



Federal Court Decisions Involving Electronic Discovery December 1, 2006 – February 28, 2009

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AAB Joint Venture v. United States, 75 Fed. Cl. 432 (Fed. Cl. 2007). In this contract dispute, the plaintiff moved to compel discovery of documents previously requested. Defendant responded that all responsive and non-privileged documents had been produced to the plaintiff, but the requested e-mails dated prior to June 2003 were on back-up media, and too costly to produce. As the December 1, 2006 amendments to the Federal Rules of Civil Procedure were not in effect in the Court of Federal Claims at the time of this decision, the court relied on *McPeck v. Ashcroft*, 2002 F.R.D. 31 (D.D.C. 2001) to rule that the defendant should restore a portion of its backup tapes to assist the court in determining whether cost-sharing was appropriate.

Acker v. Workhorse Sales Corp., 2008 WL 1902034 (E.D. Mich. April 28, 2008). After a series of delays in the production of electronically stored information, the defendant moved to compel. The parties appeared before the Magistrate Judge and reached a stipulated agreement during a recess in the hearing. The Magistrate Judge endorsed the agreement, but went on to award the defendant costs and attorneys' fees incurred in litigating the motion to compel. The plaintiff appealed the costs award to the District Judge, claiming that the delay in production was attributable to the defendant's failure to give adequate production format directions. The court upheld the Magistrate Judge's order as authorized by Rule 37(a)(5)(A), finding no error in law or abuse of discretion.

Aebischer v. Stryker Corp., 2006 U.S. Dist. LEXIS 87810 (C.D. Ill. Dec. 5, 2006). In a product liability/personal injury action in which the plaintiff was seeking \$115,000 in damages, the plaintiff requested product experience reports. The defendant moved for an order shifting the costs of production, estimated to be \$100,000. The defendant cited the cost shifting factors enunciated in *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568,

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572 (N.D. Ill. 2004). The court rejected the defendant's argument, as the *Wiginton* factors, similar to the factors enunciated in *Rowe Entertainment* and *Zubulake I*, applied only to electronic discovery, and the plaintiff had not requested electronic discovery.

Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec., 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008). In a civil rights class action suit, the parties did not discuss the production of metadata in tier Rule 26(f) conference and only mentioned it "in passing" by letter before the defendant had completed its document collection efforts. Later, the plaintiff requested that the defendants produce metadata from emails and electronic documents, and produce any spreadsheets and databases in native format. The defendants objected on relevance and burden grounds and proposed to produce all ESI as text-searchable .pdf format documents. The court engaged in a detailed analysis of the discoverability of metadata, drawing on the rules, the case law and Principle 12 of The Sedona Principles (Second Edition), concluding that timely requests for relevant and accessible metadata are routinely granted, but courts are reluctant to order a second production if metadata was not originally requested, nor will courts order the production of metadata or production in native format unless the metadata or format are relevant or will materially aid in search for relevant information. The court declined to order the defendant to repeat the collection of active email from employees or to attempt to capture email metadata from backup media. The court further found that the production of metadata related to word processing and PowerPoint documents would not materially enhance the plaintiffs' ability to search the relatively small production nor was the metadata more than marginally relevant to the plaintiffs' claims, and it would only order production if the plaintiff assumed all costs. The court ordered the production of spreadsheets in native form, as the defendant had expressed a willingness to do so. Finally, the court ordered that the defendant demonstrate its hierarchical database for the plaintiff in a "training environment" using dummy data, to allow the plaintiffs' expert to identify what metadata may be necessary to request.

Ajaxo, Inc. et al., v. Bank of America Technology and Operations, Inc., 2008 U.S. LEXIS 97602 (E.D. Cal. Dec. 2, 2008). In a copyright infringement case, the plaintiff was ordered to produce its expert's documents in searchable form. Instead, it produced 5 CDs of material in a non-searchable format several weeks after the discovery deadline. The defendant moved for sanctions including preclusion of the expert's testimony and costs. The court declined to preclude the expert's evidence, but required the plaintiff to pay costs for this motion and for the defendant to re-depose the expert.

Ak-Chin Indian Cmty. v. U.S., 85 Fed. Cl. 397 (Ct. Fed. Cl. 2009); motion for reconsideration denied, ___ Fed. Cl. ___, 2009 WL 320333 (Fed. Cl. Feb 5, 2009). In an action brought by the plaintiff Indian tribe against the United States for breach of trust, the Tribe sought an order compelling production of documents. The documents in issue had been transferred to the American Indian Records Repository and indexed using an "off-the-shelf commercial software package." The court concluded that the documents, "[o]nce ... disassembled ... and reorganized to comport with the filing system" were no longer kept "in the usual course of business," that the filing system did not facilitate a meaningful review, and that the United States was required to organize and label the

documents to correspond with the Tribe's requests. The court also held that the United States, in answer to the Tribe's interrogatories, could not avail itself of the option to produce business records.

Alcom Mfg. Ltd. v. Apotex, 2008 U.S. Dist. LEXIS 96630 (S.D. Ind. Nov. 26, 2008).

In a patent infringement action, the court enforced the terms of a clawback agreement, requiring the defendants to return documents inadvertently produced and marked as exhibits in two depositions. Citing Fed. R. Evid. 502(d), the court noted that while the inadvertent disclosure could have been avoided if counsel had "meticulously double or triple-checked all disclosures against the privilege log prior to any disclosures," the rule was designed to relieve parties of this expense.

Alexander v. F.B.I., 2008 WL 903115 (D.D.C. April 3, 2008).

Former employees and political appointees from the Reagan and Bush administrations brought suit under the Privacy Act, alleging that their FBI files were improperly handed to the Clinton White House – a scandal known as "Filegate." The plaintiffs filed an emergency motion seeking contempt and spoliation sanctions against the Executive Office of the President (EOP) for filing a false declaration in an attempt to obstruct their request for e-mail. The court found that the errors committed by the White House's counsel were not the result of bad faith or intentional obstruction, but a result of the lawyers' lack of familiarity with computer terminology, occurring in a time before the development of "current sophisticated ways that lawyers have had to learn to deal with computer experts." In the absence of findings of a waiver of sovereign immunity and of bad faith on the part of the EOP, the court declined to invoke its inherent authority to sanction the EOP.

Allcare Dental Mgmt., LLC v. Zrinyi, et al., 2008 WL 4649131 (D. Idaho Oct. 20, 2008).

In a tort action against two named individuals and five unknown "Does" who posted allegedly defamatory material on a web site, the plaintiff sought expedited discovery of a non-party Internet Service Provider (ISP) to establish the identity of the Does. It also sought mirror images of the hard drives of the named defendants. The court granted permission for the plaintiff to subpoena the ISP on an expedited basis, noting that relevant user log information would normally only be retained by the ISP for a short period of time. But the court limited the scope of discovery and required the ISP to notify affected subscribers to give them a chance to file a motion to quash. Permission to mirror-image the named defendants' hard drives was granted based on information that the defendants had "evaded service in other matters" and that the plaintiff would bear the costs. The court required that the imaging be performed by a neutral computer forensics expert and be filed with the court under seal until an agreement on further discovery is reached.

Almarri v. Gates, 2008 WL 4449858 (D.S.C. Oct. 2, 2008).

An enemy combatant held by the U.S. Navy challenged the conditions of his confinement and sought an order requiring that the government preserve records, including recordings of his interrogation, and conduct an inquiry into alleged spoliation. The court denied both requests, finding that the government was already operating under adequate retention procedures and that

the incidents of data destruction alleged by the plaintiff occurred months before the litigation was filed.

American Fast Freight, Inc. v. National Consolidation Distribution, Inc., 2007 WL 3357694 (W.D. Wash. Nov. 7, 2007). In this breach of contract suit, the plaintiffs moved to compel discovery of material relevant the defendant's corporate structure. The defendant objected, stating that material sought would not lead to the production of relevant information and that the burden of production outweighed the likely benefit. While the court found that the breadth of the discovery requests justified the defendant's objections and denied the plaintiffs' request for sanctions, the court ordered production based on a five factor analysis that included consideration of the needs of the case, the amount in controversy, the parties' resources, the importance of the particular issues on which discovery was sought, and the importance of the particular material sought.

American Society for the Prevention of Cruelty to Animals, et al. v. Ringling Brothers and Barnum & Bailey Circus, et al., C.A. No. 03-2006 (D.D.C. August 5, 2008). In a suit brought by animal rights activists against circus operators, the defendants deposed the plaintiffs' star witness for two days, repeatedly asking questions about his management and preservation of personal email and other electronic files. The plaintiffs' attorneys objected to the questions on privilege grounds and refused to allow him to answer. The court ruled that while the privilege questions were close, the questions were not probative of any relevant issues in the suit, as there were no allegations that the witness had mishandled or withheld any relevant evidence, and "any further discovery pertaining to his alleged 'spoliation' of e-mails or documents in light of the production of so many e-mails and other documents ... would be 'unreasonably cumulative or duplicative,'" citing Fed. R. Civ. P. 26(b)(2)(C)(i).

Ameriwood Industries, Inc. v. Liberman, 2006 U.S. Dist. LEXIS 93380 (E.D. Mo. Dec. 27, 2006). In an unfair competition and trade secret theft action, the court granted the plaintiff's request that bitstream images of hard drives of the defendants' business and personal computers be made, after a nonparty produced an email document that the court believed the defendants should have produced in their document production.

Ameriwood Industries v. Liberman, 2007 WL 496716 (E.D. Mo. Feb. 13, 2007). In an unfair competition and trade secret theft action, the court declined to find that good cause existed to order production of email and other files of plaintiff deemed "not reasonably accessible" under Rule 26(b)(2)(B) because of volume in the "hundreds of thousands." Applying the seven factors listed in the Committee Note to Rule 26(b)(2), the court found that the requests were not narrowly tailored to seek information relevant to the defendant's affirmative defense and that production would be unduly burdensome, even when restricted to 52,124 emails and 4,413 other electronic files associated with six key individuals.

Amersham Biosciences Corp. v. PerkinElmer, Inc., 2007 U.S. Dist. LEXIS 6841 (D.N.J. Jan. 31, 2007). In an earlier order in this patent infringement case, the Magistrate Judge determined that privilege claims involving 37 electronic documents

recovered by the plaintiff's electronic discovery vendor and produced to the defendant had been waived by inadvertent production, but that privilege claims involving 542 electronic documents, also produced to the defendant, had not been waived, as the privileged information was embedded in metadata and not apparent to the plaintiff. On review, the District Judge made different factual findings regarding the 542 electronic documents, determining that their privileged nature was apparent on their face. The District Judge remanded to the Magistrate Judge the question of whether the plaintiff's precautions to protect its privilege claims were adequate. Regarding the 37 electronic documents, the District Judge found no error in the Magistrate Judge's determination that the plaintiff had not taken reasonable precautions to protect its privilege claims.

Anadarko Petroleum Corp. v. Davis, 2006 U.S. Dist. LEXIS 93594 (S.D. Tex. Dec. 28, 2006). In an action for unfair competition and theft of trade secrets, the plaintiff issued a letter to the defendant requesting preservation and return of allegedly stolen electronic information. The defendant then systematically copied relevant files from his computers onto thumb drives, and then deleted the documents from the computers. He delivered the thumb drives to the plaintiff. However, the plaintiff then moved for sanctions for spoliation, claiming that the deletion of the files from the computers foreclosed its ability to verify the defendant's actions. The court declined to sanction the defendant, as no showing had been made of bad faith on the part of the defendant or prejudice to the plaintiff. The court ordered a forensic audit of the computers, after which the plaintiff could supplement its motion for sanctions.

In re Subpoena Duces Tecum to AOL, LLC, 2008 WL 1956266 (E.D. Va. April 18, 2008). In this *qui tam* action against State Farm Insurance for improperly shifting certain Hurricane Katrina damage costs to the federal government, State Farm issued a subpoena to AOL to obtain e-mail of key witnesses against State Farm. The District Judge, upholding the Magistrate Judge's prior ruling, held that the Electronic Communications Privacy Act barred AOL from producing emails in response to this subpoena, and that the subpoena was overbroad and imposed an undue burden under Rule 45(c), since it requested all e-mails of the witnesses for a six week period, including private information unrelated to the litigation.

APC Filtration, Inc. v. Becker, 2007 U.S. Dist. LEXIS 76221 (N.D. Ill. Oct. 12, 2007). The plaintiff brought suit against a former employee for trade secret misappropriation and breach of contract. Several days after receiving the complaint, the defendant traveled 20 miles to a construction site dumpster to dispose of his personal computer, later claiming that the computer had crashed and that he had been told it was beyond repair. The plaintiff moved for default judgment, sanctions and attorney's fees. Relying on its inherent power and Rule 37, the court declined to enter default judgment because the plaintiff was able to obtain copies of many of the documents that would have been found on the destroyed computer from third parties, but affirmed the plaintiff's motion for sanctions, finding the defendant acted in bad faith. The court ordered the defendant to pay reasonable attorney's fees and costs associated with the plaintiff's motion, third party discovery, and retention of the computer expert.

Apsley v. Boeing Co., 2007 U.S. Dist. LEXIS 5144 (D. Kan. Jan. 17, 2007). In an age discrimination class action stemming from the sale and downsizing of manufacturing facilities, the plaintiffs requested extensive searches of the email accounts of up to 550 individuals for terms as broad as "benefit" or "old." The defendant objected on the basis of overbreadth and burden, citing factors including the undetermined number of email accounts involved, the geographic spread of the servers and storage devices involved, and the encryption of many messages. The court ordered a hearing to consider the estimated cost of the discovery, whether costs should be borne by plaintiffs, and whether there might be more efficient methods for discovery than key word searches.

Apsley v. Boeing Co., 2008 U.S. Dist. LEXIS 5274 (D. Kan. Jan. 22, 2008) ("Boeing II"). In an age discrimination case, the court denied the plaintiff's request for an *in camera* review of documents that were withheld by the defendant on privilege grounds, as the court was presented with no evidence that the privilege claims made by the defendant were improper.

Arista Records, Inc. v. Does 1 - 4, 2007 U.S. Dist. LEXIS 85652, 2007 WL 4178641 (W.D. Mich. Nov. 20, 2007). In this copyright infringement action by record distributors against four unknown defendants for unlawfully downloading music via the Internet, the plaintiff sought permission to serve a subpoena on the university that provided the Internet connectivity allegedly used to download the music, seeking the identities of the four defendants. The court noted that recent amendments to Rule 26(d) clarified that discovery prior to a Rule 26(f) conference may be allowed for good cause and that expedited discovery was allowed in a parallel case, *LaFace Records, LLC v. Does 1-5* (W.D. Mich. Sept. 27, 2007), where the discovery request was granted, conditioned on the university making a reasonable effort to notify the individuals being identified that the subpoena had been served to provide an opportunity for the defendants move to quash the subpoena.

Arista Records, LLC v. Usenet.com Inc., 2009 U.S. Dist. LEXIS 5185, 2009 WL 185992 (S.D.N.Y. Jan. 26, 2009). Plaintiffs filed a copyright infringement action against Usenet, a world-wide Internet-based file sharing service, alleging that Usenet allowed its subscribers to both upload and download digital files of copyrighted music on its servers. The plaintiffs moved for sanctions, alleging that the defendants failed to preserve user data and the copyrighted works themselves. Ruling on the motion, the court that the point in time "when the duty to preserve evidence arises may, under certain circumstances, be dependent on the nature of the evidence." Here, the ESI in issue was "transitory," and "once defendants had actual notice that plaintiffs were requesting the data, defendants had the obligation to preserve it, if possible, or to at least negotiate in good faith what data they could produce." Nevertheless, certain ESI was irretrievably lost, even as the parties discussed preservation and the defendants to make some production. The court concluded that the defendants had failed to preserve evidence, that they acted in bad faith in taking affirmative steps that would result in the destruction of evidence and that the spoliated evidence was relevant. The court, as a sanction, allowed certain adverse inference instruction, precluded defendants from challenging certain facts, and awarded

attorneys fees and costs. The court also struck in part an expert's declaration for failure to comply with Fed. R. Evid. 702 and *Daubert*.

Arteria Property Pty Ltd. v. Universal Funding V.T.O., Inc., et al., 2008 U.S. Dist. LEXIS 77199 (D.N.J. Oct. 1, 2008). In a breach of contract and fraud action stemming from the failure to secure \$125 million in real estate development financing, the plaintiff sought spoliation sanctions for the defendants' failure to produce relevant pages from their web site. The court found that the defendants had a duty to preserve the web site at the time the suit was filed and that it exercised control over the web site, although a non-party hosted it. Establishing the relevance of the web site and prejudice to the plaintiff by its non-production was assisted by a defendant's own deposition testimony that the web site presented "a little fallacious information... just to get people, you know, to come into, you know, our organization to get ... funding." The court determined that an adverse inference instruction should be given to the jury.

Atlantic Recording Corp., et al. v. Howell, CV-06-02076-PHX-NVW (D. Ariz. Aug. 29, 2008). In a copyright infringement suit for the unlawful downloading of music files, the court granted the defendants' motion to compel and allow them to conduct a forensic examination of the defendants home computer. Analysis of the hard drive revealed that the defendant had removed the downloading software and deleted the contents of his shared music file shortly after the lawsuit was filed. The court found that the defendant actions were "deliberately calculated to conceal the truth" and that the defendant's explanations for the destruction of evidence were implausible. The court imposed the sanction of default judgment against defendant, including an injunction against further downloading, \$40,000 in statutory damages, and costs.

***In re* ATM Fee Antitrust Litigation, 2007 U.S. Dist. LEXIS 47943 (N.D. Cal. June 25, 2007).** The plaintiffs in this antitrust action filed a supplementary discovery request shortly after December 1, 2006, two years into discovery, requesting the defendants be required to produce all electronically stored information in a form or forms in compliance with amended Rule 34(b). The court declined the plaintiffs' request, citing a previous agreement by the parties governing the form of production and concerns about confidentiality.

Attard v. City of New York, 2008 WL 1991107 (E.D.N.Y. May 5, 2008). In this suit for age discrimination, the court found that the defendants "forced [the] plaintiffs to endure lengthy delays, struggle with defective data production and expend valuable resources to compel [the] defendants to comply with the law." The court ordered the defendant to pay the plaintiff's attorneys' fees, expert witness fees, and costs.

Auto Club Family Ins. Co. v. Ahner, 2007 U.S. Dist. LEXIS 63809 (E.D. La. Aug. 29, 2007). In an insurance suit stemming from Hurricane Katrina, nonparty Rimkus Consulting Group, which had investigated claims on behalf of the defendant, agreed to produce a hard copy of its investigation file in response to a Rule 45 subpoena, but it refused to produce corresponding electronically stored information and filed a motion to quash the subpoena. The court denied the petition, saying that Rimkus failed to meet its

burden of showing that the electronically stored information was “not reasonably accessible because of undue burden or cost.” Further, the court held that “it is not a valid ground for objection that relevant, non-privileged, electronic data can be produced in paper form, when the requesting party has specified production in an electronic format.”

Autotech Techs. Ltd. P’ship v. Automationdirect.com, Inc., 288 F.R.D. 556 (N.D. Ill. 2008). In a trademark infringement action, the defendant moved to compel production of a word processing document in native format with associated metadata to determine the history of the document. The plaintiff had previously produced the document in paper and in .pdf forms, including a nine-page history of seven years of revisions to the document since its creation. The court, citing Principle 12 of *The Sedona Principles*, noted that the defendant had failed to request the document in native format in its original document request, and it had failed to demonstrate that the paper and .pdf forms of production were not “reasonably useable” within the meaning of Rule 34(b).

Babaev, et al. v. Grossman, et al., 2008 WL 4185703 (E.D.N.Y. Sept. 8, 2008). In an investment fraud action involving \$100,000, the plaintiffs sought discovery of the defendants’ business records, which the defendants failed to produce, claiming that the records could not be recovered from a computer that had been lost or discarded. The plaintiffs moved for spoliation sanctions. The court held an evidentiary hearing and received post-hearing submission from both parties, and found that “[a]lthough it is difficult to discern precise dates when evidence was corrupted or destroyed, the conclusion to be reached from the record is that the evidence on [the defendants’] computer should have been preserved, that it was destroyed with a culpable state of mind, and that it was relevant to the plaintiffs’ claim.” The court ordered an adverse inference instruction and \$5,000 in costs, but declined to issue an instruction that the jury find against the defendants on the ultimate issue of fraud, or award the full \$52,765.80 in costs that the plaintiff requested.

Baker & Hostetler LLP v. United States Department of Commerce, 473 F. 3d 312 (D.C. Cir. 2006). The plaintiff filed a Freedom of Information Act request with the Department of Commerce seeking records related to Canadian lumber exports. Dissatisfied with the Government’s response, the plaintiff contended that the Government had performed an inadequate search. The Department of Commerce submitted extensive documentation of the search and explained its inability to retrieve deleted email, which was uncontroverted by the plaintiff’s expert. The trial court found that the Government’s searches were calculated to find responsive documents, and that there was no evidence of bad faith. These findings were upheld by the Circuit Court of Appeals.

Baker v. Gerould, 2008 WL 850236 (W.D.N.Y. Mar. 27, 2008). In this employment litigation, the plaintiff moved to compel additional production of e-mail, alleging that the defendant’s production was incomplete. In an effort to ascertain the adequacy of the defendants’ search, the court first ordered the defendant to submit an affidavit describing the procedures undertaken to search for email. The defendant submitted an affidavit that instead described the cost and burdens that would be associated with the restoration of email from backup media, not the procedures used to search the accessible media.

Finding the affidavit incomplete, the court ordered depositions to determine what search protocol the defendant used before ruling on whether the production was sufficient.

Balfour Beatty Rail, Inc. v. Vaccarello, 2007 WL 169628 (M.D. Fla. Jan. 18, 2007). In an action for unfair competition, the plaintiff moved to compel further discovery on 15 previous requests. The defendants agreed to supplement discovery in all but three, and the court stated that the plaintiff could have resolved the remaining differences with further conferences. Two of the remaining requests were for the hard drives of any computers used by two of the defendants. The court refused these requests as overbroad and not grounded in any justification, such as prior non-compliance with discovery requests.

Bedwell v. Fish & Richardson P.C., 2007 U.S. Dist. LEXIS 88595 (S.D. Cal. Dec. 3, 2007). In an employment action brought by a paralegal against a law firm, the defendant sought an order requiring return of documents that the plaintiff had taken with her upon leaving the firm, including time sheets and copies of email. The court ordered that time sheets and emails with references to clients or services performed for clients be returned. The court declined to order return of non-privileged, non-confidential email relating to the paralegal's status as a firm employee.

