded that the lost emails could not be restored or replaced. Although the court could not conclusively determine that the EEOC was prejudiced by the loss of emails, it held that Rule 37(e)(2) permitted an adverse inference without a finding of prejudice if the defendant acted in bad faith. Rather than rule on the existence of bad faith, however, the court allowed the EEOC to introduce evidence of the alleged spoliation to the jury. According to the court, if the jury determined that the defendant acted with the "intent to deprive" the EEOC of evidence, an adverse inference would be appropriate.

Request for Adverse Inference Instruction Granted Where Defendants Disposed of Central Piece of Evidence

Ragan v. Stafford, No. 4:16-cv-4097, 2017 WL 4764620
(W.D. Ark. Oct. 20, 2017)

Judge Susan O. Hickey of the U.S. District Court for the Western District of Arkansas held that the plaintiff was entitled to an adverse inference instruction where the defendants repaired a broken fence central to the litigation after the litigation had commenced. The plaintiff brought a personal injury lawsuit after a car accident in which he hit a cow that had escaped from the defendant's pasture by breaking through a fence. The plaintiff subsequently sought spoliation sanctions based on the defendant's alleged failure to preserve the original fence. The court found that the defendant had a duty to preserve the fence because he had been put on notice by the plaintiff's complaint that the fence would be an issue in the lawsuit, and the defendant's removal of the fence shortly after the litigation began was

strong evidence of intent to destroy evidence. Moreover, the court found that the plaintiff was prejudiced by the inability to inspect the fence.

Specifically, the court noted that the plaintiff's negligence claim against the defendant was largely rooted in the breach of the defendant's duty to maintain an adequate enclosure of his pasture, and that the plaintiff's inability to evaluate the fence or obtain expert opinions regarding the fence's condition at the time of the accident significantly hindered his ability to present his case. The court also rejected the defendant's argument that the photographs of the fence produced by the defendant mitigated any prejudice, finding that the photos did not provide the same type of information as an in-person examination. As a result, the court held that the plaintiff's counsel was permitted to discuss the defendant's failure to preserve the fence at trial, and the jury would be instructed that it may infer that the part of the fence that was disposed of would have been favorable to the plaintiff.

Curative Measures Allowed Where Spoliation Resulted From Negligence Rather Than Intent to Deprive an Adverse Party of Evidence

Leidig v. BuzzFeed, Inc., No. 16 Civ. 542 (VM) (GWG), 2017 WL 6512353 (S.D.N.Y. Dec. 19, 2017)

Magistrate Judge Gabriel W. Gorenstein of the U.S. District Court for the Southern District of New York held that at least some sanctions were appropriate where the plaintiffs failed to preserve certain websites and metadata at issue in the case. The plaintiffs brought a defamation suit against defendant BuzzFeed based on its publication of an article that suggested the plaintiffs sold fake news stories. BuzzFeed requested spoliation sanctions as a result of the plaintiffs' failure to preserve (1) websites where the plaintiffs' stories were posted; and (2) the metadata related to certain produced documents, including their date of creation. Applying Rule 37, the court found that, although the plaintiffs did not act with an intent to deprive BuzzFeed of the evidence, their actions in failing to preserve it amounted to negligence because they failed to initiate a litigation hold until after the lawsuit began and failed to take any other efforts to preserve relevant information. The court also found that BuzzFeed was prejudiced due to the relevance of the websites and metadata to the plaintiffs' claims and the lack of adequate substitutes for the websites or metadata. Accordingly, BuzzFeed was permitted to present evidence at trial regarding the plaintiffs' destruction of

metadata and disabling of websites. The court, however, denied BuzzFeed's request for sanctions based on the plaintiffs' alleged destruction of other evidence where BuzzFeed could not prove that data was actually lost and/or that the lost information was unavailable from other sources.

