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Technical Challenges Are No Excuse For Discovery Failures

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In two recent cases, *EBIN New York, Inc. v. SIC Enterprise, Inc.*, 19-CV-1017 (PKC) (TAM), 2022 WL 4451001 (E.D.N.Y. Sept. 23, 2022) and *Red Wolf Energy Trading, LLC v. BIA Capital Management, LLC*, No. 19-10119-MLW, 2022 WL 4112081 (D. Mass. Sept. 8, 2022), the parties cited technical difficulties with messaging platforms as a defense for their failure to comply with discovery obligations.

In both cases, the courts declined to accept the purported explanations, concluding that parties are responsible for the challenges presented by their chosen messaging platforms and should take reasonable steps to handle them throughout the e-discovery process.

In *EBIN New York*, the defendants sought sanctions based on the plaintiff's alleged spoliation of electronically stored information ("ESI") contained in its WeChat and KakaoTalk text messages. 2022 WL 4451001, at *1. Earlier in the discovery process, the plaintiff claimed that it would be "too expensive to conduct e-discovery and review documents for production." *Id.*, at *2.

> Both of these recent cases are cautionary tales, and suggest that parties will be increasingly held responsible for the e-discovery challenges that their chosen technologies present.

According to the plaintiff, the WeChat and KakaoTalk messages could not be reviewed because they were encrypted, and its chosen e-discovery vendor could not "'de-crypt' the data for viewing." *Id.*, at *3. The KakaoTalk platform also did not retain data beyond six months, which created further production challenges. *Id.*

Magistrate Judge Taryn Merkl of the U.S. District Court for the Eastern District of New York concluded that "Plaintiff did not take reasonable steps to preserve potentially relevant KakaoTalk messages." *Id.*, at *9. In response to plaintiff's argument that it could not access old conversations because KakaoTalk automatically deleted messages after six months, Merkl reasoned that "Plaintiff should have issued a litigation hold or some other form of notice that would inform participants of the messaging thread and other communications to save or create copies of the messages." *Id.*

Though the court declined to issue sanctions because it did not find that plaintiff's actions were intentional or created undue prejudice for the defendants, it did find that the plaintiff violated its

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obligations under Federal Rule of Civil Procedure 37 to make disclosures and cooperate in discovery. *Id.*, at *13.

Similarly, in *Red Wolf Energy Trading*, the plaintiff sought sanctions twice to obtain Slack messages that it believed the defendants were required to produce. 2022 WL 4112081, at *2-3. Judge Mark Wolf of the U.S. District Court for the District of Massachusetts rejected the defendants' argument that in 2019 "there was no ready mechanism to export the messages so they could be produced in litigation" and held that there was more the defendants could have done to produce the messages. *Id.*, at *23.

For example, Judge Wolf accepted the testimony of plaintiff's expert that "in 2019, defendants could have used 'a standard eDiscovery processing tool' to search and produce Slack messages for a cost of about $10,000." *Id.*, at *15.

He concluded that "[a]t a minimum, Moeller's decision to utilize an unpaid novice in Kazakhstan to conduct its search for Slack messages, rather than an experienced vendor in the United States at a modest cost, and defendants' repeated failures to produce all required documents, was in reckless disregard of his duties under Rule 26 and to obey court orders." *Id.*, at *23.

Unlike in *EBIN New York*, the court in *Red Wolf* did issue sanctions because of the severity of the violations and their impact on the court's ability to manage the case. *Id.*, at *19.

The "reasonable steps" necessary to comply with e-discovery obligations will often vary by case. However, some common examples include checking retention settings, using an e-discovery vendor that specializes in the technology at issue, and addressing production questions early on with the requesting party. *See Red Wolf*, 2022 WL 4112081, at *23 (highlighting the risk of relying on e-discovery vendors who are unfamiliar with Slack); *Mercer v. Rovell*a, No. 3:16-CV-329 (CSH), 2022 WL 1540447, at *10 (D. Conn. May 16, 2022) (discussing how cooperation between the parties regarding the production of ESI allows the parties to save resources, better control the flow of information, and facilitate a faster decision on the merits); *Mobile Equity Corp. v. Walmart Inc.*, No. 2:21-cv-00126-JRG-RSP, 2022 WL 36170, at *2, n.1 (E.D. Tex. Jan. 4, 2022) (ordering the parties to "meet and confer and narrow" the list of forty Slack channels the plaintiff identified as relevant).

Both of these recent cases are cautionary tales, and suggest that parties will be increasingly held responsible for the e-discovery challenges that their chosen technologies present. They also highlight that serious consequences may befall litigants who fail to take reasonable steps to identify, collect, and produce emerging categories of ESI. *See also DR Distribs., LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2022 WL 5245340 (N.D. Ill. Oct. 6, 2022) (granting plaintiffs' motion for sanctions due to the defendant's failures to produce responsive emails and chats); *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 341 F.R.D. 474 (S.D.N.Y. 2022) (imposing monetary sanctions where Keurig failed to preserve relevant ESI on 25 laptop computer hard drives of custodians). These decisions place the onus squarely on the parties to ensure that they take reasonable steps to handle any e-discovery challenges that result from the communication channels they choose to use.