Bensel, et. al v. Air Line Pilots Ass'n et al., 248 F.R.D. 177 (D.N.J. 2008). In an action brought by former TWA pilots against the defendant union, the defendant moved to compel the plaintiffs to disclose 25 documents that had previously been produced in discovery by prior class counsel. These consisted of correspondence between one or more plaintiffs and counsel. The court noted that the Third Circuit had not specifically addressed the standard for determining whether inadvertent production gave rise to a waiver, but adopted the five-part test adopted in *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404 (D.N.J. 1995). The court held that the disclosure was inadvertent but that the privilege had been waived. There was no evidence of precautions taken to prevent inadvertent disclosure, that the number of documents disclosed was significant (155 pages out of a total production of 6,000), and no circumstances relieved plaintiffs of their error. The court also held that the scope of waiver did not extend to related documents.

Benton v. Dlorah, Inc., 2007 WL 2225946 (D. Kan. Aug. 1, 2007) (“Benton I”). In an employment discrimination suit brought by a university instructor, the defendant moved to compel the plaintiff to produce her computer hard drive for inspection and copying, after the plaintiff admitted to deleting emails between herself and her students in the past. The court found no evidence of spoliation “beyond speculation,” and it denied the defendant’s motion without prejudice.

Benton v. Dlorah, Inc., 2007 U.S. Dist. LEXIS 80503, 2007 WL 3231431 (D. Kan. Oct. 30, 2007). In this employment discrimination suit brought by a university instructor, the defendant renewed a prior motion (see “Benton I” above) to compel the plaintiff to produce her personal computer for inspection by a forensic specialist and sought sanctions for alleged deletion of email. The plaintiff objected, claiming the hard drive contained personal information beyond the scope of discovery, but admitted to having

used the computer to send, receive, and delete hundreds of potentially responsive e-mails with her husband and students. The court granted the defendant's request, limited in scope to topics responsive to the production requests, and it ordered the plaintiff to pay \$1,000 to reimburse the defendants for costs. However, the court denied the university's request for further spoliation sanctions because the defendant's duty to preserve the email had not been clearly established at the time the email was deleted.

Best Buy Stores, L.P. v. Developers Diversified Realty Corporation, 2007 U.S. Dist. LEXIS 7580 (D. Minn. Feb. 1, 2007). In a commercial tenant/landlord dispute, the magistrate judge ordered the defendant to produce electronic information sought by the plaintiff within one month, finding that the defendant had failed to establish that the requested information was "not reasonably accessible" because of undue burden or cost. Two weeks later the defendant objected and asked for the district judge to review the order, citing vendor cost and time estimates. The district judge found that compliance with the magistrate judge's order was not technologically impossible and that the magistrate judge's order was neither clearly erroneous nor contrary to law, based on the information provided to her at the time.

Best Buy Stores, L.P. v. Developers Diversified Realty Corp., 247 F.R.D. 567 (D. Minn. 2007) ("Best Buy II"). In a commercial tenant/landlord dispute, the magistrate judge ordered the plaintiff to restore and produce a database prepared for unrelated prior litigation. The district court vacated the magistrate judge's order, finding that the database was "not reasonably accessible" due to the \$124,000 cost associated with its restoration from backup tapes and that "good cause" for production of the database had not been established under the multi-factor test found in the Advisory Committee Notes accompanying Rule 26(b)(2)(B). Further, the district court declined to sanction the plaintiff for failing to maintain the database, as the defendants failed to establish that the database, while relevant to litigation in general, could reasonably be considered enough of a source of specific and unique evidence to justify the estimated \$27,000 monthly cost for preservation.

Board of Regents of the Univ. of Nebraska v. BASF Corp., 2007 U.S. Dist. LEXIS 82492, 2007 WL 3342423 (D. Neb. Nov. 5, 2007). In a breach of contract case, the defendant sought sanctions against the plaintiff for violating a court order compelling document production, after 6,000 pages of documents were produced after a discovery deadline and deposition testimony established that a key custodian had not been instructed to search electronic files. The court found that counsel for plaintiff had been "far from diligent" and did not meet the "obligation to affirmatively direct complete compliance with the order in objective good faith," but did not find that the plaintiff had willfully disobeyed the discovery order. The court ordered the university to pay defendant's costs in bringing this motion, to pay for further depositions, to conduct a complete search of electronic files, and to pay for the services of a computer forensics expert to assist in further discovery.

Bolton v. Sprint/United Mgmt. Co., 2007 WL 756644 (D. Kan. Mar. 8, 2007). In this age discrimination case, individual plaintiffs sought 13 categories of electronically stored

information in native format, including monthly human resources data and a large number of databases and spreadsheets. Relying on *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223 (10th Cir. 2006) the court held that “testimony concerning the other employees’ circumstances was relevant to Sprint’s discriminatory intent,” and therefore the requested documents were within the broad scope of discovery. However, the court considered each request separately and applied the limitations of privilege and proportionality under Rule 26(b)(2). Among the cost considerations taken into account by the court was the estimated cost of review. The court denied several requests outright; narrowed the remaining requests; and allowed discovery under a protective order “in the form in which [the ESI] is currently maintained, but in electronic format to the extent possible.”

Bray & Gillespie Management LLC, et al. v. Lexington Ins. Co., et al., No. 6:07-cv-222-Orl-35KRS. In this action, the owner and operator of resorts in Florida filed suit against its insurer to recover damages to its properties caused by three hurricanes. The insurance company disputed whether the damages claimed were the result of three separate “occurrences” under the policy. The plaintiff, in preparation for litigation, downloaded ESI in native format, converted it to TIFF images and, in the process, failed to capture relevant metadata. The defendants objected to the plaintiff’s production of the TIFF images and moved to compel production of the ESI in native format. Deciding this latest in a series of motions by the defendants, the court held that the production was not in the form requested by them, that the ESI was not in a reasonably useable form, that the plaintiff and its attorney concealed information and made material misrepresentations, and that monetary and other sanctions were warranted against the plaintiff and various of its attorneys. The court noted that the plaintiff, “as the client, has the obligation to supervise its lawyers,” that an inside counsel cannot blindly rely on outside counsel, and that outside counsel acted in bad faith. Finally, the court advised that it would issue an order to show cause why one attorney should not be personally sanctioned.

Brookdale Univ. Hosp. & Med. Ctr., Inc. v. Health Ins. Plan of Greater N.Y., 2009 WL 393644 (E.D.N.Y. Feb. 13, 2009). The defendant sought reconsideration of an order requiring them to return or destroy inadvertently produced documents and prohibiting them from making use of the information contained therein. On the motion for reconsideration, the court stated that it is “closing and locking the door” and held that it would not entertain any argument on documents that might have been inadvertently produced by the plaintiff. The court also held that a confidentiality agreement between the parties was unavailable to the plaintiff as a basis to assert further claims of possible inadvertent waiver, as it had failed to act promptly to raise any such claims. The court also refused to extend the discovery period, noting that it had not authorized new discovery requests and that the plaintiff had failed to raise timely objections to a defendant’s production. Lastly, the court directed the parties to meet and confer with regard to the plaintiff’s failure to provide certain metadata (“email string headers”) to the defendant.

Bro-tech Corp. v. Thermax, Inc., 2008 WL 724627 (E.D. Pa. Mar. 17, 2008). In a trade secret theft case, the defendants had been ordered by the magistrate judge to

produce forensically sound images of data storage devices reviewed by the defendants' expert for inspection by the plaintiff. The district judge modified the order in part, distinguishing between the data storage devices reviewed by the expert in his role as a witness, which would be subject to full disclosure regardless of any claim of privilege under Rule 26(a)(2)(B), and data storage devices reviewed in the expert's consulting expert capacity, disclosure of which would be limited to relevant, non-privileged data identified by a hash value and key word search protocol. In a subsequent decision, **2008 WL 5210346 (E.D. Pa. Dec. 11, 2008)**, the court denied a motion to compel production of a disputed document, enforcing the terms of the clawback agreement entered into by the parties, which required that a party objecting to a privilege claim concerning an inadvertently disclosed document must object within five business days and that the objection would be resolved by the e-discovery master.

Butler v. Kmart Corp., 2007 WL 2406982 (N.D. Miss. Aug. 20, 2007). In a personal injury action against a retailer, the plaintiff moved to compel production of ESI related to the retailer's security operations. Alleging that the defendant did not sufficiently discharge its discovery obligations, the plaintiff sought direct access to the defendant's databases. The defendant responded with affidavits describing its search efforts. The court ordered the defendant to produce responsive ESI or demonstrate unsuccessful diligent searching, but denied the plaintiff's request for direct access to the databases based on the lack of evidence of improper action.

B-Y Water Dist. V. City of Yankton, 2008 WL 5188837 (D.S.D. Dec. 10, 2008). In this action, the defendant asked the court to bar the plaintiff from using two exhibits at trial, arguing that these were privileged, inadvertently produced, and discovered by defendant's counsel to have been produced only when the plaintiff made use of the documents at a deposition. The court granted the defendant's request, noting that the defendant's counsel "took steps to prevent disclosure," was not "sure how the mix-up occurred," that only three of over 3,380 pages of documents produced were implicated, and that defendant's counsel asserted the privilege during the deposition, "the first time that... [he] realized he may have accidentally produced the privileged information."

Cache La Poudre Feed, LLC v. Land O' Lakes Inc., 244 F.R.D. 614 (D. Colo. 2007). In this trademark infringement case, the plaintiff moved for sanctions against the defendants for failing "to fully discharge their discovery obligations." The court, relying heavily on *Zubulake* and *The Sedona Principles*, questioned whether the defendants' litigation hold fulfilled the Rule 26(g) requirement for counsel to perform "a reasonable inquiry" in response to the discovery request. The court held that defendant's failure to follow up with key employees and properly monitor the activities of IT was inadequate under Rule 26(g), and a sanction of \$5,000 was appropriate.

Cambrians for Thoughtful Development, U.A. v. Didion Milling, Inc., 2007 U.S. Dist. LEXIS 88878 (W.D. Wisc. Nov. 27, 2007). In a citizens' suit brought under the Clean Air Act, the court held that email between the defendant company's employees, consultants, and outside counsel in preparation for a conference with a state

environmental enforcement agency constituted protected work product under Rule 26(b)(3).

Canon USA, Inc. v. SAM, Inc., 2008 WL 2522087 (E.D. La. June 20, 2008). In a suit alleging violations of a dealership agreement, the plaintiff sought electronically stored information from the defendant, a New Orleans-based retailer heavily damaged by flooding and fire during Hurricane Katrina. During a deposition, the defendant's owner revealed that he had undamaged boxes of documents and a server in his home in Florida that he "forgot about" containing responsive customer data, emails, and internet sales records. He admitted that he did not affirmatively search these sources, but asked his wife and son to look through document storage boxes and search the server "when they can," which the court characterized as "lackadaisical" treatment of the plaintiff's discovery request. The court held that any undeleted information on the server was reasonably accessible, even if the defendant himself did not have the ability or inclination to search the server himself, and ordered the defendant to employ a "forensic computer specialist" at his own expense to conduct a search.

In re Carco Electronics v. Ideal Aerosmith, Inc. No. 07-1009 (3d Cir. May 20, 2008). Carco Electronics filed for Chapter 11 bankruptcy protection, and immediately creditor Ideal Aerosmith took possession of Carco's production facilities. A competing creditor challenged Ideal's action and the Bankruptcy Court issued a desist order. The competing creditor was awarded the assets at a court-sanctioned sale. Before leaving the Carco premises, however, Ideal employees are alleged to have copied computer files, and the new owner sought discovery to determine the extent of Ideal's violation of the desist order. Following a hearing, the Bankruptcy Court entered a protective order allowing "counsel and one senior executive of each company to see 'Highly Confidential' information under strict terms." Ideal appealed the protective order to the District Court, which affirmed. The Circuit Court denied Ideal's subsequent appeal on jurisdictional grounds, holding that the protective order was not a final order, nor did the narrow "collateral order" doctrine apply. The appellate court distinguished the denial of a protective order altogether, which might give rise to an appeal, to a situation in which "the appealing party objects solely to the form or scope of the protection."

Cason-Merenda v. Detroit Med. Ctr., 2008 WL 2714239 (E.D. Mich. July 7, 2008). In a class action lawsuit, the defendant brought a motion to require the plaintiffs to pay 50% of the defendant's third-party vendor electronic discovery costs incurred to date. The court rejected the motion as inappropriate and untimely, citing Fed. R. Civ. P. 26(b)(2)(B) and the commentary to Principle 13 of *The Sedona Principles* for the proposition that any assertion that sources or electronically stored information are inaccessible or that production is unduly burdensome, justifying cost shifting or sharing, must be brought before the costs are incurred, to give the requesting party and the court an opportunity to consider alternatives.

Christian v. Central Record Service, 2007 U.S. Dist. LEXIS 80027 (W.D. Ark. Oct. 19, 2007). In an employment discrimination suit against a records storage and management company, the plaintiff requested copies of email sent by or received by her

on her employee account. The defendant had deleted all the email from the computer system, but had kept hard copies and filed them in its own paper storage system. The court refused to order the defendant to search potentially hundreds of thousands of boxes stating that, "[e]ven relevant evidence may be precluded from discovery when the burden or expense of the proposed discovery outweighs its likely benefit."

Christopher v. Tulsa Ambassador Hotel, L.L.C., 2006 U.S. Dist. LEXIS 89796 (N.D. Okla. Dec. 11, 2006). In an employment discrimination and harassment action, the plaintiff testified in her deposition that she had copied information off her employer's computer onto disks and she took them with her upon her termination. She produced the disks for a computer forensics inspection that concluded that the disks contained proprietary information about her former employer's sales contracts. The defendant requested modification of the scheduling order to allow further discovery, which the court granted, as the plaintiff's removal and use of the employer's electronic information could be relevant to determining whether the plaintiff was entitled to front pay and reinstatement.

Citizens for Responsibility and Ethics in Washington v. Executive Office of the President, C.A. 07-1707 (HHK/JMF). The plaintiff, a citizens' watchdog organization, filed a motion for a temporary restraining order requiring the White House to preserve all backup media that may contain deleted email responsive to their Freedom of Information Act requests. Citing *The Sedona Conference Glossary* and applying the D.C. Circuit's four-part test for injunctive relief, the Magistrate Judge found that the weight of the legal questions and threat of irreparable harm to the plaintiff outweighed any potential harm to the government and recommended that the trial court grant the motion. The Magistrate Judge's report and recommendation dated October 19, 2007 were adopted by the District Judge in an order dated November 12, 2007. On January 8, 2008, the magistrate judge issued further instructions, ordering the White House to provide answers "within the next five business days" to the following questions: (1) "Are the back-ups catalogued, labeled or otherwise identified to indicate the period of time they cover?"; (2) "Are the back-ups catalogued, labeled, or otherwise identified to indicate the data contained therein?"; (3) "Do the back-ups contain emails written and received between 2003-2005?"; and (4) "Do the back-ups contain the emails said to be missing that are the subject of this lawsuit?" On March 18, 2008 the court ordered the White House to show cause why it should not be required to create and preserve forensic images of electronic data storage media used by employees during a 30-month time period time when the White House did not have an email management system and has no surviving disaster recovery backup tapes. On April 24, 2008, the court asked the White House to quantify the number of hard drives that may require forensic imaging to preserve emails and considered other strategies for preservation necessitated by the failure of the White House to implement an email management system.

City of Seattle v. Prof'l Basketball Club, LLC, 2008 WL 539809 (W.D. Wash. Feb. 25, 2008). In a dispute brought by the city for specific performance of the Seattle Sonics' lease, the City sought email from six of the eight managers of the basketball club. The club produced approximately 150,000 email messages of two managers, and the city

moved to compel production from the other managers. The club objected, citing burden and overbreadth. The court, citing Rule 26(b)(2)(B), held that the club had failed to establish that the proposed discovery was being sought from sources “not reasonably accessible because of undue burden or costs” and had provided no support for its “bald assertion that discovery will be burdensome.” The court ordered production, based on search terms already agreed upon by the parties and applied to the initial production.

In re Claims for Vaccine Injuries Resulting in Autism Spectrum Disorder, 2007 WL 1983780 (Fed. Cl. May 25, 2007). Plaintiffs sought access to data on approximately 2.3 million children held by the Vaccine Safety DataLink Project. The Court of Claims denied the request, stating that the data “does not exist in a form in which it could simply be ‘copied,’ either by copying machine or by electronic copying or otherwise” and “must involve substantial participation by personnel of the CDC.” The court analogized its ruling to decisions denying discovery that would require a party to ‘create’ or ‘prepare’ documents that do not already exist, conceding that “there may be instances when it may be reasonable to so order, especially in this era of computerized data.”

Claredi Corp. v. SeeBeyond Tech. Corp., 2007 WL 735018 (E.D. Mo. Mar. 8, 2007). In this contract dispute, the plaintiff requested that the court sanction the defendant for not producing relevant electronic documents. The defendant represented that the requested documents did not exist. However, when the plaintiff obtained discovery from a nonparty, the documents in question were disclosed to the court. Relying on Rule 26(g)(3) and Rule 37(c), the court awarded \$53,943.75 in sanctions to compensate the plaintiff for the defendant’s failure to disclose documents. In addition, the judge ordered that the defendant pay a \$20,000 fine for increasing cost and length of litigation.

In re Classicstar Mare Lease Litigation, 2009 WL 250954 (E.D. Ken. Feb. 2, 2009). In this multidistrict action, a group of plaintiffs sought to compel a party to produce ESI in native format. After the court ordered production but did not specify the format, the party converted the ESI into TIFF images with load files, but not provide embedded metadata. The plaintiffs then secured an order for the production of the ESI in native format, but the court allowed the producing party to seek a protective order. Citing to Rule 34(b) and the *Manual for Complex Litigation, Fourth*, the court concluded that the producing party had met its Rule 34(b) obligation and had not “downgraded” data, but -- based on an agreement of counsel -- native format production was required. The court also stated that “[s]hould there be any problem retrieving the data or should any corrupt data be found, the parties and the court will cross that bridge when they get to it.” Lastly, as this was a second production and the plaintiffs had not specified a production format in their original request, it was “only fair” to shift production costs to the plaintiff.

ClearOne Comm., Inc. v. Chiang, 2008 WL 704228 (D. Utah Mar. 10, 2008). In a software copyright infringement action, the plaintiff sought sanctions against the defendant for failure to produce an allegedly “smoking gun” email authored by a principal of the defendant. The court declined to sanction the defendant, finding that while the defendant’s email system, which did not retain copies of sent emails, represented a “significant irregularity,” it did not constitute bad faith. The court imposed

an adverse inference instruction, however, for a defendant witness's failure to truthfully answer questions about the existence of "comments" in the subject source code. In a subsequent order, 2008 WL 920336 (D. Utah Apr. 1, 2008), the court delved into the electronic search protocol proposed by the parties, weighing the merits of "conjunctive" or "disjunctive" search strategies for different sets of terms.

Coachmen Industries, Inc. v. Kemlite, 2007 U.S. Dist. LEXIS 82196 (N.D. Ind. Nov. 2, 2007). In a breach of warranty action, the plaintiff claimed work product protection for emails between it and another manufacturer containing the mental impressions of counsel for the other manufacturer litigating against the same defendant. The court held that the plaintiff had standing to assert work product protection, applying a seven-factor analysis to determine common interest and confidentiality.

Cobb v. Dawson, 2007 U.S. Dist. LEXIS 4632 (M.D. Ga. Jan. 22, 2007). In a personal injury suit stemming from an automobile collision, the plaintiff sought information from the defendant's Event Data Recorder (EDR). The defendant allowed six months to pass until the last day of discovery, when it then requested an extension to hire an expert to retrieve the requested information from the EDR. The court granted a 30-day extension in the interests of discovering the cause of the accident, over the plaintiff's objection.

Coburn v. PN II, Inc., 2008 WL 879746 (D. Nev. Mar. 28, 2008). In this gender discrimination claim, the defendants filed a motion to compel the plaintiff to provide supplemental answers to interrogatories and requests for the production of documents. Specifically, the defendants sought a forensic examination of the plaintiff's home computers. The plaintiff opposed the request as potentially violating her privilege, privacy, and confidentiality interests. Citing *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999), the court found that the burdens could be minimized under a protocol by which the defendants pay the expense of the forensic examiner who would be approved and appointed by the court and serve as an officer of the court, the parties would agree to a time and date for collection, the plaintiff's attorney would retain the sole copy of the forensic image of the hard drives, and the parties would enter into an agreement whereby the examiner's access to protected information would not result in waiver of the attorney-client privilege.

Columbia Pictures Indus., et al. v. Bunnell, 2007 U.S. Dist. LEXIS 63620, 2007 WL 2080419 (C.D. Cal. Aug. 24, 2007). In this high-profile case brought by motion picture and television rights holders against a website for facilitating unauthorized distribution of movies and TV shows on the Internet, the plaintiffs requested a discovery order requiring the website operators to preserve the "server data log," which would show the Internet Protocol (IP) addresses of the web site visitors and what they requested. The data would be derived from the random access memory (RAM) of the defendant's web servers in the U.S. and the Netherlands. The defendant objected, stating that RAM is considered "ephemeral," a stream of data which is not ordinarily saved and is routinely overwritten, often within seconds of being received and acted upon by the computer system. In addition, the defendant posted a "privacy policy" on its site, representing to visitors that their IP addresses were not being recorded. The Magistrate Judge held in an initial

decision, 245 F.R.D. 443 (C.D. Cal. 2007), and the District Court affirmed, that RAM constituted “electronically stored information,” in that it was fixed (however briefly) and capable of being preserved for production, and therefore the server log data was within the scope of Rule 34. The court also provided that the IP addresses themselves, which are not directly relevant to the plaintiff’s theory of the case, could be redacted prior to production. On December 13, 2007, the court granted “Plaintiff’s Motion for Terminating Sanctions” and entered default judgment against the defendant, citing the defendant’s efforts to destroy evidence and provide false testimony, unrelated to the preservation of RAM.

Committee Concerning Community Improvement v. City of Modesto, 2007 U.S. Dist. LEXIS 94328 (E.D. Cal. Dec. 11, 2007). At the close of an unsuccessful citizens’ suit against a local government, the defendant applied for \$13,445 reimbursement for processing over a million emails that had been requested by plaintiffs. The court denied reimbursement for processing services that did not appear to fit the definition of “exemplification,” such as “online review,” “technical time,” and “image export set up fee.” In addition, the court denied reimbursement for items on service providers’ invoices that the court determined were non-reimbursable “intellectual costs,” stating that the defendant should have moved for a protective order under Rule 26(C) during discovery to relieve it of such costs.