Decisions Declining Sanctions

Adverse Inference Instruction and Dismissal Denied Where Defendants Could Not Meet Burden of Demonstrating Bad Faith or Prejudice

Cerrato v. Nutribullet, LLC, No. 8:16-cv-3077-T-24 JSS, 2017 WL 5149206 (M.D. Fla. Nov. 6, 2017)

Judge Susan C. Bucklew of the U.S. District Court for the Middle District of Florida denied the defendant's request for spoliation sanctions based on the plaintiff's alleged damage to the blender at issue in a product liability case. The defendant alleged that when their expert received the blender that allegedly injured the plaintiff, it was missing three locking tabs that connect the cup to the base of the blender. The court found that although the plaintiff did have a duty to preserve all elements of the blender, the defendant could not prove that the plaintiff acted with intent to destroy evidence or that the loss of the tabs caused prejudice. Specifically, the court held that the defendant could not show by a preponderance of the evidence that the plaintiff or their counsel engaged in an affirmative act to damage the blender cup.

In addition, the court held that the locking tabs were not crucial to the defendant's case because the plaintiff was not pursuing a manufacturing defect claim based on some unique defect in the specific blender at issue. Instead, the plaintiff alleged that the blender suffered from a design defect that applied to all blenders of the same type. As a result, the court noted that the defendant's expert could test the plaintiff's allegations by examining an exemplar blender that was undamaged. For these reasons, the court denied the severe sanctions requested by the defendant, including dismissal of the case and an adverse inference instruction. The court did, however, note that if the plaintiff later attempted to argue that the exemplar blender cup examined by the defendant's expert was different from the actual cup at issue in the case, the defendant would be permitted to introduce evidence that they were unable to test the actual cup because the plaintiff damaged it.

Third-Party Production of Emails That Defendant No Longer Possessed Did Not Warrant Finding of Spoliation

Crestwood Membranes, Inc. v. Constant Servs., Inc., No. 3:15-CV-537, 2018 WL 343854 (M.D. Pa. Jan. 9, 2018)

Judge Robert D. Mariani of the U.S. District Court for the Middle District of Pennsylvania denied a request for an adverse inference instruction where relevant emails involving the defendant were uncovered from a third party but never produced by the defendant. The plaintiff initially brought suit related to a business arrangement whereby the defendant printed patterns on the swimming pool liner vinyl that the plaintiff sold to customers. The plaintiff alleged that the defendant had infringed on some of the plaintiff's copyrighted patterns and that the defendant's printing methods caused the plaintiff's vinyl to separate at the seams and fade. The plaintiff became aware of emails between the defendant and one of its other customers, O'Sullivan, that showed that O'Sullivan had experienced similar issues with seam separation and that the defendant had not produced emails related to the issue. The court found that although the defendant claimed to no longer be in possession of these emails, that fact alone was insufficient to demonstrate either that spoliation had occurred or that the defendant acted with a sufficient level of intent to justify an adverse inference instruction. As a result, the court denied the plaintiff's request for an adverse inference instruction but allowed the plaintiff to renew its request at trial if the plaintiff identified additional evidence demonstrating that spoliation had occurred.

Spoliation Sanctions Denied Where Defendant Could Not Show Prejudice From Loss of Materials

Int'l Bus. Mach. Corp. v. Naganayagam, No. 15 CIV. 7991 (NSR), 2017 WL 5633165 (S.D.N.Y. Nov. 21, 2017), *appeal filed*, No. 17-4098 (2d Cir. Dec. 21, 2017)

Judge Nelson S. Roman of the U.S. District Court for the Southern District of New York denied the defendant's request for spoliation sanctions where the defendant was unable to show that the plaintiff's loss of emails caused any prejudice. The plaintiff in the suit, IBM, sought to rescind long-term incentives and other equity awards it had given to the defendant, a former employee who later went to work for CSC, a competitor of the company. IBM argued that, pursuant to its company policies, it was permitted to rescind any such awards if the recipient rendered services to a competitor. During the course of the litigation, the former employee sought spoliation sanctions based on IBM's alleged negligent failure to preserve evidence capable of demonstrating

that IBM did not consider CSC to be a competitor, including the former employee's emails and account list, another employee's emails regarding the defendant's departure and IBM's strategic plans regarding certain projects.

Applying Rule 37, the court denied the request for an adverse inference instruction because there was no evidence that IBM acted with an intent to deprive the defendant of evidence. The court held that other, less severe spoliation sanctions were similarly inappropriate because the defendant could not establish that any of the missing evidence would actually address whether IBM and CSC were competitors. For instance, the court noted that the defendant had deposed the IBM employee whose emails were lost, and her testimony did not suggest that the emails contained discussions of whether the two companies were competitors. In addition, the court pointed out that while the defendant's accounts and IBM's strategic plans may show IBM's relationship to CSC on certain matters, they would not resolve the question whether IBM and CSC were competitors generally. As a result, the court denied the defendant's request for spoliation sanctions.

Discovery Costs/Scope/Format Decisions

Decisions Addressing the Format of Discovery

Only 'Line-Item' Redactions of Personal and Sensitive Information Are Permissible in Otherwise Responsive Documents

IDC Fin. Publ'g, Inc. v. BondDesk Grp., LLC, No. 15-cv-1085-pp, 2017 WL 4863202 (E.D. Wis. Oct. 26, 2017)

Judge Pamela Pepper of the U.S. District Court for the Eastern District of Wisconsin granted the plaintiff's motion to compel the production of unredacted documents from the defendants in an action alleging misappropriation of copyrighted information. The defendants had produced more than 6,000 documents in discovery, more than 600 of which were "unilaterally redacted" for material that the defendants deemed irrelevant to the case. The plaintiff offered an example in which more than 30 pages of a 37-page document were redacted. The court found that these broad redactions went "beyond the sort-of 'line-item' redactions of personal information or account numbers" sanctioned by Federal Rule of Civil Procedure 5.2 and instead "blocked out large chunks of information on documents that, by virtue of producing them, [the defendants] admit are discoverable." Noting that the defendants did not assert any privilege protecting the redacted information, the court thus granted the plaintiff's motion to compel.

Party Required to Produce Electronically Stored Information (ESI) in Computer-Readable Format Where It Had Control Over the ESI

Landry v. Swire Oilfield Servs., L.L.C., No. CIV 16-0621 JB/LF, 2018 WL 279749 (D.N.M. Jan. 3, 2018)

In this class action alleging violations of the Fair Labor Standards Act against an oilfield services company, Judge James O. Browning of the U.S. District Court for the District of New Mexico granted the plaintiffs' motion to compel production of the defendants' payroll records in electronically readable format. The plaintiffs contended that the defendants "flouted Rule 34" by producing electronic payroll records in PDF format and not in computer-readable format, as requested. Although the documents were held by a third-party vendor, the court found that the defendants nevertheless had "control" over them because, as the defendants conceded, they could request the data in a particular format from the vendor. Critical to the court's analysis was the fact that the defendants' vendor had indicated that the data was available in a format that could be imported into Microsoft Excel. The court thus held that the defendants were required to produce the records in the requested electronic format.

Decisions Addressing Cost Shifting

Nonparty Awarded 30 Percent of Costs and Fees for Subpoena Compliance Under Rule 45

In re Aggrenox Antitrust Litig., No. 3:14-md-02516 (SRU), 2017 WL 4679228 (D. Conn. Oct. 18, 2017)