Conner v. Sun Trust Bank, 546 F. Supp. 2d 1360 (N.D. Ga March 5, 2008). In this Family and Medical Leave Act action, plaintiff moved for summary judgment and sanctions for the defendant’s destruction of a relevant email that explained why the plaintiff was fired while on leave. The defendant counter-moved for summary judgment and opposed sanctions, relying on their 30-day e-mail destruction policy which automatically deleted e-mails that were thirty days old, unless they were first archived by the user. The court, citing *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005) applied a five-factor test in considering sanctions for spoliation. Finding that a sanction short of “outright dismissal” was appropriate, “the court will instruct the jury as to the appropriate inference to draw from the absence of evidence.”

Containment Tech. Group, Inc. v. Am. Soc’y of Health Sys. Pharmacists, 2008 WL 4545310 (S.D. Ind. Oct. 10, 2008). Prior to discovery in a defamation action, the parties disputed the terms of a proposed protective order affecting the production of proprietary information. The plaintiff sought an order allowing it to designate entire documents containing proprietary information as “confidential.” Such documents, if filed with the court, would automatically be filed under seal. The defendants objected to blanket designations of entire documents, citing circuit precedent requiring particularized findings of “good cause” before documents could be filed under seal. The court acknowledged that document-by-document review would be “painstaking” and that “[m]assive electronic discovery production has significantly added to this challenge,” but that the parties need to distinguish between the scope of review needed for production to each other in discovery, and the scope of review needed before filing documents with the court under seal. At the level of discovery, the parties should agree to act in good faith in

making confidentiality designations, but the parties need to make particularized showings that good cause exists for filing documents with the court under seal.

Continental Casualty Co. v. Under Armor, Inc., 537 F. Supp. 2d 761 (D. Md. Feb. 13, 2008). In a declaratory judgment action, the plaintiff insurance companies (collectively known as “CNA”) sought a determination that they were not obligated to defend or indemnify the defendant in parallel trademark litigation. CNA operated a password-protected web site that was used to communicate with their brokers. Prior to the suit, the defendant’s broker asked for information on the defendant’s claims and had received replies on several occasions containing notes from CNA counsel, which were supposed to be posted to a specially-designated, restricted area of the web site. These allegedly privileged communications was included with other communications that the broker provided to the defendant. The defendant’s counsel, upon reviewing the information and realizing that it was potentially privileged, notified CNA’s counsel. The defendant asked the court to rule as to whether privilege or work product protection applied to the communications, and if so, whether any privilege or protection had been waived. The court applied Maryland privilege law, which uses the “intermediate” approach to privilege waiver, taking into consideration (1) the reasonableness of the precautions to protect confidentiality, (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) the promptness of the measures taken to rectify the disclosure, and (5) the overriding interests of justice served by enforcing the privilege in spite of the disclosure. The court found that CNA failed to adequately protect the confidentiality of its attorney-client communications and that the broker acted within the scope of his duties in providing the documents to his client. Federal law regarding work product protection also applied, and federal law gives heightened protection to “opinion” work product provided to a client in contemplation of litigation. Reviewing precedent from the Fourth Circuit and other authority on the waiver of work product protection, the court found that disclosure of counsel’s notes and opinions to the defendant’s agent was tantamount to disclosure to the defendant, and the defendant was free to use them to the extent they were relevant and otherwise admissible in the proceeding.

Covad Comm. Co. v. Revonet, Inc., 2008 WL 5377698 (D.D.C. Dec. 24, 2008). In an action for breach of contract and theft of proprietary business information, the court ordered that the defendant produce email in native format, as hard-copy printouts or .tiff images were not reasonably useable and not the formats in which the information was routinely kept, and the cost of production in native format was low. However, noting that the plaintiff’s original request consisted of “ancient boilerplate designed for discovery in a paper world, the parties had not met and conferred prior to discovery, and that the plaintiff accepted the defendant’s initial production of hard copy documents. Finding that both parties “went through the same stop sign, it appears to me that they should both pay for the crash,” the court ordered that the parties split the cost of paralegal review to delete privileged material, not to exceed \$4,000.

Cumberland Truck Equip. v. Detroit Diesel Corp., 2008 WL 511194 (E.D. Mich. Dec. 2, 2008). In this antitrust action, the defendants moved for spoliation sanctions against the plaintiffs, alleging that the plaintiffs failed to preserve revenue and expense

data as well as email. The court denied the motion without prejudice, considering it “premature.” The defendants had only shown “a suspicion of prejudice,” there was no showing of intentional loss of evidence, and this was “not a situation where one party had access to the evidence and derived an advantage therefrom while denying the opposing party access...” The court admonished the plaintiffs, however, that “future losses of data, whether through negligence or else, are not acceptable.”

Cunningham v. Standard Fire Insurance Co., 2008 WL 2668301 (D. Colo. July 1, 2008). The plaintiff homeowner sued the defendant insurance company for bad faith and breach of contract. The defendant objected to several proposed topics of inquiry in the plaintiff’s Rule 30(b)(6) Notice of Deposition and moved for a protective order. The court reviewed the proposed topics in detail and restricted inquiry into the defendant’s information management procedures in general, and on email backup procedures for certain named employees in particular, on relevance grounds. However, the court allowed inquiry into the defendant’s discovery response activities, refusing to grant a blanket protective order on the basis of nonspecific and conclusory claims of attorney client privilege and work product protection.

CynergyErgonomics, Inc. v. Ergonomic Partners, Inc., 2008 WL 2064967 (E.D. Mo. May 14, 2008). In a trademark infringement action, the court refused to take judicial notice of a number of web sites for the proposition that the image claimed by the plaintiff as unique is in reality common. While there is precedent for courts to take judicial notice of appropriate facts presented by web sites, *e.g.*, *Enterprise Rent-a-Car Co. v. U-Haul Int’l, Inc.*, 327 F. Supp. 2d 1032 (E.D. Mo. 2004), the taking of judicial notice under Fed. R. Evid. 201(b) of web sites as a substitute for the factual discovery necessary to establish (or negate) the essential element of “likelihood of confusion” in this action would be inappropriate.

DaimlerTruck North America LLC v. Younessi, 2008 WL 2519845 (W.D. Wash. June 20, 2008). In a business tort action arising from the defendant’s departure from the plaintiff to work for a competitor, the plaintiff sought email and other electronically stored information from the new employer, who was not a party to the action. The court denied the nonparty’s motion to quash, finding that the email would likely be relevant, necessary for the full examination of witnesses in upcoming depositions, and unavailable from any other source. However, recognizing the sensitivity of the competitive relationship and the nonparty’s interest in protecting trade secrets, and citing *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999), the court directed the nonparty to search its own computers, rather than allow the plaintiff direct access to the nonparty’s information system, as requested in the subpoena. In addition, the scope of the subpoena was narrowed to require production of emails from computers and other devices used by one particular employee of the nonparty to, from, or concerning the defendant within a specified 14-month period of time.

DE Technologies, Inc. v. Dell, Inc., 2007 WL 128966 (W.D. Va. Jan. 12, 2007). In a patent infringement suit, the defendant produced 543,000 documents in searchable, electronic form in a custom database. Responding to a motion for sanctions brought by

the plaintiff, the Magistrate Judge found that the defendant's production, while searchable, was not "as kept in the ordinary course of business" nor organized in any way responsive to the discovery requests, *DE Technologies, Inc. v. Dell, Inc.*, 238 F.R.D. 561 (W.D. Va. Dec. 4, 2006). The District Judge modified the order, finding that "Rule 34 does not necessarily require that documents be produced in an identical format" (emphasis in original) and that the defendant's production satisfied amended Rule 34's alternative requirement that the documents be "reasonably useable."

Diabetes Centers of America, Inc. v. HealthPia America, Inc, 2008 U.S. Dist. LEXIS 8362 (S.D. Tex. Feb. 5, 2008). In a contract dispute over diabetic cell phones that test, read, and transmit patient blood sugar levels, both the plaintiff and defendant claimed that the other had lost or destroyed relevant emails. The plaintiff admitted that its search for email was conducted by a junior associate with inadequate skills and no supervision (e.g., failing to use the term "phone" in the search), but neither side could demonstrate bad faith, and the court declined to sanction either party.

Disability Rights Council of Greater Washington, et al., v. Washington Metropolitan Transit Authority, et al., 242 F.R.D. 139 (D.D.C. 2007). In a class action suit brought by disabled riders against a municipal transit system, the defendant admitted to not having suspended its automatic email deletion policy for more than two years into the litigation. As a consequence, potentially relevant emails to and from key employees were now only available from backup sources. Characterizing the defendant's argument that these were now "not reasonably accessible" and outside the scope of discovery as "chutzpah," the judge applied the seven-factor test found in the Advisory Committee Note to the 2006 Amendments to Rule 26 to determine good cause to order discovery of the email and further ordered the parties to develop a stipulated e-discovery plan, including consideration of keyword searching and more advanced alternatives.

Doctor John's, Inc. v. City of Sioux City, 486 F. Supp. 2d 953 (N.D. Iowa 2007). The parties settled this zoning and land use case, but the court retained jurisdiction to consider possible sanctions against the city government for failing to preserve recordings of city council sessions relevant to plaintiff's claims. The court characterized the city's argument that state records retention regulations required the destruction of the documents as "laughable and frivolous" and the city's destruction of the recordings while litigation was pending as "unreasonable and amount[ing] to bad faith." However, the court declined to impose a proposed \$50,000 fine, in consideration of the city's post-litigation efforts to institute a proper records management policy and in the interests of taxpayers.

Doe v. Norwalk Community College, 2007 U.S. Dist. LEXIS 51084 (D. Conn. Jul. 16, 2007). In this sexual assault case arising from an incident occurring on a college campus, the court found that the duty to preserve relevant evidence arose when the Dean and two professors met to discuss the reported incident. Sometime after that event, the hard drives of several key witnesses were "wiped," eliminating email messages about of relevant past incidents. Because the college did not have routine electronic records management procedures in accordance with state regulations and failed to institute a litigation hold, the court held that it was not protected against sanctions by Rule 37(f). According to the

court, the college's conduct was "at least grossly negligent, if not reckless," and the plaintiff was entitled to an adverse inference jury instruction, attorneys' fees, and the cost of forensic examination of the hard drives.

Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc., 2008 WL 4298331 (N.D. Cal. Sept. 19, 2008). In a breach of contract action involving defective goods, the defendant moved for spoliation sanctions against a third-party defendant. Reviewing the evidential record regarding discovery and in particular a 30(b)(6) deposition of the third party, the court found "a troubling picture" that included discrepancies between the party's document destruction policy and what had been preserved, a failure to identify when litigation had been anticipated, and destruction of administrative records regarding the decision to destroy the relevant records. The court ordered the parties to file supplemental briefings to answer specific questions about the circumstances surrounding the anticipation of litigation and document destruction.

D'Onofrio v. SFX Sports Group, Inc., 247 F.R.D. 43 (D.D.C. 2008). In a sex discrimination suit, the plaintiff moved to compel production of the defendant's business plan in native format, including metadata. The plaintiff had already produced a copy of the requested document in accordance with the plaintiff's request, which specified "in such files, or in such a manner as to preserve and identify the file from which such documents were taken." The court held that the instruction could be interpreted only to refer to paper document production, and the plaintiff had not specified a "form or forms of production" for the production of electronically stored information, leaving the defendant free to choose a "reasonably useable" form of production. In **D'Onofrio v. SFX Sports Group, Inc., 2008 WL 4737202 (D.D.C. Oct. 29, 2008)**, the plaintiff requested direct access the defendant's servers and backup media to search for and recover relevant files lost as a result of the defendant's loss of the plaintiff's former work computer. The defendant proposed a search protocol that the court rejected as too restrictive. The court formulated its own protocol, placing considerable trust in the plaintiff's expert to act in a "quasi-judicial" role in conducting the search, filing the search results with the court under seal, and providing a copy of the search results to the defendant for review before production to the plaintiff.

Dorn-Kerri v. South West Cancer Care, 2008 WL 3914458 (S.D. Cal. Aug. 18, 2008). In an employment discrimination case brought by an insurance billing manager, the plaintiff requested copies of accounts reports assigned to her for review and collections. The defendant contended that, because its accounting program is not capable of reproducing the requested reports from a previous time period due to the evolving nature of the information contained in the reports, it had met its discovery obligation by searching for hard copies of the records, which had been routinely shredded. The court agreed with defendant, noting also that the duty to preserve the reports or the underlying data did not arise until well after they had been routinely destroyed.

In re eBay Seller Antitrust Litigation, 2007 U.S. Dist. LEXIS 75498, 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007). In conjunction with a Rule 30(b)(6) deposition, the defendant agreed to testify about its efforts to collect and preserve potentially responsive

electronically stored information. However, the court declared that the defendant's "document retention notices" themselves are privileged as attorney-client communication and work product. The plaintiffs would be limited to inquiring into the facts of what employees did to collect and preserve responsive information, including the identities of employees who received the notices.

Eckhardt v. Bank of America, 2008 U.S. Dist. LEXIS 5172, 2008 WL 111219 (W.D.N.C. Jan. 9, 2008). In an employment discrimination suit, a deponent testified that various responsive documents were not produced and were no longer in the defendant's possession. The plaintiff filed a motion to compel production, and the court ordered that the defendant certify that it had made a thorough search and to disclose what responsive documents may be stored on "not reasonably accessible" backup media. In **Eckhardt v. Bank of America, 2008 WL 1995310 (W.D.N.C. May 6, 2008)**, the court ordered further discovery from the defendant's backup tapes. The court did not find that the defendant acted in bad faith, commenting that this discovery dispute "highlights the changing face of discovery in an electronic world." The court ordered the defendant to pay the plaintiff's additional discovery costs.

Ed Schmidt Pontiac-GMC Truck, Inc. v. DaimlerChrysler Motors Co., 538 F. Supp. 2d 1032 (N.D. Ohio 2008). In a breach of contract dispute involving performance of a 1994 settlement agreement, the plaintiff sought to amend its complaint to include a claim for spoliation, alleging that the defendant replaced or altered employee hard drives days before forensic images were to be made by the plaintiff. Analyzing the elements of the common law spoliation action in Ohio, the court found that the plaintiff's allegations met those requirements, and analyzing 6th Circuit precedent on amendment of pleadings, the court found that allowing the amendment would not create undue prejudice, unjustifiable delay, or jury bias, nor require the withdrawal of counsel. Subsequently, in **Ed Schmidt Pontiac-GMC Truck, Inc. v. DaimlerChrysler Motors Co., 2008 WL 2704859 (N.D. Ohio July 7, 2008)**, the court declined to decide the spoliation claim on summary judgment, reserving for the jury the question of whether the defendant possessed the requisite intent, under Ohio spoliation law, to "disrupt" the plaintiff's case.

EEOC v. Boeing Co., 2007 WL 1146446 (D. Ariz. Apr. 18, 2007) (Not for publication). The court considered the plaintiff's motion to compel answers to several topics listed in the plaintiff's Rule 30(b)(6) deposition notice, including the defendant's efforts to locate documents and the basis for the defendant's prior statement that the retrieval of emails responsive to document requests would cost \$55,000. The court held that the plaintiff had not established that the defendant's litigation hold procedure was relevant to the claims or defenses in the litigation and that such inquiry would be denied to the extent that it sought discovery of defense counsel's legal theories. The court likewise held that relevance had not been established for inquiry into the email retrieval cost estimate, and the court itself had previously gone on record as having "no reason to doubt" the defendant's estimate.

Emmerick v. S&K Famous Brands, Inc., 2007 U.S. Dist. LEXIS 59147 (E.D. Tenn. Aug. 6, 2007). The *pro se* plaintiff in this employment action moved to compel production of "network backup tapes magnetic or other media etc., containing electronic

mail messages, plus other Data relating to sales and sales analysis, payroll, condition of store, losses, scheduling, quotas, customer satisfaction, and other information stored as Electronic Data and or otherwise stored Data that is not in a backed-up format.” The court dismissed the plaintiff’s motion without prejudice for failure to meet and confer in good faith and for failure to follow local procedural rules.

Equity Analytics, LLC v. Lundin, 248 F.R.D. 331 (D.D.C. 2008). In a suit against a former employee, the plaintiff alleged, and the defendant admitted to, unlawful access to its electronically stored information, resulting in a restraining order and an agreement to allow inspection of the defendant’s home computer system. The parties turned to the court to resolve several issues regarding the search protocol. The court announced its intention to order mirror images to be made of the hard drives, to issue an order regarding privilege, and to require that the examiner submit a written report. Citing *U.S. v. O’Keefe*, 2008 WL 44972 (D.D.C. Feb. 18, 2008) for the proposition that courts in e-discovery situations benefit from expertise that meets the requirements of Fed. R. of Evid. 702. The court ordered the examiner to submit an affidavit explaining how the search will be conducted.

Escobar v. City of Houston, et al., 2007 U.S. Dist. LEXIS 72706 (S.D. Tex. September 29, 2007). In a wrongful death action against a city police department, the plaintiffs sought, *inter alia*, email communications between officers involved in the 24 hours after the incident. However, after testimony that all email communications are routinely destroyed after 90 days, the plaintiffs sought an adverse inference instruction as a sanction for spoliation. There was further testimony that the police officers involved had no official access to email and seldom used email for work-related communications. The court held that since email was a highly unlikely source of responsive electronically stored information, the city was under no duty to suspend its routine email destruction policy, and in the absence of any demonstrated prejudice to the requesting party, sanctions would be barred by Rule 37(e).

Exact Software North America, Inc. v. Infocon, Inc., 479 F. Supp. 2d 702 (N.D. Ohio 2006). In a software sales dispute, the defendant sought default judgment as sanction for the plaintiff’s failure to produce requested electronic discovery. The plaintiff responded by claiming that the failure was due to the inadequate “key words” supplied by the defendant to conduct the search. The court refused to accept that excuse, stating that the responding party had an independent obligation to produce requested information or seek clarification of the request. A hearing was ordered to determine the extent of the plaintiff’s culpability and whether the default sanction would be appropriate.

***In re Fannie Mae Securities Litigation*, 2009 WL 21528 (D.C. App. Jan. 6, 2009).** In this appeal taken by the Office of Federal Housing Enterprise Oversight from a contempt order entered against it for failing to comply with a discovery deadline, the Court of Appeals affirmed the contempt order, holding that the district court had not abused its discretion. Subpoenas had been issued to the Office in civil litigation seeking “records it collected in performing its oversight functions and preparing its investigative report” of Fannie Mae. Following court orders, a Rule 30(b)(6) deposition, and a contempt motion

arising out of the Office's attempts to produce the requested ESI, the Office entered into an agreement with the subpoenaing parties leading to the designation of over 400 search terms resulting in the identification of 660,000 documents. After further judicial intervention, the Office hired 50 contract attorneys and expended over 9% of its annual budget in an attempt to comply with the production schedule, but could not do so. The district court concluded that the Office's efforts were "not only legally insufficient, but too little too late," held the Office in contempt, and ordered production without waiver of privilege of all documents not logged by the production deadline. Holding the Office to the stipulated order, the Court of Appeals noted that the Office could have refused to resolve the discovery dispute, completed the original hearing, or defied the adverse ruling, thus preserving its rights under Rule 45.

Ferron v. Search Cactus, L.L.C., 2008 WL 1902499 (S.D. Ohio Apr. 28, 2008). In this action brought under the Ohio Consumer Sales Practices Act alleging distribution of unlawful unsolicited emails, the defendant requested inspection of the plaintiff's computer to determine if the emails were indeed unsolicited or were actively solicited to create a cause of action. The court held a telephone conference call and found that the plaintiff had not taken reasonable steps to preserve relevant information, the plaintiff had not produced relevant information, and that the computer hard drives were the only available sources of relevant information. Concerned about confidentiality and privilege, however, the court issued a detailed protocol covering the conduct of the inspection.

Finley v. Hartford Life and Accident Ins. Co., 2008 WL 509084 (N.D. Cal. Feb. 22, 2008). The plaintiff filed suit for wrongful termination of disability benefits. The defendant disclosed their administrative record, which included electronic notes and surveillance videos. Later the defendant discovered that the surveillance videos disclosed were incomplete, due to an incomplete search for responsive files by an administrative assistance. The plaintiff moved for expert costs and attorneys fees totaling \$57,888.50 and sanctions against the defendant, and also against the defendant's attorney, for failure to perform a reasonable inquiry as required by Fed. R. Civ. P. 26(g)(2). The court found that the defendant and the attorney acted negligently but not in bad faith, that the plaintiff had not served a clear and concise request before incurring additional expert discovery costs, and that most of the costs she claimed would have been incurred without the defendant's negligence. The court limited the sanction to \$9,000.

Flagg v. City of Detroit, 2008 WL 787061 (E.D. Mich. Mar. 20, 2008). In a suit against the City of Detroit and several city officials for failure to investigate a murder case, the plaintiff sought text messages sent between 34 named defendants over a 5-year period. He issued subpoenas to the text messaging service, Bell Industries (d/b/a SkyTel). The court enforced the subpoenas, requesting the plaintiff to limit the number of persons involved and the relevant time period. It ordered the defendants to cooperate by providing necessary information, including PIN numbers, to access accounts, and appointed two magistrate judges to review the messages under seal before disclosing them to the plaintiff. In **Flagg v. City of Detroit, 252 F.R.D. 346 (E.D. Mich. Aug. 22, 2008)**, the court held that the Stored Communications Act, 18 U.S.C § 2701 et. seq., which prohibits an entity providing an electronic communication service to the public from knowingly

divulging the contents of any communication retained on the service, did not prohibit civil discovery of text messages electronically stored by the defendant's pager service provider. The court noted that the defendant's asserted right to control over disclosure of the messages rendered the defendant subject to the electronic discovery request.

Fleming v. City of New York, 2007 U.S. Dist. LEXIS 90114 (S.D.N.Y. Dec. 7, 2007).

In a discrimination suit brought by a former police officer against the City of New York, the City failed to produce requested data on disciplinary proceedings and race and gender of police officers. In response to the plaintiff's motion for sanctions, the court ordered the City to pay the plaintiff's costs in bringing the motion and expert witness expenses, and excluded defendant expert testimony based on the undisclosed data, but denied the plaintiff's request that the court strike the defendant's answer.

Flexsys Americas, LP v. Kumho Tire U.S.A., Inc., 2006 U.S. Dist. LEXIS 88303 (N.D. Ohio Dec. 6, 2006).

In a patent dispute in district court, the plaintiff stated that it had already produced substantial discovery available to the defendant in a prior International Trade Commission action. Acknowledging that the parties had not agreed on the scope of further electronic discovery under the recently adopted federal rules, the court ordered that further discovery was to be limited to ten individuals designated by the defendant most likely to have relevant information.

Flying J Inc v. TA Operating Corp., 2008 WL 2003764 (D. Utah May 7, 2008).

In an unfair trade practices case, the defendant requested data identifying all credit card transactions processed over the plaintiff's system to counter the plaintiff's claim that was the target of an unlawful boycott. The plaintiff objected on the bases of burden, reasonable accessibility, and the privacy rights of third parties, claiming that any discovery of electronically stored information would be in violation of an agreement between the parties to "defer production of ESI drawn from corporate databases." The Magistrate Judge interpreted the defendant's request as one for summaries, not raw data, in keeping with the parties' agreement and the privacy interests of third party customers, and narrowed the temporal scope of the request to the time periods for which accessible data is available.

Fox Cable Networks, Inc. v. Goen Technologies Corp., 2008 WL 2165179 (D.N.J. May 20, 2008).

In an action to enforce payment of a contract for advertising, the court denied the plaintiff's motion for summary judgment, finding that the exchange of emails and attachments that the parties agreed constituted an enforceable contract were "cryptic" and "unclear," leaving open questions for the jury as to whether there was in fact an enforceable contract and whether it had been breached, or whether the plaintiff's alternative claim of unjust enrichment (in the absence of a contract) could be sustained.

Frees, Inc. v. McMillian, 2007 U.S. Dist. LEXIS 4343 (W.D. La. Jan. 22, 2007).

In an unfair competition and trade secret theft action, the court agreed with the plaintiff that the laptop and the hard drive of the defendant, a former employee, were the most likely places to find data taken from the plaintiff and ordered that they be produced for inspection. While allowing the expert to conduct a wide-ranging search that might

include personal and sensitive information, the court imposed measure to restrict the disclosure of such information.

Fresenius Medical Care Holdings, Inc. v. Brooks Food Group and Brooks Food Group Employee Benefits Plan, 2008 E.S. Dist. LEXIS 5030 (W.D.N.C. January 18, 2008). A health care provider sued an employer and its employee benefit plan over the calculation of payments for dialysis services and sought discovery of computer records and email relevant to the plans decision making process. Prior to filing suit, the plaintiff had administratively appealed the payment calculations under the ERISA process, and in the subsequent lawsuit, the defendant argued that discovery beyond the record of the administrative appeal was improper. The court determined that it had the power to go beyond the appeal record and granted the plaintiff's motion to compel production.

Gail v. New England Gas Co., 243 F.R.D. 28 (D. R.I. June 27, 2007). Production of a CD pursuant to a subpoena containing scanned copies of privileged information waived any privilege, since the in-house counsel who instructed the vendor to deliver the CD to the requesting party did not review it and waited two weeks after being notified of the production before taking corrective action.

Gamby, et al. v. First National Bank of Omaha, 2009 U.S. Dist. LEDIS 7687 (E.D. Mich. Jan. 20, 2009). In this action arising under the Fair Credit Reporting Act, the plaintiff requested production of business operating manuals describing the defendant's credit policies and procedures. The defendant produced only 10 pages of material, stating that hard copies of the manuals for the relevant time periods no longer existed and that electronic versions had been routinely updated and overwritten. Plaintiff then subpoenaed the defendant's outside auditor, who acknowledged that it had access to the manuals, but refused to produce them because they were on a "shared server of sorts." Two years after plaintiff's original request, defendant finally produced an electronic version of the manual after a "screen by screen and folder by folder" review of documents on the shared drive. Defendant counsel admitted to the court that he repeatedly misinformed opposing counsel and the court about the availability of the document and was not personally familiar with his client's information systems. The court found that defendant had engaged in "monumental incompetence, inexcusable neglect, or purposeful evasion," and recommended default judgment for the plaintiff as to liability and attorneys fees.

Garcia v. Berkshire Life Ins. Co. of Am., 2007 U.S. Dist. LEXIS 86639, 2007 WL 3407376 (D. Colo. Nov. 13, 2007). In a disability insurance bad faith action, the plaintiff produced ten email strings and a privilege log listing 135 additional emails from a DVD created by her former employer, which contained 4,000 email messages and 1,500 attachments from her email account. The defendant moved to compel the production of the DVD itself. The court found the entire contents of the DVD were relevant to the plaintiff's claim of total disability and ordered the plaintiff to secure competent technical assistance to produce all non-privileged electronically stored information from it.

***In re Genetically Modified Rice Litigation*, 2007 WL 1655757 (E.D. Mo., June 5, 2007).** This is an example of a highly detailed order addressing the preservation of

electronically stored information in complex, multidistrict litigation. Particular attention has been paid to defining terms contained in the order.

Gibson v. Ford Motor Co., 510 F. Supp. 2d 1116 (N.D. Ga. Jan. 4, 2007). In a product design defect case, the plaintiff requested production of the defendant’s “litigation hold” notice that was sent to employees at the outset of the litigation instructing them not to destroy certain documents. The court denied the plaintiff’s request as not reasonably calculated to lead to the discovery of admissible evidence and likely to implicate the attorney work-product doctrine, contrary to public policy encouraging such instructions.

Gipetti v. UPS, Inc., 2008 WL 3264483 (N.D. Cal. Aug. 6, 2008). In an age discrimination employment suit, the defendant raised the affirmative defense that the plaintiff delivery truck driver was terminated for taking excessive rest and lunch breaks. The plaintiff then requested discovery of digital records, called “tachographs,” showing the fleet vehicles’ speeds and the length of time they are moving or stationary, to support his claim that other drivers were not disciplined for the same alleged infractions. The defendant represented that such records were routinely retained for only 37 days and produced records covering only the most recent two-month period of time, plus the document retention policy dating back to 2002. The plaintiff moved for spoliation sanctions, claiming that the defendant knew or should have known that the tachographs would be relevant to the litigation. The court disagreed, holding that the defendant has no notice that tachographs would be relevant to his claims, that they were not directly related to the defendant’s affirmative defense, that they were destroyed in accordance with a routine company policy, and that more relevant information could be derived from available employee time cards.

Gipson, et al. v. Southwestern Bell Tel. Co., 2008 U.S. Dist. LEXIS 103822 (D. Kan. Dec. 23, 2008). The court noted that in less than a year, 115 motions had been filed in this class action. The court directed the parties to read *The Sedona Conference[®] Cooperation Proclamation*, meet and confer regarding the resolution of as many outstanding issues as possible, report to the court in two weeks, and consider the selection of a Special Master if they are not able to resolve substantially all of their disputes.

Goodbys Creek v. Arch Inc. Co., 2008 WL 4279693 (M.D. Fla. Sept. 15, 2008). In an action for breach of a performance bond, the plaintiff had failed to specify a form or forms for the production of ESI, and the defendant produced ESI in the form of TIFF (Tagged Image File Format) images. The court found that to the extent the ESI was searchable before its conversion to TIFF images, that form of production of was not “reasonably useable,” in that it made searching the documents more difficult. The defendant was given the option of re-producing the documents in native format, providing the documents in another more searchable format, or providing the plaintiff with software enabling it to search the documents. The court declined to impose sanctions requested by the plaintiff.

Google Inc. v. American Blind & Wallpaper Factory, Inc., 2007 U.S. Dist. LEXIS 48309 (N.D. Cal. June 27, 2007). In this action for a declaratory judgment involving

alleged trademark infringement, the defendant was found to have erased data on two computers early in the litigation following the departure of its CEO. The court concluded that the defendant had acted with “willful indifference” to its discovery obligations, resulting in the likely loss of relevant information, but without the “conscious wrongdoing” necessary to warrant default judgment for the plaintiff. Instead, the court made key evidentiary findings in favor of the plaintiff and ordered payment of \$15,000 in attorneys’ fees and costs.

GP Industries, LLC v. Bachman, 2008 WL 1733606 (D. Neb. April 10, 2008). In response to the plaintiffs’ motion for sanctions, the defendants stated they produced documents in a “jumbled fashion” because that is how their documents were kept in the ordinary course of business, consistent with Rule 34(b). Citing *Cardenas v. Dorel Juvenile Group, Inc.*, 230 F.R.D. 611 (D. Kan. 2005), that court explained that a “party who chooses the Rule 34(b) option to produce documents as they are kept in the ordinary course of business bears the burden of showing that the documents were in fact produced in that manner. A mere assertion that they were so produced is not sufficient to carry that burden. In addition, merely categorizing the documents produced does not, without some further explanation, satisfy the requirement that they be produced as kept in the usual course of business.” Because the defendants responded the 213 requests for production with only boilerplate objections, and either did not produce documents, produced them in a disorganized fashion, or produced them too late in the discovery process, the defendants were ordered to comply with discovery and pay the plaintiff’s attorney’s fees and costs.

Graham v. Cingular Wireless LLC, 2007 U.S. Dist. LEXIS 595 (W.D. Wash. Jan. 3, 2007). In a complex breach of contract action, summary judgment was granted in favor of the defendant on all but the plaintiff’s defamation and invasion of privacy claims. The court granted the plaintiff’s motion for further discovery under Fed. R. Civ. P. 56(d), due to the defendant’s production of redacted email without attachments and without a corresponding privilege log.

Grange Mut. Cas. Co. v. Mack, 2008 WL 744723 (6th Cir. Mar. 17, 2008) (Not for publication). In this suit alleging fraud under the Racketeer Influenced and Corrupt Organizations (RICO) Act, the defendant appealed a default judgment of \$3,430,983.69 plus costs and attorneys fees, arguing abuse of judicial discretion. Citing Rule 37(b)(2)(C), the court “without hesitation” held that the judge “acted well within [his] discretion,” following the Six Circuit’s four part test for determining the severity of sanctions: (1) whether the disobedient party acted in willful bad faith; (2) whether the opposing party suffered prejudice; (3) whether the court warned the disobedient party that failure to cooperate could result in a default judgment; and (4) whether less drastic sanctions were imposed or considered. The court held that all four elements were met, finding ample evidence on the records that the defendant purposely delayed discovery, ignored court discovery deadlines and orders to compel, instructed employees to ignore court orders and ignored a serious warning from the district judge relating to his continued discovery misconduct. Based on the defendant’s willful bad faith and the resulting prejudice suffered by the plaintiffs, the court affirmed the default judgment,

“both to punish the defendant for his egregious conduct and to deter other litigants who might be tempted to make a mockery of the discovery process.”

Grantley Patent Holdings, Ltd. v. Clear Channel Comm., Inc., C.A. 9:06CV259 (E.D. Tex.) (Order on Motion for Sanctions, Aug. 14, 2007). In this software patent infringement suit, the court found that the defense counsel’s failure to make relevant source code available to the plaintiff “border(s) on willfully delaying discovery,” but did not find that the failure was attributable to the defendant itself, a factor that would otherwise weigh in favor of a monetary sanction. The court ordered the defendant to reimburse plaintiff’s counsel and expert for travel expenses and time, not to exceed \$10,000.

Grayson v. Witt, 2008 WL 2096368 (E.D. Ky. May 16, 2008). The plaintiff, an officer in the county sheriff’s department, was accused of downloading unlawful pornographic images on his home computer. An investigation was initiated, during which the sheriff seized a laptop and home computer belonging to the plaintiff, made “mirror images” of the hard drives, and subjected them to forensic examination. The examiner reported finding images that may have been child pornography, but no evidence was presented to the Disciplinary Review Board, which concluded that there was insufficient evidence to fire the plaintiff. Notwithstanding the Review Board’s conclusion, the sheriff fired the plaintiff, who then brought this civil rights action. The sheriff applied to the court for a protocol allowing it to conduct discovery of the plaintiff’s computer data – already in its possession – and the Magistrate Judge denied the defendant’s motion. The District Judge sustained the Magistrate Judge’s order, finding that the sheriff’s seizure of the computers was without a warrant and that the Magistrate Judge’s order barring further discovery of the unlawfully seized data was neither contrary to law nor clearly erroneous.

Great Am. Ins. Co. of New York v. Lowry Development, LLC, 2007 WL 4268776 (S.D. Miss. Nov. 30, 2007). In an insurance dispute stemming from Hurricane Katrina, the court was presented with contradictory testimony about the loss of the defendant insurance agent’s laptop computer, which was likely to contain relevant evidence about the agreed-upon terms of various insurance policies. The agent originally claimed that the laptop computer had been damaged by lightning and taken to a technician who could not repair it and disposed of it. When confronted with a statement from the technician who claimed that it was repaired and returned to the agent, the agent changed his testimony to say that the laptop malfunctioned again a few days after he received it from the technician and he disposed of it. Finding that the defendant had a clear duty to preserve the hard drive of the laptop whether or not it was in working order, the court allowed the plaintiff to inform the jury of the defendant’s actions and reduced the plaintiff’s burden of proof in establishing the disputed terms of the insurance policies.

Greyhound Lines, Inc. v. Wade, 485 F. 3d 1032 (8th Cir. 2007). In this tort case involving a Greyhound bus and a commercial delivery vehicle, the plaintiff moved for sanctions against the defendant for failing to preserve the electronic control module (ECM) data in anticipation of litigation. The court, relying heavily on *Morris v. Union Pac. R.R.*, 373 F.3d 896 (8th Cir. 2004), explained that “the ultimate focus for imposing

sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth, not the prospect of litigation.” *Morris* at 902. Finding no evidence of prejudice or bad intent, the appellate court affirmed the district court’s ruling that spoliation sanctions were not appropriate.

Grider, et al. v. Keystone Health Plan Central, 2007 U.S. Dist. LEXIS 73066 (E.D. Pa. Sept. 28, 2007). In a class action suit against a managed health care plan, the plaintiffs moved for sanctions against the defendant, claiming three years of discovery obstruction and last-minute production of paper and ESI that the defendants had previously claimed did not exist. The court imposed monetary sanctions totally \$5 million on both the defendants and their counsel. (*As of this writing, this decision is on appeal to the Third Circuit.*)

Gulfstream Worldwide Realty, Inc. v. Philips Elecs. N. Am. Corp., 2007 WL 5685128 (D.N.M. Oct. 19, 2007). In a suit for commissions from the sale of a manufacturing facility, nonparty NXP had cooperated in discovery of several employees who had formally worked for the defendant before it closed its plant. The defendant, and NXP’s request, moved for a protective order allowing it to recycle more than 1,000 backup tapes. The backup tapes would cost \$60,000 to replace and 4,320 hours to search. The court found that the likelihood that the backup tapes would yield significant information not available from more accessible sources was low and that the burdens on the non-party outweigh any benefits of production. However, the court instructed NXP to file a motion and supporting affidavits on its own behalf, and begin recycling the backup tapes “one at a time, or as slowly as possible.”

Gutman, et al. v. Klein, et al., 2008 WL 4682208 (E.D.N.Y. Oct 15, 2008). In a complex contract action with a five-year history of discovery, the court ordered the defendants to submit to a forensic investigation of their laptop computers after the plaintiff alleged spoliation. The evidence indicated that in the days immediately prior to the forensic imaging, the defendants had deleted hundreds of files (including files identified on their prior privilege logs), installed a file deletion program, modified the operating system, and tampered with the time clock to obscure the timing of these events. U.S. Magistrate Judge recommended default judgment against the defendants, with attorneys fees and costs, finding that “in this case, the destruction of evidence was of the worst sort: intentional, thoroughgoing, and (unsuccessfully) concealed.”

Guy Chemical Co. Inc. v. Romaco AG, et al. 243 F.R.D. 310 (N.D. Ind. 2007). A nonparty to a commercial lawsuit in the Western District of Pennsylvania was subpoenaed under Rule 45 in the Northern District of Indiana to provide electronic discovery. The nonparty did not object to producing the requested information, but petitioned the court for reimbursement of the \$7,200 cost. The judge determined that given the cost and effort expended by the nonparty, the information could reasonably be deemed as having been “not reasonably accessible,” opening up consideration of cost-shifting. Rather than apply *Zubulake* or other tests for shifting costs between parties, the judge determined that the overriding consideration in this case was that the responding

was not a party to the underlying suit. The judge ordered that the requesting party pay the costs of production.

H.H. v. Chesterfield County School Board, 2007 U.S. Dist. LEXIS 87682 (E.D. Va. Nov. 29, 2007). Defendants in a suit for injuries brought by the parents of a severely disabled schoolchild moved for summary judgment. The court denied the motion, finding that the plaintiffs had not had an opportunity to conduct adequate discovery and had made a credible claim that the defendants had destroyed relevant email.

Haka v. Lincoln County, 246 F.R.D. 577 (W.D. Wis. 2007). In this employment action alleging retaliatory discharge of a government agency “whistle blower,” the plaintiff requested all “documents, notes, memos, e-mails and metadata of any Lincoln County official . . . or any other Board member or officer regarding the reorganization or restructuring of the Lincoln County Child Support Agency.” The defendant reported that the universe of potentially responsive electronically information stored on various media totaled approximately 4 terabytes of data and moved for a protective order requiring the plaintiff to pay the estimated \$27,000 cost of retrieval. Noting that “neither litigant has deep pockets” the court ordered the parties to “proceed incrementally” with limited key word searches of readily accessible email stored on hard drives to be performed by a neutral consultant with the parties splitting the cost.

Hawaiian Airlines, Inc. v. Mesa Air Group, Inc. (In re Hawaiian Airlines, Inc., Debtor), 2007 Bankr. LEXIS 3679, 2007 WL 3172642 (Bankr. D. Haw. Oct. 30, 2007). In a high-profile business bankruptcy case, Hawaiian Airlines claimed that competitor Mesa Air improperly obtained confidential trade secrets from Hawaiian Airlines while posing as a potential investor. Mesa Air’s Executive Vice President and Chief Financial Officer was found to have “wiped” files from his laptop computers shortly after receiving a “legal hold” notice from his company’s counsel, later claiming the purpose was to remove “adult content” from the hard drives. Sanctioning Mesa Air with an adverse jury instruction and findings of fact that the airline improperly obtained and used Hawaiian Airlines’ trade secrets, the court held that the executive’s actions were intentional and in bad faith, and as a result, Mesa Air was culpable for failing to take action to back up the executive’s hard drives.

Healthcare Advocates, Inc. v. Harding, Earley, Folmer & Frailey, 497 F. Supp. 2d 627 (E.D. Pa. 2007). A health care firm sued a law firm, claiming that the law firm had improperly obtained outdated pages from the plaintiff’s web site from a nonparty Internet archiving service, which it unlawfully republished to co-counsel during prior litigation. In addition, the plaintiff moved sanctions against the law firm for failing to preserve the web pages among their computer system’s temporary Internet cache files. The court dismissed the action on summary judgment, finding that downloading and republishing the web pages in the context of the underlying litigation constituted fair use, and it denied the plaintiff’s motion for sanctions. Applying the 3d Circuit’s balancing test for spoliation, it found that the law firm did not act affirmatively or culpably in allowing the temporary cache files to be deleted or overwritten in the ordinary course of computer system operations, and that the plaintiff suffered no prejudice resulting from the loss of the files.

The court also found that the law firm had no notice, constructive or otherwise, that downloading files from a public Internet site would subject them to a civil lawsuit, and when they received notice of the suit, they took appropriate measures to preserve the evidence that they reasonably thought was relevant.

Heartland Surgical Specialty Hospital v. Midwest Div., Inc. 2007 WL 1054279 (D. Kan. Apr. 9, 2007). In an antitrust case, the defendant brought a motion to compel the plaintiff to provide a knowledgeable Rule 30(b)(6) witness on a number of specified topics. The witness was unable to answer questions relating to the plaintiff's IT system or its response to prior discovery requests. Relying on *Starlight Intern, Inc. v. Herlihy*, 186 F.R.D. 626 (D. Kan. 1999), the court held that corporation had an "affirmative duty to produce a representative who can answer questions . . . known or reasonably available." *Herlihy*, 186 F.R.D. at 638. The court awarded the defendant another Rule 30(b)(6) deposition to answer the remaining questions. Sanctions for attorney's fees were denied, because the witness was able to answer some of the questions during her deposition.

Heartland Surgical Specialty Hosp., LLC v. Midwest Division, Inc., 527 F. Supp. 2d 1257 (D. Kan. Oct. 1, 2007) ("Heartland IV"). On the eve of filing summary judgment papers in an antitrust case, the defendant produced a highly relevant email string reversing a position it had taken earlier in the litigation. The plaintiff moved to have the email excluded, to strike any declarations referring to the email, and to prohibit any witness testimony about the email. The court declined to sanction the defendant, finding no evidence of bad faith and no prejudice, as the plaintiff had time to respond to the new evidence and trial was not imminent.

Hedenburg v. Aramark American Food Services, 2007 U.S. Dist. LEXIS 3443 (W.D. Wash. Jan. 17, 2007). In an action for wrongful termination and sex discrimination, the defendant's requested a bitstream image of the plaintiff's home computer to check the veracity of the plaintiff's statement that she had made a diligent search of her files. Finding that the request was not based on a likelihood of discovering admissible evidence, but on the speculation that the plaintiff's representations could be impeached, the court denied the defendant's request.

Henry v. Quicken Loans, Inc. 2008 WL 474127 (E.D. Mich. Feb. 15, 2008). In a class action to recover overtime pay, plaintiffs proposed to review, before production, email files disclosed by the defendant under a protective order that would provide the defendants and opportunity to object to the production of privileged communications. The defendant refused to enter into this protective order, fearing that disclosure would lead to a waiver of the privilege. The court established a protocol under which the plaintiffs' computer expert would perform -- at plaintiffs' expense but under the defendant's direction -- searches for agreed-upon key words and names to exclude as much potentially privileged material as possible. The expert performed a series of searches and his fees were paid by the plaintiffs. But the defendants instructed the expert to perform additional searches not agreed upon as part of the protocol, resulting in much narrower productions. The court found the additional searches to be beyond the scope of the protocol and ordered the defendant to pay for the unauthorized work and to show

cause why it should not produce all emails resulting from the agreed-upon search protocol.

Hone v. Presidente U.S.A. Inc., N.D. Cal., No. C08-80071 (N.D. Cal. July 21, 2008). In an employment discrimination suit, the plaintiff moved to quash the defendant's subpoena to non-party Yahoo! For the content of "any and all" of the plaintiff's email messages and attachments for a six-year period. The court held that such a broad subpoena would violate the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701-11: "The court does not question that Hone's personal e-mail may contain information that is relevant to the issues raised in her complaint. Potential relevance, however, does not eliminate the SCA's prohibition on the release of plaintiff's e-mail information." As to the six-year breadth of the defendant's subpoena, the judge stated, "[t]his is the all too familiar fishing expedition which this court does not countenance."

Hoover v. Fla. Hydro, Inc., 2008 WL 4467661 (E.D. La. 2008). In a breach of contract suit, the defendant issued subpoenas requesting inspection of the personal computers of two non-parties, the plaintiff's mother and former roommate. The plaintiff objected that these subpoenas were unduly harassing and amounted to a "fishing expedition," but the defendant proffered evidence that the plaintiff's mother had been intimately involved in the conduct of the plaintiff's business and her computer was a likely source of relevant information. The court allowed the inspection, conditioned on the adoption of a search protocol to protect attorney-client privilege and the reimbursement of reasonable costs to the mother, not including attorneys fees. The subpoena directed to the former roommate was quashed, as he had adequately complied with a prior discovery request.