A recipient of a Rule 45 nonparty subpoena in a complex multidistrict antitrust case sought to recover from the plaintiffs the costs it incurred in complying with the subpoena and making the instant motion for fees. Judge Stefan R. Underhill of the U.S. District Court for the District of Connecticut granted the motion in part. The court first noted that Rule 45 does not require cost shifting in all instances in which a nonparty incurs significant expenses by its compliance with a subpoena, but rather only where the equities of the case demand it. The court also noted that only reasonable costs were compensable and that the determination of reasonableness was committed to the sound discretion of the court. The court found that the rates of the out-of-district counsel retained by the nonparty were not reasonable in comparison to the average rates charged by local counsel and should be reduced by 30 percent. The court also found that the amount of the time billed by the nonparty's out-of-district

counsel was excessive and thus discounted a portion of the total hours worked. Finally, the court found that the nonparty was not entitled to its costs in filing a motion under Rule 45, noting that "motion costs are due only to a 'prevailing or substantially prevailing party'" under federal fee-shifting statutes. According to the court, "it [was] not obvious that [the nonparty had] 'prevailed or substantially prevailed' here." As a result, the court awarded the nonparty, in total, about 30 percent of its requested costs and attorneys' fees.

Decisions Addressing Scope of Discovery

'Quick Peek' at Privileged Material May Be Permissible Over Objection in Order to Facilitate Efficient Discovery Practices

Fairholme Funds, Inc. v. United States, No. 13-465C, 2017 WL 4768385 (Fed. Cl. Oct. 4, 2017)

Judge Margaret M. Sweeney of the U.S. Court of Federal Claims granted the plaintiffs' motion to compel a "quick peek" at approximately 1,500 documents withheld by the defendant pursuant to the deliberative process and bank examination privileges, over the defendant's objection. The quick peek procedure permits the disclosure and return of privileged material in a litigation without constituting a waiver in other state or federal proceedings, thus permitting parties to produce documents for review without engaging in a privilege review, and with the assurance that any privileged material will be returned and not used. The plaintiffs argued that the quick peek procedure was necessary because the defendants repeatedly produced additional documents when its privilege claims were challenged. According to the plaintiffs, a quick peek procedure would be the only way to ensure that they received all documents to which they were entitled without unnecessarily prolonging the discovery process. The defendant, however, objected, arguing that the quick peek procedure had been ordered over a defendant's objection only once and, in that case, the defendant had been exceptionally uncooperative in discovery.

The court acknowledged that the quick peek procedure was not common but noted that the defendant's production had thus far been "piecemeal" and inefficient. Accordingly, the court granted the plaintiff's motion, citing the court's desire to facilitate a "speedy and efficient conclusion" of discovery and to avoid the need for an *in camera* review of the defendant's privileged documents in light of the court's "heavy caseload and limited resources."

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Parties Should Cooperate and Devise Search Terms for ESI Discovery Together

United States v. N.M. State Univ., No. 1:16-cv-00911-JAP-LF, 2017 WL 4386358 (D.N.M. Sept. 29, 2017)

In this pay discrimination case, Magistrate Judge Laura Fashing of the U.S. District Court for the District of New Mexico denied the defendant's motion for a protective order to prevent the production of certain ESI. The defendant argued that the discovery the plaintiff sought was not proportional to the needs of the case and noted that it had more than satisfied its discovery obligations by producing more than 14,000 pages of documents and performing more than 20 keyword searches of ESI. The plaintiff, for its part, argued that its discovery requests were appropriate and the defendant's searches of ESI had been inadequate. In rejecting the defendant's motion for a protective order, the court found that the defendant had not "adequately confer[red]" with the plaintiff before performing its searches. According to the court, cooperation "prevents lawyers designing keyword searches in the dark, by the seat of the pants, without adequate discussion with each other to determine which words would yield the most responsive results." The court went on to identify particular search terms for the defendant to use in performing additional searches and suggested that the defendant work with the plaintiff should it wish to narrow those terms further.