Hubbard v. Potter, 247 F.R.D. 27 (D.D.C. 2008). In a putative employment class action brought by deaf employees of the Postal Service, the defendant moved for the close of discovery on the class certification phase of the litigation. The plaintiffs alleged that the low number of electronic documents produced led to the inference that the defendant's discovery response had been inadequate. The court declined to accept the plaintiffs' "hunch" or "speculation" as sufficient basis for ordering further discovery, and granted the defendant's motion.

Hutchins v. Hutchens-Collins, 2007 WL 319990 (D. Ore. Jan. 30, 2007). After judgment in an inheritance dispute, the prevailing defendant petitioned the court for an award of costs, including the cost of having a neutral technical expert download and authenticate disputed documents from the plaintiff's website, which came to \$957.34. The court held that the costs claimed beyond copying and the statutory \$40.00 per day witness fee were not within the scope of costs recoverable under 28 USC § 1920.

Hynix Semiconductor, Inc. v. Rambus, Inc., 2009 WL 292205 (N.D. Cal. Feb 3, 2009). In this patent infringement action, the court rejected a defense of unenforceability asserted by Hynix based on Rambus' alleged spoliation of evidence. On a motion for reconsideration, or in the alternative to apply issue preclusion, Hynix (as characterized by the district court) sought to "substitute" a contrary ruling of unenforceability made by the District of Delaware in *Micron Tech, Inc. v. Rambus, Inc.*, 2009 WL 5887 (D. Del. Jan 9,

2009). After considering various factors, the court declined to grant the plaintiff's motion for issue preclusion, holding that non-mutual issue preclusion was not applicable. The court also declined to reconsider its prior order on spoliation, being unpersuaded that litigation with Hynix was reasonably foreseeable by Rambus when it issued its now-infamous "nuclear winter" memorandum.

ICE Corp. v. Hamilton Sundstrand Corp., 2007 U.S. Dist. LEXIS 88358 (D. Kan. Nov. 30, 2007). After the defendant produced documents in response to the plaintiff's request, the plaintiff moved to compel the production of the same documents in electronic form. The court denied the motion, as the plaintiff had not specified the form of production in its request and more than six months had passed since the defendant's response to the document request.

Ideal Aerosmith, Inc. v. Acutronic USA, Inc., 2008 WL 4693374 (W.D. Pa. Oct. 23, 2008). In this "contentious" litigation, the plaintiff sought sanctions against the defendant based on its failure to designate a Rule 30(b)(6) witness knowledgeable of the defendant's "email systems, other computer systems, and backup policies and procedures." Finding that the witness produced by the defendant was not knowledgeable on certain topics, the court ordered the defendant to produce a new Rule 30(b)(6) witness in the judicial district where the action was proceeding.

Infinite Energy, Inc. v. Thai Heng Chang, 2008 WL 4098329 (N.D. Fla. Aug. 29, 2008). In an action by an employer against a former employee for breach of contract and misappropriation of trade secrets, the plaintiff moved to compel production of email from the defendant's deactivated "Yahoo!" account. The defendant claimed that production was impossible, citing Yahoo's stated policies. However, the defendant took no action to inquire of Yahoo! whether the emails could be recovered. The court ordered the defendant to take all necessary steps to obtain the requested discovery and held off on sanctions, but noted that the defendant's failure to initially disclose the existence of the email account, leading to delay in the plaintiff's request, may have led to the inability to obtain discovery, which would be a contributing factor in considering sanctions.

Integrated Service Solutions, Inc. v. Rodman, 2008 WL 4791654 (E.D.Pa. Nov. 3, 2008). The plaintiff sought discovery of the laptop computer of a nonparty, allegedly used to unlawfully access the plaintiff's information system. After negotiations, the nonparty agreed to a neutral third party forensics examiner and a protocol to search for keyword and any evidence of file deletion. The neutral examiner reported no evidence of file deletion and no search results relevant to the allegations or underlying issues in the litigation, as determined by the nonparty's counsel. The plaintiff demanded a more detailed report from the neutral examiner and to see all the search results. The court declined to order production of the search results in the absence of any agreement to produce more than relevant documents and in the absence of any evidence of bad faith on the part of the nonparty. However, the court did find evidence of an agreement entitling the plaintiff to a more detailed report from the neutral examiner as to the methods employed in conducting the search and the results, providing that the nonparty would not be put to any further expense.

***In re Intel Corp. Microprocessor Antitrust Litig.*, 2008 WL 2310288 (D. Del. June 4, 2008).** Anticipating that the discovery in this antitrust class action would result in the “largest electronic production in history,” the defendant embarked on an extensive litigation hold program, providing detailed preservation notices to approximately 1,500 employees, creating a company-wide snapshot of email and other electronic documents, and moving key custodians onto isolated servers that would create weekly backups of email as a “fail safe” system of preservation. Approximately one year into the litigation, the defendant discovered some lapses in the plan and employed a law firm to interview 1,023 employees to determine their level of compliance. It informed the plaintiffs of the lapses and its compliance efforts and provided a detailed report. Characterizing the defendant’s preservation actions as “ill-conceived” and “lackluster,” the plaintiffs moved for production of the underlying interview notes, arguing that the defendant had waived attorney-client privilege and work product protection. The Special Master found, and the District Judge affirmed, that by raising the defense of human error in the preservation dispute and proactively engaging in the critical self-analysis, providing the reports to opposing counsel as opposed to forcing the plaintiffs to conduct 1,023 depositions, the defendant had waived attorney-client privilege, and must allow access to the interview notes to test the defendant’s positions. To the extent that the interview notes contain protected opinion work product, the Special Master concluded that this could be redacted, but that the factual content must be produced.

***Jacob, et al. v. City of New York, et al.*, 2009 U.S. Dist. LEXIS 8897 (E.D.N.Y. Feb. 6, 2009).** In a civil rights action against the New York City Police Department for false arrest, assault, and battery, plaintiffs filed a motion to compel production of 911 call recordings and for costs associated with a Rule 30(b)(6) deposition regarding the 911 recordings. A copy of the missing recordings was later obtained from the files of the nonparty Civilian Complaint Review Board. While the originals had been destroyed, the court found that the defendants had not acted with the requisite state of culpability to warrant sanctions, and that the costs associated with the deposition would have been incurred in any event. While not imposing sanctions in this case, the court urged the defendant to institute 911 recording preservation procedures for future litigation.

***John B., et al. v. Goetz*, 2008 WL 2520487 (6th Cir. June 26, 2008).** In this class action against the State of Tennessee alleging violation of the Social Security Act by failing to provide required medical screening, vision, hearing, and dental services to approximately 500,000 children enrolled in the state’s TennCare program, the trial court ordered the defendants to allow the plaintiffs’ computer expert, under the supervision of a court-appointed monitor, to inspect computer hard drives of various state agencies and 50 state employees and make forensic images to determine in any relevant data had been deleted in violation of court preservation orders. The trial court’s order extended beyond the state’s servers and hard drives of state employees in their offices to include home computers, and authorized the court-appointed monitor, plaintiff expert, and U.S. Marshal to visit the homes of the 50 affected state employees to execute the order. The defendants petitioned the Sixth Circuit Court of Appeals for a Writ of Mandamus, which the court granted, finding the district court’s order to be “clearly erroneous as a matter of

law.” Citing *The Sedona Principles* and Rules 37(a) and (e), the court noted that it is the responsibility of the responding party to preserve and produce relevant information, and “mere skepticism that an opposing party has not produced all relevant information is not sufficient to warrant drastic electronic discovery measures” such as forensic examination. The court further found that the district court’s orders “fail to account properly for the significant privacy and confidentiality concerns present in this case” and “implicate federalism and comity considerations not present in typical civil litigation.”

Johnson v. Big Lots Stores, Inc., 2008 WL 2191357 (E.D. La. May 7, 2008). In a wage-and-hour class action lawsuit, the plaintiffs objected to the Magistrate Judge’s order denying their request to take a deposition of the defendant’s representatives under Rule 30(b)(6) two days before the close of discovery, to inquire into the defendant’s data preservation and collection efforts. Stating that “e-discovery matters are no longer the novel issues they once were... there is no legitimate excuse for plaintiff’s failure...” the District Judge sustained the Magistrate Judge’s order.

Johnson v. Wells Fargo Home Mortgage, Inc., 2008 WL 2142219 (D. Nev. May 16, 2008). In this Fair Credit Reporting Act case, the plaintiff claimed he sent documents and communications drafted on his computers to his mortgage banker. The defendants claimed that the plaintiff manufactured the evidence and then reformatted the laptops to avoid discovery. The court ordered forensic analysis of the laptops, which revealed that they had been reformatted after the discovery request but before the order. In considering the appropriate sanction for spoliation, the court declined the dismissal requested by the defendant and instead issued a less drastic adverse inference jury instruction, stating that the plaintiff’s credibility was a question for the jury and the defendant had plenty of evidence to support its case against the plaintiff.

Juniper Networks Inc. v. Toshiba America Information Systems Inc., 2007 WL 2021776 (E.D. Tex. July 11, 2007). In a patent infringement case, the defendant failed to produce requested BIOS source code. In response to a motion to compel, the defendant filed charts with the court, listing the BIOS source code as “not available.” This was contradicted by testimony of the defendant’s own witnesses, prompting the court to find that the defendant “made the conscious and willful decision” to withhold the requested information from production. Among the sanctions ordered by the court were limitations on the defendant’s time for opening and closing statements, removal of two of the four permitted preemptory jury challenges, exclusion of expert testimony on non-infringement, a jury instruction on the withholding of discovery, and payment of attorneys fees to the plaintiff.

Kellogg v. Nike, Inc., 2007 U.S. Dist. LEXIS 95629, 2007 WL 4570871 (D. Neb. Dec. 26, 2007). In a patent infringement suit, the plaintiff filed a motion to compel production of information regarding the defendant’s document retention and preservation policies. The plaintiff also sought documents from a privilege log predating this litigation. The court held that the plaintiff had already obtained information about document retention and preservation policies through a Rule 30(b)(6) deposition and could not demonstrate any gaps in the defendant’s production. Regarding the privilege log, the court held that

the privilege status of the documents at their creation date controlled -- not the status on the date that the log was created -- and therefore the documents remained protected by the attorney-client privilege.

Kelly v. Montgomery Lynch Assoc., 2007 WL 4412572 (N.D. Ohio Dec. 13, 2007). In a putative class action, the plaintiff moved to compel discovery related to issues of class certification. The defendant objected, claiming undue burden because the requested information was not maintained a searchable format. The court found that the defendant did not make a reasonable inquiry before lodging the objection and ordered the defendant to produce the information requested. The court strongly advised the parties to cooperate in further discovery and warned the defendant that a failure to comply may result in sanctions.

Kentucky Speedway, LLC v. NASCAR, Inc., 2006 U.S. Dist. LEXIS 92028 (E.D. Ky. Dec. 18, 2006). In this antitrust action, the plaintiff requested metadata associated with the printed and electronic documents over a half year after the defendant complied with the initial discovery request. In support of their request, the plaintiff cited *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005), which required the production of metadata associated with relevant Excel spreadsheets. However, the court rejected the *Williams* precedent as “not persuasive.” Instead, the court relied on *The Sedona Principles, Principle 12 (2005 Edition)* and held that the routine production of metadata was not presumed without a showing of the relevance or the need for the metadata.

Keithley v. The Home Store.com, Inc., 2008 WL 3833384 (N.D. Cal. August 12, 2008). In a patent infringement suit involving several popular real estate web sites, the court found that the defendants were on notice as early as August 2001 that web development source code and other documents would be relevant to the litigation, but defendants did little or nothing to preserve evidence, resulting in the loss of original source code and the belated production of large amounts of relevant data the defendant had previously represented did not exist. According to the court, the “Defendants’ conduct was not inadvertent or beyond their control or merely negligent; to the contrary, Defendants did not even come close to making reasonable efforts to carry out their preservation and other discovery obligations and to determine that their representations to the Court and to opposing counsel were accurate. As a whole, Defendants’ discovery misconduct in this case was both reckless and frivolous.” However, finding “no evidence that Defendants engaged in deliberate spoliation,” the court declined to enter a default judgment against the defendants. The court awarded the plaintiff \$148,269.50 in costs, left open the possibility of further cost awards upon appropriate showings, and imposed a mandatory adverse inference jury instruction.

Kipperman ex rel. Magnatrx Litigation Trust v. Onex Corporation, et al., 2008 WL 4372005 (N.D. Ga. Sept. 19, 2008). The plaintiffs requested production of email from the defendants’ backup tapes based on a search for key words. The defendants initially performed the search but limited the scope to the email boxes of seven named deponents. The plaintiffs requested, and the court granted, that the search be re-run on all email boxes, but the court suggested that the parties negotiate a narrower set of search

terms and custodians. The defendant failed to participate the negotiations and executed the broader search, which resulted in the large collection of “hits.” The defendant then requested relief from reviewing and producing these documents. The court denied the general relief sought, stating that the defendant did not take advantage of the opportunity to reduce the scope of discovery earlier, and “must now lie in the bed that they have made.” However, it granted relief in two clearly identifiable categories of documents involving a transaction and a subsidiary not relevant to the litigation.

Klayman v. Freedom's Watch, Inc., 2008 WL 4194881 (S.D. Fla. Sept. 12, 2008). At the close of a trademark infringement suit, the prevailing defendant requested reimbursement for \$167,535.59 in third-party vendor expenses to collect, preserve, inventory, code, and image electronically stored information pursuant to 28 U.S.C. § 1920. The costs were not awarded, as the defendant failed to demonstrate that they were necessary due to the complexity of the case of volume of material under 28 U.S.C. § 1920(4).

***In re Kmart Corporation*, 371 B.R. 823, 2007 Bankr. LEXIS 2541 (Bkrcty. N.D. Ill. July 31, 2007).** In Kmart’s Chapter 11 proceedings, creditor Global Property Services filed a claim for unpaid invoices and also for approximately \$25 million in damages resulting from breach of contract. Global provided landscaping and outdoor maintenance services to Kmart stores nationwide and claimed that prior to Kmart’s bankruptcy, Kmart management had tried to repudiate Global’s maintenance contracts and contract directly with Global’s subcontractors. During discovery, it was revealed that Kmart had no “litigation hold” procedure and that Kmart’s automatic email deletion function was not suspended until more than two years after Global’s claim had been filed. While characterizing Kmart’s response to its discovery obligations as “woefully insufficient,” the court declined to find the requisite willfulness or bad faith, or prejudice to the claimant, to support spoliation sanctions. The court did order Kmart to produce further electronically stored information and reserved for the end of trial a determination of attorneys’ fees and costs to be awarded to the claimant.

Knifefsource LLC v. Wachovia Bank, N.A., 2007 U.S. Dist. LEXIS 58829 (D.S.C. Aug. 10, 2007). The plaintiff alleged that a former employee had been stealing checks payable to it, altering them to make herself the payee, and depositing them in a Wachovia Bank account. The plaintiff sued the bank for conversion and moved to compel production the checks and other account documents. The bank objected, citing the privacy provisions of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801(a). The court rejected the argument based on an exception found within the statute to reply to discovery requests, 15 U.S.C. § 6802(e)(8). The bank also objected that it could not produce requested copies of the former employee’s bank statements, because it does not maintain physical copies, and the request would require the bank to create a statement from its computer records. The court held that since the bank did not demonstrate that the request called for information from sources that are not reasonably accessible, the bank was under an obligation to produce the information.

Koch Foods of Alabama LLC v. General Electric Capital Corp., 531 F. Supp. 2d 1318 (M.D. Ala. Jan. 17, 2008). In a business dispute over the ownership of automated poultry processing equipment, plaintiff discovered that one page of a three-page email between the CFO and plaintiff's counsel had been inadvertently included within a 37-page document, which was part of a 3758-page document production. The magistrate judge found that the plaintiff had not waived attorney-client privilege, based on a conclusion that "if the Alabama Supreme Court were to confront the issue of inadvertent waiver, it would likely adopt the more comprehensive and sensitive totality-of-the-circumstances analysis." The district judge, in response to the defendant's objection, affirmed the magistrate judge's finding.

***In re Rule 45 Subpoena Issued to Robert K. Kochan*, 2007 WL 4208555 (E.D.N.C. Nov. 26, 2007).** In an insurance case pending in the Southern District of Mississippi stemming from Hurricane Katrina, a Rule 45 subpoena was issued in the Eastern District of North Carolina, requesting electronically stored information from nonparty Robert Kochan, an officer of the defendant corporation in the underlying suit. The subpoena requested that Kochan "produce and permit inspection" of the computers from various corporate offices across the country at the corporate headquarters in Raleigh, North Carolina. Kochan filed an objection to the subpoena the night before the scheduled requested inspection and refused to allow plaintiff counsel and forensic examiners access the next day. The plaintiffs moved for an order to compel production. The court found that Kochan's objection had been filed in a timely manner, but the court rejected Kochan's various objections, ordering the production to proceed that day under a detailed protocol similar to that used by law enforcement in executing a search warrant for information on a seized computer.

Koosharem Corp. v. Spec Personnel, LLC, et al., 2008 WL 4458864 (D.S.C. Sept. 29, 2008). In an action for breach of a non-competition agreement, the plaintiff alleged that a former employee took proprietary information to a competitor who used the information to hire 20 of the plaintiff's employees and open office in competition with the plaintiff in eight cities. Pursuant to a motion to compel, the defendant produced 1,936 pages of email, but the plaintiff noted that the dates on all the emails reflected the date of collection, emails were missing attachments, and other irregularities. The plaintiff brought a second motion to compel, this time requesting forensic examination of the defendants' business and home computers. Based on the relevance of the information sought and the defendants' failures to comply with prior discovery, the court granted the motion, issued a detailed, 20-point protocol, and awarded the plaintiff costs and attorneys fees in bringing the motion.

***In re Krause*, 367 B.R. 740 (Bankr. D. Kan. 2007).** The United States filed an adversary proceeding in bankruptcy against a debtor to collect more than \$3 million in back taxes. The Trustee joined the action, and moved for sanctions up to and including default judgment against the debtor for alleged spoliation of electronically stored information. The court held a two-day evidentiary hearing that included a "virtual live tour" of the debtor's computer hard drives. The court determined that the debtor had installed a file wiping or purging program shortly after a court order to produce electronic

records and before turning his computer over to the government for inspection and copying. Stating “the Court is soundly convinced that Krause willfully and intentionally destroyed electronic evidence on his computers,” causing “severe prejudice,” the judge entered a partial default judgment against the debtor, ordered the debtor to comply with discovery obligations within ten days or face incarceration, and ordered the defendant to surrender his passport.

Kvitka v. Puffin Co., LLC, 209 WL 385582 (M.D. Pa. Feb 13, 2009). In this action, the plaintiff, purchasers and sellers of antique dolls, brought suit against the defendants, who allegedly “launched a campaign of character assassination” that led to the plaintiffs being barred from advertising in a trade publication. The defendants moved for spoliation sanctions after the plaintiffs failed to produce relevant email. The court found that the plaintiff “acted with the highest degree of fault” in discarding an old laptop that contained relevant email, failed to comply with preservation directions from her attorney, and had ignored the advice of her computer technician that the email might be retrievable. The court also found that the loss of this evidence severely prejudiced the defendants. Given these findings, and noting that only a handful of emails had been produced, the court dismissed the plaintiff’s claim and allowed an adverse inference on the defendant’s counterclaims.

Laface Records, LLC v. Does 1-5, 2007 U.S. Dist. LEXIS 72225 (W.D. Mich. Sept. 27, 2007). Music copyright holders filed an action against five unknown defendants who had downloaded or distributed plaintiffs’ music through an Internet service provided by Northern Michigan University. Plaintiffs sought permission to serve a subpoena on the University, seeking the identities and addresses of the persons using the computers on which the file sharing had occurred, prior to the mandatory Rule 26(f) conference before formal discovery is permitted. The court allowed the pre-conference discovery sought by plaintiffs, but due to privacy concerns, allowed the third party Internet service provider and the “Doe” defendants opportunity to modify or quash the subpoena.

Lawson v. Sun Microsystems, Inc., 2007 WL 2572170 (S.D. Ind. Sept. 4, 2007). Early in a dispute over unpaid commissions, the plaintiff requested by letter that the defendant produce all requested electronically stored information in electronic form. The formal Rule 34 request, issued four months later, did not explicitly designate a form of production, and the defendant produced paper. The plaintiff moved to compel the production in electronic form, to which the defendant objected, citing Rule 34(b)’s “one form” provision and the cost of changing formats after discovery has commenced. The court, finding that the letter was sufficient notice of the desired form of production, ordered the defendant to re-produce the material in electronic form.

L.H. v. Schwarzenegger, 2008 WL 2073958 (E.D. Cal. May 14, 2008). In a class action brought against the State of California on behalf of wards and parolees in the state juvenile justice system, the plaintiffs filed motions to compel production of documents and for sanctions after a series of production delays by the defendant. In the words of the court, “[f]rom the first discovery motion in this case to the present time, [the court] has striven to be receptive to the difficulties governmental defendants face in class action

litigation. The discovery requested can be voluminous, and government staffing is not set up such that state agencies have a plethora of resources to deal with the multitude of discovery obligations. Oftentimes, discovery is easily requested and not so easily the subject of response. Nevertheless, defendants did not seek to resolve problems via discovery conferences or other available avenues, but simply, unilaterally denied/delayed discovery until plaintiffs were compelled to file motions. Or, defendants and their attorneys understaffed the discovery effort to the point where non-compliance was guaranteed. Defendants then sought the solicitude of the court for the difficulties they face, and in most instances have exacerbated. The court has little solicitude left.” Finding the defendants’ behavior constituted “purposeful foot dragging”, the court ordered production of the requested information “in reasonably useable form” under Rule 34(b), together with fees and costs.

Lockheed Martin Corp. v. L-3 Communications Corp., 2007 U.S. Dist. LEXIS 79572, 2007 WL 3171299 (M.D. Fla. Oct. 25, 2007). In an action for violation of the Computer Fraud and Abuse Act, 18 U.S.C.S. § 1030, an employee of the plaintiff testified at a deposition that he did not recall receiving a litigation hold memorandum and that he had deleted email to “clean up” his computer. The defendant then sought sanctions against the plaintiff for spoliation. The court held that the defendant was not entitled to sanctions as there was no evidence that the deleted email was relevant to defendant’s claims or defenses. In addition, plaintiff would conduct a forensic search of the hard drive of the employee’s computer and would produce any responsive email found.

Lorraine v. Markel Am. Inc. Co., 241 F.R.D. 534 (D. Md. 2007). In this insurance contract dispute, both the plaintiff and defendant filed motions for summary judgment supported by unauthenticated, and therefore inadmissible, emails. The court dismissed the cross motions for summary judgment without prejudice, because “neither party to this dispute complied with the requirements of Rule 56 that they support their motion with admissible evidence.” The court then provided a detailed and extensive analysis of the requirements for authentication and admission of electronically stored information under the Federal Rules of Evidence.

Mackelprang v. Fidelity National Title Agency of Nevada, Inc., 2007 U.S. Dist. LEXIS 2379 (D. Nev. Jan. 9, 2007). In a sexual harassment suit, the defendant issued a subpoena to an online service provider (OSP) seeking production of the plaintiff’s email, which the OSP refused to obey without a court order or permission of the account owner. The defendant moved for an order from the court compelling the plaintiff to provide a letter of consent. The court refused to issue the order, citing the highly attenuated connection alleged between the email sought and the facts of the case, and suggesting the proper procedure would be to serve the plaintiff directly with a properly framed discovery request.

MacLean-Fogg Co. v. Nongbo Fastlink Equip. Co., Ltd., 2008 WL 5100414 (N.D.Ill. Dec. 1, 2008). In this civil action, the plaintiff sought leave to serve process on the defendants, all of whom reside in China, by email and facsimile. The court granted the

request, concluding that substituted service by electronic means may be authorized under Fed. R. Civ. P. 4(f)(3), and that the proposed methods of service comported with due process.

Malletier v. Dooney & Bourke, Inc., 2006 WL 3851151 (S.D.N.Y. Dec. 22, 2006). In a trademark infringement action, the plaintiff moved for sanctions, citing several deficiencies in the defendant's responses to requests for email and other electronic records. The court denied all but one of the plaintiff's requests, citing a lack of factual details in the allegations and evidence of any prejudice to the plaintiff.

Mancia, et al. v. Mayflower Textile Servs. Co., et al., 253 F.R.D. 354 (2008). In a wage and hour action brought by six laundry workers, the plaintiffs served extensive discovery requests on the defendants, prompting objections and a series of disputes over the adequacy of the defendants' responses, particularly the defendants' certification under Rule 26(g) that their boilerplate responses had been based on a "reasonable inquiry." The case was referred to the Chief Magistrate Judge for resolution of the discovery issues. In a lengthy and scholarly opinion, the judge cited The Sedona Conference® Cooperation Proclamation and other authorities for the proposition that cooperation with opposing counsel in discovery is a professional obligation, and that both sides must refrain from turning discovery into a tactical battleground. He ordered the parties to meet and confer to discuss the realistic damages alleged, estimate their attorneys fees in prosecuting and defending this action, and "quantify a workable 'discovery budget' that is proportional to what is at issue in the case. He also suggested that proposed discovery be targeted to the most accessible, non-duplicative sources; that phased discovery be considered; and that any objections to discovery be particularized. Finally, the judge provided counsel with a format to report on their progress and raise any unresolved issues with the court.

Margel v. EGL Gem Lab Ltd., 2008 WL 2224288 (S.D.N.Y. May 29, 2008). In a trademark dispute between two gemstone grading businesses, the plaintiff admitted that computers in its Belgian facility containing business records were routinely replaced every three years without any effort to preserve the data. The defendant applied for a finding that this constituted a failure to respond to discovery, but the court denied the application, as there was no evidence that any data on computers in the Belgian facility would be relevant to the action in the United States. The plaintiff applied for an order compelling the defendant to supplement its production of reports derived from a database with the database itself. Finding that the database was independently discoverable under Rule 34, as well as discoverable pursuant to Evidence Rule 1006 requiring that the underlying data of a summary be available to the requesting party, the court ordered production of the database.

Marketfare Annunciation, LLC v. United Fire & Casualty Ins. Co., 2007 U.S. Dist. LEXIS 81830, 2007 WL 3273440 (E.D. La. Nov. 5, 2007). In insurance litigation stemming from Hurricane Katrina, the plaintiffs sent the defendants a "preservation" letter shortly after the complaint was filed. One year later, two week before the scheduled close of discovery, the plaintiffs filed a motion for sanctions, citing several instances of emails missing from the defendant's production. The court held that given the late date of

the plaintiffs' motion and the failure of the plaintiffs to file a motion to compel during discovery, the plaintiffs' motion for sanctions would be declined.

Marrer Hernandez v. Esso Standard Oil Company, 2006 WL 1967364 (D. P.R. July 11, 2006). The production of privileged documents that were unintentionally merged with non-privileged documents on a CD-ROM due to an "errant mouse click," which had not been identified on a privilege log, waived any privilege. The court acknowledged that the documents were screened for privilege before being placed on the disk, but held that the failure to inspect the disk before production and the delay of four months before finding the error made it fair to hold that the privilege was waived.

Maxpower Corp. v. Abraham, 2008 WL 1925138 (W.D. Wis. April 29, 2008). In a business tort case against former employees who went to work for a competitor, the plaintiff obtained an order allowing it to inspect the former employees' laptop hard drives. The plaintiffs' computer forensic expert examined the defendants' laptops, finding evidence of hard drive wiping software and of "text strings" referring to information about outdated products. The inspection established that the former employees had deleted information from the hard drives after the suit had been filed. The defendants presented evidence that the wiping of their laptops was done for maintenance purposes and that any information they may have had on the laptops was in their possession in compliance with their former employer's lax company confidentiality policy. The court denied the plaintiffs' motion for sanctions, finding insufficient evidence to support the argument that wiping the hard drive constituted deliberate spoliation.

May v. Pilot Travel Centers LLC, 2006 U.S. Dist. LEXIS 94507 (S.D. Ohio Dec. 28, 2006). In a Family and Medical Leave Act suit for retaliatory termination, the plaintiff sought sanctions against the defendant for spoliation. The electronic information, which was apparently misplaced due to a system upgrade during the litigation, was later produced by the defendant. The court held that the defendant's failure to preserve the information, while culpable, did not result in permanent prejudice to the plaintiff. The sanction was limited to requiring the plaintiff to pay the defendant's attorney's fees and costs related to the additional discovery.

Metavante Corp. v. Emigrant Savings Bank, 2008 WL 4722336 (E.D. Wis. Oct. 24, 2008). In a complex breach of contract dispute stemming from the plaintiff's development of customized online banking application for the defendant, the defendant sought production of the plaintiff's source code. The plaintiff objected, saying that it would cost \$300,000 and 5,000 staff hours to prepare the source code for production, and that the source code itself bore little relevance to the litigation. The defendant offered to mitigate the plaintiff's costs and objection on the grounds of relevance by having the source code produced "as is" to expert consultants, who could examine it and determine if any portions were relevant to the issues in dispute. The court agreed with the defendants and ordered production of the source code, noting that a protective order was already in place to assure confidentiality. In other discovery issues, the court declined to compel the plaintiff to produce further documentation of customer support work, saying that the plaintiff had already produced more than 70,000 "SupportTrack" tickets and the

defendants had not previously asked for more. The court also declined to compel production of documents in native format, saying that the defendant provided “no basis” for the demand; declined to compel the production of documents that the plaintiff stated no longer exist; and declined the defendant’s request for direct court supervision of discovery.

Metrokane, Inc. v. Built NY, Inc., 2008 WL 4185865 (S.D.N.Y. Sept. 3, 2008). In this trademark infringement case, one remaining non-party deposition was taken five months after formal discovery had closed. During the deposition, relevant emails of the plaintiff were disclosed for the first time, and one email was disclosed in full that had only been produced as a fragment in discovery. The defendant sought sanctions for the plaintiff’s failure to produce the emails earlier, including dismissal of the plaintiff’s claims. The plaintiff argued that it was not under any obligation to produce emails that were no longer in its system, but offered no explanation as to why the emails were not in its system. The court held that based on the evidence, the emails were response to the defendant’s earlier requests and that the defendant had been prejudiced by not receiving them. It appeared that the failure to produce was not due to any systematic deletion of the emails, as at least one fragment still existed, and the emails themselves were dated after anticipation of litigation, so were within the scope of the plaintiff’s duty of preservation. The court ordered that the emails could be included in a motion for summary judgment, and should there be a trial, the defendant would be entitled to an adverse inference jury instruction.

Michigan First Credit Union v. Cumis Insurance Society, Inc., 2007 U.S. Dist. LEXIS 84842, 2007 WL 4098213 (E.D. Mich. Nov. 16, 2007). The plaintiff sought sanctions for defendant’s failure to include metadata in its production of ESI in compliance with a previous court order. However, the previous court order did not specify native production or the production of metadata, Rule 34 does not specifically require native production or the production of metadata in all cases, and the court found that in this case “the production of this metadata would be overly burdensome with no corresponding evidentiary value.”

Micron Tech., Inc. v. Rambus, Inc., 2009 WL 54887 (D.Del. Jan 9, 2009). In the continuing saga of nationwide patent infringement actions involving microchip manufacturer Rambus as both plaintiff and defendant, the court held a bench trial on competitor Mircon’s allegations that Rambus spoliated evidence and was guilty of “unclean hands” in its enforcement of patent claims. The court found that Rambus spoliated evidence by conducting employee “shred days” after a duty to preserve had attached and that Rambus had made misrepresentations with regard to its destruction of evidence. Addressing the appropriate sanction, the court noted that “[t]he required burden of proof to establish spoliation is not a matter of settled law in the Third Circuit,” and held that a clear and convincing evidence standard “in the patent area in proving inequitable conduct.” The court continued, “[m]ore specifically, once intent and prejudice have been established, the court must determine whether their total weight satisfies the clear and convincing standard of proof. In this regard, the showing of intent (i.e., bad faith) can be proportionally less when balanced against high prejudice.” The court concluded that “[t]he spoliation conduct was extensive” and that, in the nonjury context,

an appropriate sanction was to declare the patents in issue unenforceable as against Micron.

Mikron Ind., Inc. v. Hurd Windows & Doors, Inc., 2008 WL 1805727 (W.D. Wash. Apr. 21, 2008). Defendants in this commercial dispute filed for a protective order requiring shifting of costs for discovery of electronically stored information. The court found that the defendants had failed to confer with the plaintiff prior to filing the motion and had failed to demonstrate that requested discovery was unduly burdensome or called for data from sources that were not reasonably accessible. The Court specifically noted that the defendant had not provided details such as (1) the number of back-up tapes to be searched, (2) the different methods defendants use to store electronic information, (3) the defendant's electronic document retention policies, (4) the extent to which the ESI stored on backup tapes overlaps with ESI stored on more accessible sources, and (5) the extent to which defendants have search ESI on accessible sources.

Miles v. Wal-Mart Stores, Inc., 2007 U.S. Dist. LEXIS 46747 (W.D. Ark. June 26, 2007). In an employment retaliation suit, the court struck the defendant's blanket objections to discovery and ordered production of all documents on the defendant's privilege log that were authored by or sent to the plaintiff. The court also ordered the defendant to produce affidavits detailing the privilege claims and to produce to the court for in-camera inspection any documents over which privilege disputes remained.

Miller v. Holzmann, 2007 U.S. Dist. LEXIS 2987 (D.D.C. Jan. 17, 2007). More than ten years before this decision in a government contracting fraud case, a third party had submitted a Freedom of Information Act (FOIA) request involving the same contacts. The request was eventually fulfilled and the government retained a copy of its response. That copy was later destroyed. Citing Principle 5 of *The Sedona Principles* for the concept of the "litigation hold," the court found that the government had failed to act reasonably to establish a litigation hold, and that failure resulted in the loss of the FOIA file. Although the government's loss of documents was potentially sanctionable, the Magistrate Judge declined to consider any sanction pending trial, when the prejudicial effect to the plaintiff of the loss of documents can be determined.

Mintel Int'l Group, Ltd. V. Neerghen, 2009 WL 249227 (N.D. Ill. Feb. 3, 2009). In this action against a former employee for theft of trade secrets, the plaintiff requested direct access to computers of the former employee's current employer. The plaintiff had been offered the opportunity to submit search terms to the nonparty new employer, which would have conducted its own search, but the plaintiff rejected the offer. The court denied access to the nonparty's computer, being unpersuaded by the plaintiff's expert allegations that the defendant transferred relevant ESI to the new employer's computer and noting that discovery restrictions may be broader when a nonparty is the target of discovery.

MGP Ingredients, Inc. v. Mars, Inc., 2007 WL 3010343 (D. Kan. Oct. 15, 2007). In this suit alleging patent infringement and misappropriation of trade secrets, the plaintiff moved the court to compel the defendant to identify particular documents responsive to

each request for production, rather than merely producing documents in the format in which they are kept in the usual course of business. The court denied the motion, relying on Rule 34(b), which requires a responsive party to produce documents either in the manner in which they are kept in the usual course of business or to organize and label the documents to correspond to each request, absent an agreement by the parties to an alternative form of production.

Mon River Towing, Inc. v. Industry Terminal and Salvage Co., 2008 WL 2412946 (W.D. Pa. June 10, 2008). In a shipping contract dispute, the defendant requested that the plaintiff produce, *inter alia*, computer printouts “analyzing barges available for the Ingram contracts [and] analyses of charters extended in 2004.” The plaintiff objected that Rule 34 does not require it to create or generate responsive materials, but only to produce items in its “possession, custody or control.” The court distinguished requests that called for electronically stored information in databases to be produced as computer printouts, from requests requiring the responding party to perform any “analyses.” The court ordered the responding party to produce any existing data or analyses, and to execute an affidavit indicating the extent to which any request could not be met with documents or electronically stored data in its “possession, custody or control.”

Muro v. Target Corporation, 243 F.R.D 301 (N.D. Ill. June 7, 2007) (“Muro I”). In the class certification stage of this putative class action alleging violation of the Truth in Lending Act, the defendant listed several email message chains on its privilege log. The court ordered that the threads be produced, as the defendant had failed to comply with requirements of Rule 26(b)(5) to identify with particularity the messages it claimed were privileged and the basis for the privilege. The court held that where a chain of email contains privileged and non-privileged communications, only the privileged communications that are adequately identified may be withheld. The court expressed doubt that communications circulated among large numbers of corporate employees and intermingled with non-privileged business discussions could have been created or maintained with the intention of being confidential attorney-client communications.

Muro v. Target Corp., 2007 U.S. Dist. LEXIS 81776, 2007 WL 3254463 (N.D. Ill. Nov. 2, 2007) (“Muro II”). In the class certification stage of this putative class action alleging violation of the Truth in Lending Act, the plaintiff sought discovery of the defendant’s litigation hold notices and the defendant objected to a previous ruling by the Magistrate Judge deeming that privilege was waived for email threads not adequately identified on its privilege log (see “Muro I” above). The district judge upheld the magistrate judge’s ruling that the litigation hold notice was protected as work product, but modified the magistrate judge’s ruling requiring that each element of an email thread over which privilege is claimed be identified and described separately on the privilege log. Rule 26(b)(5)(A) is satisfied if the attorney-client communication transmitting otherwise non-privileged communications is adequately described. However, the district court found that the defendant’s privilege log still contained serious deficiencies and ordered the defendant to submit a revised privilege log in ten days.

***In re National Security Agency Telecommunications Records Litigation*, 2007 WL 3306579 (N.D. Cal. Nov. 6, 2007).** In multidistrict class action litigation challenging the federal governments “warrentless wiretap” program, the district judge entered an order requiring the preservation of “documents, data and tangible things, requiring counsel to investigate their respective clients’ business practices involving the “routine destruction, recycling, relocation, or mutation of such materials,” and requiring the “most senior or lead trial counsel representing each party” to file a statement conforming to Rule 11 regarding their preservation efforts.

***Nursing Home Pension Fund, et al. v. Oracle Corp., et. al*, No. C 01-00988 SI (N.D. Cal. Sept. 2, 2008).** In this securities class action, the plaintiffs alleged that the defendants failed to preserve interviews with the defendant Larry Ellison, founder and CEO of Oracle, taken by a free-lance writer. It appears from the record that the writer discarded the laptop computer containing 135 hours of transcripts and audio files after he learned of the plaintiffs’ motion to compel production of “any interview notes, transcripts or tape recordings relating to the book.” The court concluded that although Ellison and Oracle did not have physical possession of the laptop, they exercise sufficient control over the transcripts and recording by their contract with the writer and as evidenced by statements made by Ellison to the writer to give rise to a duty of preservation and disclosure. In response to other discovery requests, the defendants produced only 15 emails from Ellison’s own email files, but over 1,650 of Ellison’s emails from the files of other Oracle employees. The court held that these two discovery failures rose to a level of willfulness to warrant the imposition of sanctions under the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(C)(ii), and that the plaintiffs were entitled to an adverse inference in the court’s consideration of their summary judgment motion.

***In re Novellus Systems, Inc. Derivative Litigation*, 2007 WL 46076 (N.D. Cal. Jan. 2, 2007).** In a securities fraud case involving alleged backdating of stock options grants, the defendants produced 10,000 documents in .tif (Tagged Image File) format as part of their initial Rule 26(a) disclosure. The plaintiffs moved for an inspection of the original documents and for an order compelling production of all relevant, non-privileged documents reviewed by the defendants in preparation for the disclosure. The court granted the motion in part, allowing inspection of originals where the .tif images were illegible or obscure, but denied the motion to compel production of additional documents as part of the defendants’ initial disclosure.

***In re NTL, Inc. Securities Litigation*, 244 FRD 179 (S.D.N.Y. 2007).** In this securities class action, the defendants included entities that had gone through bankruptcy and reorganization, resulting in new entities that were not parties to the litigation. As part of the bankruptcies and reorganizations, various agreements were executed allocating custody of business records to the new entities entities, but maintaining the defendants’ access to these records. The court held that so long as the defendants still had access to the records, they were under an obligation to take reasonable steps to preserve those records relevant to the litigation, even though the records were in the physical custody of non-party entities. The defendants’ failure to take any steps to preserve documents resulted in the destruction of email of 44 key employees. The court held that the prejudice

to the plaintiffs and the culpable state of mind of the defendants warranted the sanction of an adverse inference jury instruction and payment of the attorneys' fees and costs of the plaintiffs who sought production of the email.

Nucor Corp. v. John Bell and SeverCorr, LLC, 2:06-CV-02972-DCN (D.S.C. Feb. 1, 2008). In a business tort case in which the plaintiff alleges that a former employee and his new employer misappropriated trade secrets, the plaintiff sought sanctions against the defendants for destroying data on a thumb drive and laptop computer, and for destruction on data on a computer improperly handled by the defendants' expert witness. The court found that the individual defendant reasonably anticipated litigation at the time he left the plaintiff's employ, before he threw away his thumb drive, and that he essentially admitted to throwing away the thumb drive because he anticipated litigation. This action could not be imputed to his new employer, however. Both defendants committed spoliation by continuing to use a laptop containing relevant data after the litigation commenced without taking any precautions to preserve the data, despite a court preservation order. However, there was no evidence to indicate that the defendants engaged in the intentional "wiping" of data on the laptop, or that the defendants' computer forensics expert destroyed relevant evidence by subjecting the laptop to analysis. The court found that an adverse inference jury instruction (set out in full in the Order) was the most appropriate sanction, as it allowed the jury to have the last word in the findings of fact necessary to establish spoliation.

In re NVMS, LLC, 2008 WL 4488963 (Bkrcty. M.D. Tenn. March 21, 2008). A medical services company used an outside billing service for eight years to manage its accounts receivables. It switched to a competing service and requested copies of its billing data from the old service to determine the status of its claims, a request that the old service denied. Shortly afterwards the medical services company went bankrupt and filed a motion for expedited discovery of the data from the old service, which filed a motion for a protective order. The old service provided the data in paper form and in an unformatted text file, but refused to provide it in its proprietary format, fearing that its competitor would obtain it. The debtor testified that the data in form or in the unformatted text file could not be migrated without considerable cost and burden. The court held that production of the data in its native form was required, as any other form significantly degraded the usefulness of the data. However, the court specified that the medical services company and the competing billing service were restricted in their use of the files produced to extract and upload the billing data onto the current system, and that the electronic files must be returned, uncopied, upon completion of the claims review process.

O'Bar v. Lowe's Home Centers, Inc., 2007 WL 1299180 (W.D. N.C. May 2, 2007). In this putative employment class action case against Lowe's Home Centers by white males claiming discrimination in pay and promotion, the court allowed broad precertification discovery into all managerial employees to see if a "white-male" class existed. As part of the precertification discovery plan, the court urged that the parties meet for a 26(f) conference and attempt to resolve any electronic discovery issues informally before meeting with the judge. The judge set forth specific and detailed guidelines to facilitate

discovery of electronically stored information (ESI). These guidelines were based in large part on the “Suggested Protocol for Discovery of Electronically Stored Information” of the United States District Court for the District of Maryland. That full document may be found at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>.

Opperman, et al. v. Allstate New Jersey Ins. Co., et al., 2008 WL 5071044 (D.N.J. Nov. 24, 2008). In this action challenging the defendant insurer’s property loss estimates, the court ordered the production, in an accessible form, of proprietary software owned by a nonparty and licensed to the insurer. The court found that the software was relevant to the plaintiff’s claims and that an existing confidentiality order would protect the trade secret nature of the software. The court also rejected the proposition that a nonparty could prohibit production of the software.

Oracle Corp. v. SAP AG, No. C-07-01658 (N.D. Cal. July 3, 2008). In a dispute between two major business software companies involving the alleged unlawful downloading of software and support materials in which the plaintiff claims damages of “at least a billion dollars,” discovery of the documents of 165 key custodians will cost the defendant an estimated \$16.5 million and take more than a year. Citing both Rule 26(b)(2)(C) and the mandate of Rule 1 (“the just, speedy, and inexpensive determination of every action and proceeding”), the Magistrate Judge ordered that the number of custodians be limited to 120 and that the parties consider sampling and key word searches to limit the scope of discovery even further.

Orrell v. Motorcarparts of America, Inc., 2007 U.S. Dist. LEXIS 89524, 2007 WL 4287750 (W.D.N.C. Dec. 5, 2007). In a sexual harassment suit, the plaintiff alleged that she had been the recipient of “hundreds” of offensive emails from co-workers, but could not provide them because her home computer had “crashed.” The defendant filed a motion to compel inspection of the plaintiff’s home computer by a qualified forensics technician. Applying Fed. R. Civ. P. 26(b)(2)(C), the court found the defendant’s requests to be “reasonably calculated to lead to the discovery of admissible evidence” and ordered the inspection at the defendant’s expense.