The Federal Rules Do Not Require Perfection in Any ESI Review

Winfield v. City of N.Y., No. 15-CV-05236 (LTS) (KHP), 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017)

In this housing discrimination case, Magistrate Judge Katharine H. Parker of the U.S. District Court for the Southern District of New York denied the plaintiffs' motion to compel samples of the defendant's nonresponsive documents in order to determine the adequacy of the defendant's production. The plaintiffs argued that the defendant had applied an impermissibly narrow view of responsiveness during its review process, which led "to a predictive coding system that is unable to recognize documents that are truly responsive to the issues in this case." In support of its contention, the plaintiffs produced five documents to the court that the defendant had produced inadvertently or in redacted format, which the plaintiffs contended should have been marked as responsive in full. The court, however, found that there was no evidence of gross negligence or unreasonableness in the defendant's predictive coding or review processes. According to the court, the incorrect labeling of about five out of 100,000 documents was not sufficient

to question the accuracy and reliability of the coding process as a whole. The court noted that "[i]n any ESI review, 'the Federal Rules of Civil Procedure do not require perfection.'"

Examinations of Third Parties' Electronic Devices Disfavored Where the Discovery Sought Is Only Remotely Connected to Case and Less Burdensome Means Exist to Obtain Information

Arthur J. Gallagher & Co. v. O'Neill, No. 17-2825, 2017 WL 4998650 (E.D. La. Nov. 2, 2017)

In this breach of contract action alleging misappropriation of trade secrets, Magistrate Judge Joseph C. Wilkinson, Jr. of the U.S. District Court for the Eastern District of Louisiana quashed a subpoena issued by the plaintiff to a third party seeking to "inspect and copy *any and all* computers, cell phones, and/or storage devices used or operated by [the] defendant for contact information of individuals and businesses and to determine whether any calendar or schedule of meetings are maintained." The court noted that while computer and electronic device examinations of the type sought were not uncommon in civil discovery, courts should be cautious where such requests are directed to nonparties, are "extremely broad" and the connection between the discovery sought and the issues in the case is remote. The court held that these factors weighed against allowing the discovery because the plaintiff's assertion that it would lead to admissible evidence was "unsubstantiated." Further, the court noted that the subpoena would cause substantial disruption to the third party's business and that less burdensome means existed to determine whether evidence of the defendant's contact information, calendars or meeting schedules were maintained by the third party, such as a third-party deposition.

Email and Other Discovery Denied Where Disproportionate to the Needs of the Case

Rembrandt Diagnostics v. Innovacon, Inc., No. 3:16-cv-0698 CAB (NLS), 2017 U.S. Dist. LEXIS 164015 (S.D. Cal. Oct. 3, 2017)

In a case alleging breach of a patent license agreement related to drug-testing cups, Magistrate Judge Nita L. Stormes of the U.S. District Court for the Southern District of California denied the licensor's motion to compel the licensee to produce, among other things, broad discovery of the products at issue and its employees' emails regarding the design, marketing, sale and use of the test cups. Because the licensee had already produced a representative sample of the products, the court held that production of all goods sold would be duplicative, unduly burdensome and dispropor-

tionate to the needs of the case. The court further noted that the licensor had not established the relevance of the information sought to its infringement claims. The court also agreed with the licensee that the design and marketing information targeted by the requested email discovery could be obtained from other, less-costly sources, including a search of design files or depositions. As the court explained, it would cost in excess of \$30,000 to review and produce the emails, which was disproportionate to the licensor's need for the materials.

Twitter Investors Cannot Obtain Direct Messages From Accounts of Twitter Employees

Shenwick v. Twitter, Inc., No. 16-cv-05314-JST (SK),
2018 U.S. Dist. LEXIS 22676 (N.D. Cal. Feb. 7, 2018)

Magistrate Judge Sallie Kim of the U.S. District Court for the Northern District of California denied a motion filed by plaintiffs in a securities class action to compel defendant Twitter to search

and produce direct messages sent and received by its employees. According to the court, the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*, prevents the disclosure of direct messages from anyone other than a named individual defendant. The court explained that while a party may be compelled to produce information within its possession or control, Twitter employees who are not individually named as defendants do not qualify as parties to the action. The court also noted that because Twitter did not require its employees to use direct messages for work communications, the employees have privacy rights regarding their communications that are protected by the Stored Communications Act. Thus, the court held that it could not compel Twitter to produce its employees' direct messages even though Twitter is the provider of the direct messaging service.

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