Oxford House, Inc. et al. v. City of Topeka, Kansas, 2007 WL 1246200 (D. Kan. Apr. 27, 2007). In a dispute over the denial of housing permits by the City of Topeka, the plaintiff requested deleted emails from members of the City Council. The media from which these emails could have been derived had been routinely overwritten about two months before the plaintiff issued a demand letter. Although the developer and the City had been in active negotiation over the permits at that time, the judge held that no duty to preserve backup media had arisen, citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). Further, while it is technologically possible to recover information from overwritten backup media, the estimated \$100,000 cost was not justified by the low probability that any information relevant to this action would be recovered.

Pace v. International Mill Ser., Inc., 2007 U.S. Dist. LEXIS 34104, 2007 WL 1385385 (N.D. Ind. May 7, 2007). In an employment discrimination suit, the plaintiff requested records of work orders showing the distribution of work assignments to other employees

of the defendant. The defendant first responded with information in .pdf format. After objection by the plaintiff, the defendant produced the information again as comma-separated data. That production was again supplemented by the defendant, although the plaintiff alleged that information was still missing and filed a motion to compel production in native format. Citing Principle 12 of *The Sedona Principles* and *Williams v. Sprint/United Management*, 230 F.R.D. 640 (D. Kan. 2005) for the proposition that the adequacy of the respondent's form of production "must be gauged on a case-by-case basis, according to the specific terms of the request," the court held that native format production was not required by Rule 34, and the plaintiff's third motion to compel discovery and award costs was denied.

Padgett v. City of Monte Sereno, 2007 U.S. Dist. LEXIS 24301 (N.D. Cal. Mar. 20, 2007). In a civil rights action involving allegations that a city employee had made anonymous threatening communications, the plaintiff moved to compel inspection of city computers. The court denied the motion but instructed the city to "preserve everything." Shortly thereafter, the hard drive of the city manager's laptop crashed and was discarded. The plaintiff moved for default judgment as a spoliation sanction. The court founds that while sanctions were appropriate, the plaintiff had not established prejudice to justify spoliation sanctions. The court ordered the city to pay attorneys' fees and forensic expert costs, and the costs of a special master to manage further discovery.

Palgut v. City of Colorado Springs, 2007 U.S. Dist. LEXIS 91719, 2007 WL 4277564 (D. Colo. Dec. 3, 2007). In an employment discrimination suit against a municipal fire department, the district judge affirmed the magistrate judge's ruling that the plaintiff's requests were overbroad and unduly burdensome, and the defendant's backup tapes were "not reasonably accessible" within the meaning of Rule 26(b)(2)(B) because the city lacked the necessary hardware to access the tapes. The court held that appointment of a computer forensics expert to examine the city's computer system was unnecessary, as "without a qualifying reason, plaintiff is no more entitled to access to defendant's electronic information storage systems than to defendant's warehouses storing paper documents."

Pandora Jewelry, LLC v. Chamilia, LLC, 2008 U.S. Dist. LEXIS 79232 (D. Md. Sept. 30, 2008). In an action for unfair trade practices and Lanham Act violations, the defendant failed to produce requested electronic discovery, stating that it lost files by changing servers twice since the start of the litigation and because its email system forces users to delete or archive emails every 90 days. The court held that the defendant's failure to preserve relevant electronic information was "grossly negligent" and did not fall within Rule 37(e)'s protection for "routine, good-faith operation of an electronic information system." However, the plaintiff was unable to establish that its case had been prejudiced by the defendant's actions, and the court denied dispositive sanctions for spoliation.

Parkdale America, LLC v. Travelers Casualty and Surety Company of America, Inc., 2007 U.S. Dist. LEXIS 88820, 2007 WL 4165247 (W.D.N.C. Nov. 19, 2007). In an insurance coverage dispute seeking indemnification for the settlement of private antitrust actions, the plaintiff provided 550,000 pages of email concerning the

settlements, but the defendants requested additional discovery of the email of corporate officers to determine the extent of their knowledge of or participation in the alleged underlying price-fixing activities. The court held that the plaintiff failed to demonstrate that the additional email was not reasonably accessible and ordered the plaintiffs to produce email, but recommended that the parties negotiate some cost sharing agreement.

Pass & Seymour, Inc. v. Hubbell Inc. 2008 WL 4240490 (N.D.N.Y. Sept. 12, 2008). In a patent infringement case, the plaintiff responded to 72 document requests by producing the equivalent of 405,367 pages of documents in digital form, divided among 202 unlabelled folders, with no other index, stating that the production was made as the documents were maintained in the usual course of business. The defendant moved to compel the plaintiff to identify which documents were responsive to each of the 72 document requests. The court stated that Rule 34 contemplates that a party selecting the “usual course of business” form of production option disclose information about how documents are organized in the usual course of business, such as the identity of the custodian from whom the document was obtained or a general description of the filing system. The court declined to order that the documents be organized to correspond to the 72 requests, however, acknowledging that with the advent of digitized information and litigation support software, “large quantities of documents can be rendered both manageable and text searchable.”

***In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 2007 U.S. Dist. LEXIS 2650 (E.D.N.Y. Jan. 12, 2007).** In this complex antitrust litigation, individual plaintiffs established a common protocol for the production of documents, involving printing out electronic documents, scanning the hard copies to create .tif (tagged image file) format, and then using Optical Character Recognition software to recreate a searchable full-text database. This protocol effectively eliminated all metadata from the production. The defendants at first accepted this form of production, raising objections only several months later (after December 1, 2006) during a routine status conference. Applying the new electronic discovery rules, the court found that the plaintiffs’ form of production violated the spirit of Rule 34(b), as stated in the Advisory Committee Notes, to avoid any form of production that removes or significantly degrades the searchability of the electronic information. However, the court estopped the defendants from belatedly objecting to the productions already made. The plaintiffs would be on notice that they must preserve and produce relevant metadata that would aid in searchability, and the defendants would be free to file a Rule 37 motion in the future, should future productions be inadequate.

Peacock v. Merrill, 2008 WL 176375 (S.D. Ala. Jan. 17, 2008). In a lawsuit stemming from the sales of stock, the defendants sought production of electronic financial records, which the plaintiff claimed she had already produced in hard-copy form. The defendants then sought an exact replica of the CD-ROM containing the records to determine if the plaintiff had indeed fully complied with the discovery request. The court determined that the CD-ROM constituted a “document” within the meaning of Rule 34 and was relevant, as the dates on which files were created and deleted were relevant to the defendants’ case, although the court acknowledged that “hundreds” of the documents contained on the disk

would not be relevant. The court ordered the plaintiff to allow the defendants and their experts to inspect all of non-privileged files from the disk in native electronic format to ensure access to all metadata and to allow the defendant to “tag” those documents deemed to be relevant for copying by the plaintiff to another disk, which would then be produced.

Perfect Barrier LLC v. Woodsmart Solutions Inc., 2008 WL 2230192 (N.D. Ind. May 27, 2008). The plaintiff requested production of all emails matching a set of search terms, to which the defendant agreed and produced the equivalent of 75,000 pages of email in electronic. The defendant also designated the entire production as “Type C” or “Attorney-Eyes-Only,” pursuant to a protective order agreed to by the parties previously. The plaintiff objected to the production and moved to compel a supplemental production of the same material without the designation and in paper form. The Magistrate Judge, considering the terms of the protective order, found that it allowed for “Type C” designation of entire categories. The judge also found that the plaintiff failed to designate a particular form of production in its request, and that the defendant’s choice to produce of the email in reasonably useable native format was proper under Rule 34.

Peskoff v. Faber, 240 F.R.D. 26 (D.D.C. Feb 21, 2007). In this breach of contract and fraud case, the plaintiff requested the production of several relevant emails. The defendant alleged that the emails requested do not exist and the cost of any further investigation should be borne by the plaintiff. Relying on the amended federal rules, the court held that “the producing party is relieved of producing specifically identified inaccessible data only upon a showing of undue burden or cost.” Fed. R. Civ. P. 26(b)(2)(B). Additionally, the court held that cost-shifting under Fed. R. Civ. P. 26(b)(2)(C) is only available after “a showing of inaccessibility.” Since the defendant did not exhaust all possible searches, the court ordered that an expert complete a search for the requested emails and explain the search methodology. In **Peskoff v. Faber, 244 F.R.D. 54 (D.D.C. Aug. 27, 2007)** the defendant produced results that the court characterized as “incomprehensible” and failed to appear at a scheduled hearing. The court ordered the parties to collaborate and develop a request for proposals from independent examiners to complete the investigation of the defendant’s partnership’s computers, after which the issue of who would pay those costs would be considered. In **Peskoff v. Faber, 2008 WL 2649506 (D.D.C. July 7, 2008)**, the parties returned to the court for a determination of the cost issue. The court found that the defendant’s inadequate discovery responses and failure to preserve electronically stored information had necessitated the forensic examination, and therefore no shifting of costs to the plaintiff was justified.

Petcou v. C.H. Robinson Worldwide, Inc., 2008 WL 542684 (N.D. Ga. Feb. 25, 2008). In an employment action alleging a hostile work environment, the plaintiffs broadly sought “e-mails of a sexual or gender derogatory nature sent from 1998 through 2006.” However, there was testimony that only email of current employees that had not been deleted would be accessible. Email of departed employees and email deleted for more than eight days, could only be retrieved from backup media which was not be reasonably accessible. As an example, the cost of retrieving two years of email was

estimated at \$79,300 per employee, and the defendant had 5,300 employees. The court ordered production of relevant email from accessible sources and from particular current co-workers of the plaintiffs. The court declined to sanction the defendant for spoliation, finding that the plaintiffs failed to put the defendant on adequate notice to trigger a duty of preservation, the defendant acted in good faith in accordance with its document retention policy, and that the plaintiff had recourse to other evidence to prove its case.

Peterson v. Union Pacific R.R. Co., 2008 WL 1930453 (C.D. Ill. May 1, 2008). In a wrongful death action brought against a railroad, the plaintiffs sought sanctions against the defendant, alleging that the defendant concealed, altered, or destroyed three potential sources of electronically stored information. The court found that the defendant substantially complied with previous requests for production, the plaintiffs failed to diligently pursue perceived inadequacies in the defendant's production, and the plaintiffs failed to provide any evidence that relevant information had been altered or destroyed. The defendant requested fees and costs associated with opposing the motion. Citing Rule 37(a)(5)(B), the court ordered the plaintiffs to show why their motion to compel was substantially justified.

Phillips v. NetBlue, Inc., 2007 WL 174459 (N.D. Cal. Jan. 22, 2007). In a private civil action based on "CAN-SPAM" anti-spam act, the defendant moved for dismissal based on the plaintiff's alleged failure to preserve electronic evidence. At issue were email messages consisting mostly of hyperlinks to web sites advertising pornography. While the emails themselves were preserved, the images accessible only by hyperlink to a non-party's server were not. The court denied the defendant's motion, noting that the defendant's argument that the plaintiff was under a duty to gather evidence from non-parties was "absurd."

Pipefitters Local No. 636 Pension Fund v. Mercer Human Res. Consulting, Inc., 2007 WL 2080365 (E.D. Mich. July 19, 2007). In a dispute involving the management of a pension fund, the magistrate judge issued a case management order that provided, *inter alia*, that the plaintiffs would bear the cost of restoring or locating any requested electronically stored information. Upon motion by the plaintiffs, the district judge struck that portion of the order, as there was no finding on the record that any electronically stored information was "not reasonably accessible because of undue burden or cost" to justify cost shifting under Fed. R. Civ. P. 26(b)(2)(B).

PML North America v. Hartford Underwriters Ins. Co., 2006 U.S. Dist. LEXIS 94456 (E.D. Mich. Dec. 20, 2006). In an insurance-related fraud action, a court order established a protocol for electronic discovery. The court later ordered the defendant to produce hard drives and other media for inspection by a computer forensics expert. The expert reported evidence of tampering and data spoliation, prompting defense counsel to admit in court that "it looks bad." While acknowledging counsel's candor, the court stated that "there is a point beyond which bumbling and blindness to a party's discovery obligations sufficiently resemble the sort of willful, intentional and malicious conduct that calls for the heavy sanction of judgment by default." The court granted the plaintiff partial summary judgment.

PML North America, LLC v. ACG Enterprises of NC, 2007 U.S. Dist. LEXIS 87602 (E.D. Mich. Nov. 29, 2007) (“PML IV”). In an insurance-related fraud action, the defendant corporation was sanctioned \$134,373 in attorney fees and costs destroying computers and data subject to discovery. During the course of the litigation, the defendant corporation became insolvent. In this decision, the court transferred liability for the sanctions from the corporation to its president, linking him directly to the litigation misconduct, and ordered him to pay the sanction personally.

Proctor & Gamble Co., v. S.C. Johnson & Son, Inc., 2009 U.S. Dist. LEXIS 13190 (E.D. Tex. Feb 19, 2009). The parties in this action had agreed to document production in searchable TIFF format, but the defendant sought to shift what it claimed would be a \$200,000 cost of OCR conversion to the plaintiff. The court, applying the *Zubulake* factors, rejected the application.

PSEG Power New York, Inc. v. Alberici Constructors, Inc., 2007 WL 2687670 (N.D.N.Y. Sept. 7, 2007). In this breach of contract case, the defendant sought production of all electronically stored e-mails along with their corresponding attachments. The plaintiff produced a disc with e-mails that, due to a technical glitch, were not linked to their proper attachments. Efforts to locate the attachments failed and the defendant moved to compel a second production at the plaintiff’s expense. The plaintiff claimed that a second production would be overly burdensome and costly but offered to comply at the defendant’s expense. The court found that the plaintiff’s original production was neither in the form in which the information was ordinarily maintained nor in a reasonably usable form as required by Rule 34(b)(ii) and ordered the plaintiff to comply with the second discovery request at its own expense.

Pure Power Boot Camp v. Warrior Fitness Boot Camp, 2008 WL 4866165 (S.D.N.Y. Oct. 23, 2008). In an action for breach of employment covenants, theft of trade secrets, and trademark infringement, the defendant moved to preclude the use or disclosure of 34 emails it alleged the plaintiff obtained prior to the litigation unlawfully, in violation of the Stored Communications Act, 18 U.S.C. § 2707. While employed by the plaintiff, defendant had used the plaintiff’s computers to access his webmail accounts. The plaintiff had a written policy at the time that employees have no right of privacy in personal email sent or received over company computers, and that the company had a right to access and review any such emails. The emails obtained by the plaintiff from the defendant’s webmail accounts were highly damaging to the defense, and included attorney-client communication dated after the defendant terminated his employment with the plaintiff. The court held that there was no evidence that the webmail in question had been either composed or received by the defendant using the plaintiff’s corporate computers, and that the company policy did not authorize the employer to access an employee’s webmail from a nonparty provider. Further, the defendant had not authorized his former employer to access his webmail and had a reasonable expectation of privacy in his webmail accounts. The court ordered the return of the attorney-client communication and precluded the use of the emails by the plaintiff as evidence, except for impeachment purposes.

Qualcomm Inc. v. Broadcom Corp., 539 F. Supp. 2d 1214 (S.D. Cal. 2007) (“Qualcomm I”). In a patent infringement action, the defendant alleged that Qualcomm had intentionally hidden the existence of certain of its patents from an international standard-setting consortium until the consortium had set standards -- and the industry had developed products meeting those standards -- that necessarily infringed on the plaintiff's patents. The court found for the defendants on the merits and following trial entered an order detailing the plaintiff's actions to obstruct discovery and instructing 14 plaintiff counsel to show cause why they should not be sanctioned and face professional discipline. Characterizing plaintiffs counsels' actions as “gross litigation misconduct,” the court detailed “constant stonewalling, concealment, and repeated misrepresentations,” including the withholding of over 200,000 pages of relevant emails and electronic documents.

Qualcomm Inc. v. Broadcom Corp. 2008 U.S. Dist. LEXIS 911, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) (“Qualcomm II”). Following a finding of “gross litigation misconduct (see “Qualcomm I,” above), the Magistrate Judge ordered the plaintiff corporation to pay an \$8.5 million sanction, and individually sanctioned six attorneys for intentionally or recklessly failing to meet discovery obligations and for accepting without question their corporate client's representations that discovery responses were complete. The six attorneys were ordered to forward the sanction order to the state bar for possible further disciplinary actions. The corporation's legal department was ordered to initiate a self-critical review and amelioration program which the court entitled a “Case Review and Enforcement of Discovery Obligations (CREDO)” program and to report its findings and going-forward case management protocols in open court. The order was vacated in part and remanded, **2008 WL 638108 (S.D. Cal. March 5, 2008)** by the District Judge, who applied the self-defense exception to the attorney-client privilege, allowing the outside attorneys to use their communications with Qualcomm to show cause why they should not be sanctioned.

Quinby v. WestLB AG, 2007 U.S. Dist. LEXIS 2955 (S.D.N.Y. Jan. 4, 2007) (“Quinby IV”). Following up on a prior order in this case that the plaintiff bear 30% of the cost of restoring emails of one particular employee from backup tapes, the plaintiff's share of the costs was reduced, once it was determined that the same tapes had to be restored at defendant's cost to produce email of other employees.

Quon v. Arch Wireless Operating Co. 2008 U.S. App. LEXIS 12766 (9th Cir. June 18, 2008); petition for rehearing denied, 2009 U.S. App. LEXIS 2259 (9th Cir. Jan. 27, 2009). The City of Ontario contracted with Arch Wireless to provide it with text messaging services, and distributed 22 pagers which it distributed to several employees, including the Sergeant Quon. The city had no official text-messaging use policy, but did have a general Internet and computer use policy stating that computer use was for official city business only and subject to audit. Each employee with a text messaging unit was allowed 25,000 characters and was expected to reimburse the city for any overage charges to avoid being audited. Sergeant Quon repeatedly exceeded his allotted characters and an audit was instituted, revealing many messages of a personal -- and

some of a sexual -- nature. Quon and another officer sued Arch Wireless for providing the information to the City in violation of the Stored Communications Act (SCA) and the 4th Amendment. The district court found for the defendants, and the plaintiffs appealed. The 9th Circuit found that the provisions of the SCA prohibiting Arch Wireless from disclosing the content of the text messages applied. The Court also found that Sergeant Quon had a reasonable expectation of privacy in the content of his text messages based on past practices in the Department of allowing personal use, despite the formal policy, and the reasonable expectation that “auditing” text message traffic would not involve monitoring the content of the text messages.

R & R Sails, Inc., d/b/a Hobie Cat Co. v. Ins. Co. of the State of Pennsylvania, 2008 WL 2232640 (S.D. Cal., April 18, 2008). In an insurance bad faith action, the plaintiff requested “electronic or handwritten daily activity logs” which the defendant, in a sworn statement submitted to the court, insisted did not exist. The day before his deposition, however, defendant’s senior property claims examiner informed defense counsel that he maintained an electronic database, claiming that he did not consider them to be part of his file. While the documents were later produced, the Magistrate Judge found the defendant’s prior certifications to be made in violation of Rule 26(g), which requires a “reasonable inquiry” on the part of counsel. The court found the defendant and counsel jointly liable for attorneys’ fees and costs caused by the failure to produce the computer reports in a timely manner, and recommended that the District Judge preclude the defendant from introducing or relying on any documents or ESI requested by the plaintiff but not produced before the discovery deadline.

Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 2008 WL 2487835 (W.D. Pa. June 16, 2008). In an antitrust litigation, the defendants had been producing paper documents and electronically stored information (ESI) on a “rolling basis” but had not specified a completion date. The plaintiffs filed a motion to compel seeking the completed production. Noting that this was the fifth discovery motion filed in this action, the court reminded both parties that discovery is supposed to be conducted with minimal judicial intervention: “The Court has examined the discovery-related thrusts and parries which have occurred in this case and is concerned that counsel or the parties, on one or both sides of the suit, may be taking positions that do not comply with either the letter or spirit of the Federal Rules of Civil Procedure or the Local Rules of Court regarding discovery. This Court will not allow the discovery process to be abused nor will it tolerate discovery shenanigans or delaying tactics by counsel for either party or by the parties themselves. Moreover, this Court does not referee discovery bouts between consenting adults. The Court will, however, take full advantage of sanctions available under the rules of procedure and this Court’s inherent authority to prevent discovery abuses. If any counsel or party makes excessive demands or insufficient responses after this cautionary order by the Court, an order may be entered providing for sanctions and/or more stringent controls over discovery.” Addressing the plaintiffs’ motion, the court noted the defendants’ production was due four months prior and ordered completed production of all non-privileged documents and responsive ESI within seven days.

ReedHycalog UK, LTD v. United Diamond Drilling Services, Inc., 2008 U.S. Dist. LEXIS 93177 (E.D. Texas Oct. 3, 2008). In a patent infringement action, the defendants imaged the hard drives of relevant custodians, reviewed the data for privilege, designated the rest as “confidential” or “attorney’s eyes only,” and turned over 750 gigabytes of data to the plaintiffs, allegedly including baby pictures, audio files, and pornography. The defendants also responded to interrogatories by suggesting search terms and appending references to up to 75,000 electronic documents. The court found that the defendants’ “production practices amount to a data dump with an instruction to ‘go fish.’ ... That this fishing is done electronically is of no consequence.” The court prohibited the defendants from using or relying on any document not produced from an agreed-up set of narrower search terms or produced in response to a specific request by the plaintiff.

Regan-Touhy v. Walgreen Co., No. 06-6242 (10th Cir. May 20, 2008). In an action for unlawful disclosure of medical information, the plaintiff attempted to show by circumstantial evidence that a particular employee of the local pharmacy was responsible for the unauthorized disclosure, and requested computerized “log files,” email communications, and computer manuals related to the pharmacy’s prescription and customer database management system. The pharmacy objected to the overbreadth of the request, but produced printout of the plaintiff’s transactions, none of which indicated that the named employee was involved. The district court denied the plaintiff’s motion to compel further electronic discovery and found for the defendant on summary judgment, stating that the plaintiff’s case rested largely on inadmissible hearsay and suspicion. On appeal, the 10th Circuit upheld the district court’s order, citing *The Sedona Principles* and other authority for the proposition that trial judges should exercise discretion to prevent discovery disputes from displacing trial on the merits as the primary focus of the parties’ attentions.

Reinhard v. Dow Chemical Co., 2007 U.S. Dist. LEXIS 59242 (S.D.N.Y. Aug. 13, 2007). On the same day that the plaintiff in this employment action filed suit against the defendant corporation in the Southern District of New York, the defendant filed suit against the plaintiff the Eastern District of Michigan, where the defendant has principle corporate offices, for unauthorized access to business information. Discovery in the cross-actions was likely to involve computer hard drives located at the Michigan offices, prompting the court in the Southern District of New York to hold that the “relative ease of access to sources of proof” favored transfer of the case to the Eastern District of Michigan.

Reino De Espana v. American Bureau of Shipping, 2007 U.S. Dist. LEXIS 5693 (S.D.N.Y. Jan. 25, 2007) (“Reino De Espana III”). In this high-profile oil spill cost recovery action, the plaintiff Kingdom of Spain first insisted that it had no relevant recoverable emails. When it became apparent that the plaintiff did have relevant email, it moved for time to have forensic computer experts determine whether otherwise inaccessible email could be retrieved. The court denied the plaintiff’s motion. On a motion for reconsideration, the court found no basis for reconsideration and reaffirmed the order, citing the plaintiff’s prior position that further forensic expert investigation would be fruitless.

Rhoads Industries, Inc. v. Building Materials Corp. of Am., 2008 WL 4916026 (E.D. Pa. Nov. 14, 2008). In a suit by a construction company for breach of contract, the plaintiff inadvertently produced 800 electronic documents it claimed were privileged, and the defendants moved to deem the privilege claims waived. Noting that Fed. R. of Evid. 502(b) establishes a national standard for consideration of claims of privilege waiver, the court nevertheless resorted to prior Third Circuit precedent and a five-factor balancing test. Analyzing the plaintiff's document review procedures in detail the court found that "its efforts were, to some extent, not reasonable." However, the court relied a factor of the Third Circuit test that does not appear in Rule 502(b) -- the overall interests of justice -- to find that the defendants had not met their burden of proof that privilege had been waived for documents that appeared on the privilege log but had been inadvertently produced. In a subsequent decision, **2008 U.S. Dist. LEXIS 96404 (E.D. Pa. Nov. 26, 2008)**, the court clarified its opinion and provided explicit instructions for the logging of email strings that contain both privileged and non-privileged messages.

In re Riverside Healthcare, Inc., 2008 WL 4183609 (Bankr. M.D. La. Sept. 11, 2008). The defendant in a preference adversary proceeding routinely deleted e-mail after 60 to 90 days, resulting in the destruction of relevant email well before it was made a party to the action. The defendant's parent corporation had knowledge of the bankruptcy filing, but in the absence of evidence that notice of the filing had been transmitted to the defendant subsidiary, which might indicate bad faith in the destruction of the relevant evidence, the court declined to issue an adverse inference instruction.

RLI Insurance Co. v. Indian River School District, 2007 U.S. Dist. LEXIS 78419, 2007 WL 3112417 (D. Del. Oct. 23, 2007). The plaintiffs sought an order requiring defendants to comply with the local district court's default standard for electronic discovery. They contended that it was evident from the lack of significant amounts of electronic documents produced by defendants that they had not complied with the default standard. The court denied the motion, as it was filed after discovery was closed. The plaintiff had not raised the issue of e-discovery prior to the Rule 16 Conference as required by Rule 26(f)(3) and no specific failure to produce relevant email had been shown. In addition, the defendants had submitted to the court a "careful and thorough" procedure they used for obtaining and producing relevant email.

Roberts v. Canadian Pacific Ry. Ltd., 2007 WL 118901 (D. Minn. Jan. 11, 2007). In one of more than 100 state court cases -- now consolidated in federal court -- relating to a train derailment incident occurring in Minot ND, the plaintiff moved for expedited discovery prior to initial discovery conference, based on an admission by an employee of the defendant that the defendant ordered the destruction of emails related to the incident. The defendant objected to any expedited discovery before a determination of subject matter jurisdiction, which it was confident would be denied. The court granted the plaintiff's motion for expedited discovery based on the court's inherent authority to defend the integrity of its proceedings, including proceedings that may result ultimately in dismissal of the action as a whole.

Robinson v. Moran, 2007 U.S. Dist. LEXIS 74617 (C.D. Ill. Oct. 5, 2007). In a wrongful death action against prison officials, the plaintiff sought a computerized report of prison cell door openings and closings and sanctions against the prison officials for not including the report in their initial disclosures under Fed. R. Civ. P. 26(a)(1)(B). The court ordered production of the report, but declined to sanction the defendants for failing to disclose the report, because initial disclosures of electronically stored information are limited to information that the disclosing party intends to use in the litigation.

Ross, et al. v. Abercrombie & Fitch Co., 2008 WL 4758678 (S.D. Ohio Oct. 27, 2008). In a securities class action, the plaintiffs requested that the defendant produce 1.3 million pages of documents identified by a keyword search using 123 terms provided by the plaintiffs. The court found that the keyword search produced largely irrelevant results and that the cost of reviewing these for relevance and privilege outweighed the benefit of ordering them produced. Denying the plaintiffs' motion to compel production of the entire document set, the court advised the parties to confer on strategies to improve the precision the searches.

Samsung Electronics Co. v. Rambus Inc., 523 F. 3d 1374 (Fed. Cir. Apr. 29, 2008). Samsung filed a declaratory judgment action in the Eastern District of Virginia seeking a declaration that various patents were invalid and unenforceable by Rambus. Rambus filed covenants not to sue Samsung, and the case was dismissed as moot. However, the trial court retained jurisdiction to adjudicate Samsung's claim for attorneys' fees. Rambus made a written offer and formal offer of judgment to pay the full amount of the attorneys' fees, which Samsung refused. The trial court terminated the action, but issued a separate opinion sanctioning Rambus for spoliation, adopting findings from the parallel *Rambus v. Infineon* litigation, 164 F. Supp. 2d 743 (E.D. Va. 2001). Rambus appealed, and the Federal Circuit held that when Rambus offered the entire amount in controversy to the plaintiff, the case became moot, and the trial court no longer had jurisdiction to impose sanctions on under the rules or under its inherent sanctioning authority.

Schmidt v. Levi Strauss & Co., 2007 U.S. Dist. LEXIS 69791, 2007 WL 2688467 (N.D. Cal. Sept. 10, 2007) (Not for Citation). The plaintiff brought an action under the Sarbanes Oxley Act alleging that they had been terminated in retaliation for complaining about the defendant's irregular accounting practices. The plaintiffs moved to compel the production in native format of all documents previously produced by the defendant in hard copy form, claiming it was "black letter law" that they were entitled to production in electronic form. The court disagreed, finding that the plaintiffs had failed to articulate any specific basis for compelling a second production, had not specified the form of production in their requests, and had brought this motion six months after discovery had closed. The court denied the motion without prejudice, leaving open the option for the plaintiffs to specifically identify, on a document-by-document basis, those documents they assert are unusable or unreadable in hard copy format.

School-Link Technologies, Inc., v. Applied Res., Inc., 2007 WL 677647 (D. Kan. Feb. 28, 2007). In this breach of contract case, the plaintiff contended that the defendant failed to properly implement a litigation hold and inform all key employees of the duty to

preserve relevant documents. Relying on *Zubulake V*, the court stated that the issuance of a litigation hold notice is not enough; counsel must oversee the process of discovery to ensure compliance. Here, the court doubted that the lawyers were overseeing the process, because a key employee testified that she had neither received a hold notice nor any instructions from counsel to search, gather, or preserve relevant documents. On her own initiative, she searched her home and computer and disclosed 7,500 pages of documents, unprompted by counsel. The court also ordered a copy of an identical memory stick containing all the key employees' computer files be produced to the plaintiff to ensure compliance. Although the court found that counsel was in breach of its duty to implement a litigation hold and oversee compliance, the court found that sanctions were not appropriate where there has been no showing that any relevant documents or information had been destroyed.

Scotts Co. LLC v. Liberty Mutual Insurance Co., 2007 U.S. Dist. LEXIS 43005 (S.D. Ohio June 12, 2007). In an insurance action, the plaintiff requested an order allowing its computer forensics expert to inspect the defendant's computers. The court denied the request, stating that amended Rule 34(a) is intended to put the discovery of electronically stored information on the same footing as discovery of conventional documents, and that the plaintiff's mere suspicion that a discovery response is incomplete is not a sufficient basis for such a search, any more than it would justify physical inspection of a document warehouse. The plaintiff also requested that the defendant be ordered to produce in electronic format documents already produced in paper. Citing both *The Sedona Principles* and the 2006 Advisory Committee Notes to the Rules, the court ordered the parties to meet and confer on supplementing the production.

SEC v. Badian, 2009 WL 222783 (S.D.N.Y. Jan 26, 2009). Following an in camera review of documents withheld from production in response to a subpoena, the court held that privilege claims had been waived, considering four factors. First, when originally turned over to the SEC in 2003 during an earlier investigation, no precautions were shown to have been taken to protect against inadvertent disclosure of privileged information. Second, there was a five-year delay in attempting to assert privilege after the original inadvertent disclosure. Third, a "significant number" of documents had been inadvertently disclosed. Fourth, there would be no "fairness" in precluding the SEC from using the documents.

SEC v. Collins & Aikman Corp, et al., 2009 U.S. Dist. LEXIS 3367 (S.D.N.Y. Jan. 13, 2009). In this securities fraud action brought by the SEC, the court addressed "important questions concerning the Government's discovery obligations in civil litigation." In ruling on a defendant's objections to the manner in which the SEC responded to his requests to produce, the court held that the SEC's production of some 1.7 million documents (10.6 million pages) in categories corresponding to the requests would not violate work product protection, and, even if it did, the difficulty of searching an unorganized collection of that size would constitute "undue burden" on the requesting party. The court also held that the collection was not assembled in the "usual course of business," as it resulted from an investigation. Thus, the SEC did not have the option of producing it without the categorical identification. The court also found that "[t]he SEC's

blanket refusal to negotiate a workable search protocol ... is patently unreasonable,” rejecting the SEC’s unilateral decision to limit its search to three divisions in response to certain requests to produce. Noting the proportionality provisions of Rule 26(b)(2)(C), the court observed that the requests “seem particularly reasonable in an action initiated by the SEC.” The court chided the parties for their failure to engage in a 26(f) process and drew their attention to The Sedona Conference® *Cooperation Proclamation*. Additionally, the court found that the SEC’s privilege log was deficient as a guide to its invocation of the deliberative process privilege and directed an *in camera* review. Finally, the court found the SEC’s blanket objection to producing email unacceptable and ordered that the parties meet and confer to develop a means to sample the email.

***In re September 11th Liability Insurance Coverage Cases*, 243 F.R.D. 114 (S.D.N.Y. 2007).** On September 11, 2001, Zurich’s chief underwriter for the United States ordered that a copy of Zurich’s policy relating to the World Trade Center be printed out for her files. The electronic copy was then deleted from Zurich’s computerized document library. Existence of the paper copy was not disclosed until after depositions in the ensuing litigation had been completed. The court found that Zurich’s “culpable state of mind” in causing the key document to be “buried in a box for nearly two years” justified imposition of \$750,000 in sanctions under Rule 11 as well as \$500,000 in sanctions under Rule 37.

***In re Seroquel Products Liability Litigation MDL Docket No. 1769*, 2007 U.S. Dist. LEXIS 5877 (M.D. Fla. Jan. 26, 2007).** In a multidistrict pharmaceutical products liability case, a detailed Case Management Order requires the defendant to produce documents in .tif format with an accompanying full-text database to allow word searching and a “load file” consisting of 17 items of metadata for each document. The order also addresses initial cost allocation, data preservation, and the production of databases.

***In re Seroquel Products Liability Litigation*, 244 F.R.D. 650 (M.D. Fla. 2007).** In this multidistrict pharmaceutical products liability litigation, the judge relies heavily on *The Sedona Principles* and the *Manual for Complex Litigation* (4th) to find that the defendants engaged in “purposeful sluggishness.” Sanctionable conduct included producing electronically stored information without necessary metadata; producing multi-page TIFF images, some of which consisted of more than 20,000 pages; producing electronic documents without apparent bates numbering; producing 8% of the entire production as one lengthy document which could only be opened with a very powerful work station; and producing electronic files with no load files, rendering the production inaccessible and unusable. In addition, the plaintiff employed a “plainly inadequate” key word methodology “in secret” to cull responsive documents from the collections of 80 custodians, instead of engaging in a cooperative process with the plaintiff, and did not cooperate in good faith to identify responsive databases. The court noted that these and other technical problems “likely could have been resolved far sooner and less expensively had [the defendant] cooperated by fostering consultation between the technical staffs responsible for production. Instead, [the defendant] shielded its third party technical contractor from all contact with Plaintiffs. This approach is antithetical to the *Sedona*

Principles and is not an indicium of good faith.” The court reserved a determination of the appropriate sanctions, pending further discovery on the extent of prejudice to the requesting party and the costs incurred.

Simon Property Group, Inc. v. Taubman Centers, Inc., 2008 WL 205250 (E.D. Mich. Jan. 24, 2008). In a commercial real estate sales dispute, one of the parties issued a subpoena for documents under Fed. R. Civ. P. 45 on the nonparty equity agent. The nonparty objected, stating that the subpoena called for the production of over 250,000 electronic files and would take three employees and four weeks to answer. However, the objection was not raised until after the time allowed, and the court deemed it waived, ordering the parties to negotiate a narrower scope to the request to avoid undue burden on the nonparty.

Sims v. Lakeside School, 2007 WL 2745367 (W.D. Wash. Sept 20, 2007). In an employment discrimination case, the defendant moved to allow inspection of emails on a laptop computer furnished to the plaintiff while he was employed by the defendant. The court allowed the defendant access to any emails sent or received using the school’s email system, citing the clearly stated school policy that the system was only for school business, but denied access to emails sent or received using a web-based email account, citing a reasonable expectation in the confidentiality of attorney-client and marital communications.

Sit-up Ltd. v. IAC/Interactive Corp., 2008 U.S. Dist. LEXIS 12017 (S.D.N.Y. Feb. 20, 2008). In an action alleging breach of a non-disclosure agreement, plaintiffs sought sanctions for the defendant’s failure to preserve departed employees’ emails. The court found no evidence of negligence or bad faith and declined to impose sanctions.

Smith v. Cafe Asia, 246 F.R.D. 19 (D.D.C. 2007). In an employment discrimination suit based on sexual harassment, the defendant employer requested permission to inspect the plaintiff’s cell phone and copy sexually explicit images it alleges the plaintiff shared with co-workers. The plaintiff acknowledged that he possessed such images of himself and of acquaintances, denied that he willingly shared them, and objected to disclosure because any probative value the images have in discovery or as evidence would be outweighed by the potential prejudice. The court, stating “the question of discoverability is inseparable from admissibility,” ordered that the images be preserved until a determination on admissibility by the trial judge, but that disclosure be limited to one attorney designated by the defendant.

Smith et. al. v. Slifer Smith & Frampton/Vail Associates Real Estate, LLC, et. al., 2009 WL 482603 (D. Colo. Feb. 25, 2009). In a real estate transaction dispute, the plaintiffs moved for spoliation sanctions, based on the defendant expert’s own report that one of the individual defendants had installed a wiping program on his home computer. Further investigation by the plaintiff’s expert pinpointed the times when the wiping program was used and the extent of files deleted. Further the defendants failed to preserve relevant data on a central server, based on the assumption that it would be duplicative of data on the individual defendants’ computers. The defendants challenged

the plaintiffs' conclusions that the file deletions were intentional or calculated to impede discovery, but the court held that the circumstance "strongly supports" a finding "by a preponderance of the evidence" that the defendant s destroyed evidence in bad faith to prevent disclosure, that the missing evidence was likely relevant to the issues in the case, and that the plaintiffs' ability to litigate their claims had been substantially prejudiced. However, the court did not recommend entry of default judgment, but opted for an adverse inference instruction to the jury and granted leave to the plaintiffs to amend their complaint to add a claim for exemplary damages based on the adverse inference.

Southern New England Tel. Co. v. Global NAPs, Inc., 2008 WL 2568567 (D. Conn. June 23, 2008). A telecommunications company sued a long-distance service for misrouting long-distance traffic to avoid paying applicable access charges, resulting in a Prejudgment Remedy against the defendants in the amount of \$5.25 million. In further proceedings, the plaintiffs sought discovery of the defendant's corporate structure, assets, and financial condition. The defendant stalled on producing any financial statements, tax returns, accounting records, or other documents, claiming that they were not in the defendant's "custody or control," but in the hands of various nonparties. Later the defendant claimed that the office computer containing relevant data was dropped down a flight of stairs and removed from the office in pieces, never to be seen again. Later forensic analysis of the replacement computer revealed the use of file and disk-wiping utilities. The court found that the defendants engaged in the systematic, intentional destruction of evidence and made "willfully false" representations to the court, in violation of discovery orders and warnings from the court that continued discovery abuse would "likely result in the entry of default judgment." The court characterized the defendant's behavior as "the type of willful disregard for the process of discovery created by the Federal Rules of Civil Procedure that warrants the ultimate sanction of dismissal," and entered judgment against all the defendants, jointly and severally, for \$5.25 million, plus attorneys fees and costs in excess of \$600,000.

Spieker v. Quest Cherokee, LLC, 2008 WL 4758604 (D. Kan Oct. 30, 2008). In a putative class action over mineral lease royalty payments, the parties engaged in extensive negotiations over the defendant's production of ESI, including the use of search terms to identify potentially relevant files. The search terms resulted in identifying 32 gigabytes of data or an estimated 1.4 million pages of documents. The defendant refused to incur the anticipated production costs, including the document review costs, and the plaintiffs refused to narrow the scope of the key word search. The court held that the proposed discovery costs were disproportionate to the amount at stake at this stage of the litigation, as the class had not yet been certified, the discovery was not relevant to class certification issues, and the named plaintiffs claims did not exceed \$100,000. However, the court held open the possibility that at a later stage the proposed discovery may be proportionate to the amount at issue should a class be certified, and at that time the parties may want to consider reducing the document review costs by taking advantage of Fed. R. Evid. 502.

Sprenger v. Rector and Board of Visitor of Virginia Tech, 2008 WL 2465236 (W.D. Va. June 17, 2008). In an employment discrimination suit against a state university, the

defendant issued a subpoena under Rule 45 to obtain relevant emails of the plaintiff's husband from his employer, another state agency. The plaintiff moved to quash the subpoena on the grounds that the emails would be protected by spousal privilege. The defendant argued that the privilege did not apply, as both the husband and wife were on notice that they had "no expectation of privacy" under the employer's Internet use policy. Acknowledging that this was an issue of first impression in the Fourth Circuit, the court reviewed decisions from several circuits discussing the "reasonable expectation of privacy" in employer email systems and adopted a four-factor test from *In Re Asia Global Crossing, Ltd.*, 322 B.R., 247 (Bankr. S.D.N.Y. 2005): (1) whether the employee maintained a policy on personal use of the email system; (2) whether the employer monitored employee email use; (3) whether third parties had access to the email system; and (4) whether the employee notified the employee of the policy and monitoring. Based on the "sparse" record before it, the court found that while the employer had an Internet use policy, there was no evidence that employees were notified of the policy or that employee email use was monitored. The court quashed the subpoena, but invited the defendants to move for an evidential hearing if they wished to pursue the request further.

Square D Co. v. Scott Electric Co., 2008 WL 2779067 (W.D. Pa. July 15, 2008). In a trademark infringement action involving the sale of allegedly counterfeit circuit breakers, the court ordered the defendant to submit to a limited forensic inspection of its computer facilities, giving rise to numerous motions regarding the conduct of the inspection, including these cross-motions for sanctions. The court revisited the detailed ground rules for the inspection and criticized the defendant for raising objection to further narrow the scope of discovery on the day the inspections were to take place, particularly the defendant's insistence that bitstream images of hard drives made by the examiner not be allowed to leave the defendant's premises. However, the court declined to impose a sanction of default on the defendant, finding that the defendant's action "falls just shy of conduct befitting default judgment." The court ordered immediate compliance with previous discovery orders, fees and costs, and personal appearance by all counsel at a court status conference upon completion of the inspection.

Sterle v. Elizabeth Arden, Inc. 2008 WL 961216 (D. Conn. Apr. 9, 2008). In a wrongful termination action, the plaintiff sought production of seven specific sales performance reports, which the defendant claimed could not be located. The plaintiff then requested an order allowing inspection of the defendant's computer system, which the court granted, with the proviso that if the seven reports are not located, the plaintiff was to bear the entire cost of the inspection. On the date of the inspection, the defendant restricted the inspector's access to the computer system and otherwise obstructed the inspection. The plaintiff moved for default judgment. The court denied the motion, but the court ordered the inspection to proceed and the defendant to pay all costs associated with the original motion, the inspector's frustrated activities, and the subsequent enforcement proceedings.

Stone, et al. v. Lockheed Martin Corp., et al., 2009 U.S. Dist. LEXIS 12105 (D. Col. Feb. 2, 2009). The plaintiff in the early stages of this employment action filed an "Emergency Motion to Preserve Evidence" and attached 147 interrogatories. The

defendants filed a motion to stay discovery pending a ruling on its motion to dismiss. Granting the defendants' motion, the court found "it is clear that Plaintiff seeks to conduct extensive discovery in this case resulting in undue burden and expense to all parties," that "the defendant has a likelihood of prevailing on its motion to dismiss," and that no party would suffer substantial or irreparable harm by a stay pending a ruling on the motion to dismiss.

Suarez Corp. Ind. v. Earthwise Techs. Inc. 2008 WL 2811162 (W.D. Wash. July 17, 2008). In a trademark infringement action, the defendant produced 55,000 emails, nine boxes of paper printouts of .pdf files, and 9 CDs of data in native format. The plaintiff objected to the production as an unorganized "data dump" that was neither in organized or labeled to correspond to the categories of the requests, produced as kept in the normal course of business, nor produced in reasonably useable form. The court distinguished between a requesting party's right, under Rule 34, to request that electronically stored information be produced in a particular form or forms, and a demand by the plaintiff that the information be organized in a particular way. The court ordered the defendant to comply with the production requirements of Rule 34, and recommended that the parties work together to resolve any disputes. Further, the court declined the plaintiff's request to deem any objections the defendant may have to further discovery waived due to the failure of the defendant to fully respond within Rule 34's required 30 days, noting that both parties appear to be withholding further production until a confidentiality agreement can be reached and an appropriate protective order entered by the court.

SubAir Systems, LLC v. PrecisionAire Systems, Inc., et al., No. 1:06-cv-02620-RBH (D.S.C. Feb. 19, 2009). In this action, plaintiff allowed defendant counsel to inspect its documents on-site and designate documents for copying by a copy service. However, plaintiff refused to produce several of the designated documents to the defendant after copying, claiming that they were privileged. Defendant moved to compel production of these documents, and the court considered whether the plaintiff had waived its privilege claims by failing to exercise reasonable precautions to prevent disclosure of the privileged documents during the inspection and copying process. The court found that although the plaintiff had identified and segregated the privileged documents, it failed to exercise appropriate supervision over defendant counsel in the reading room and failed to object to defendant counsel's designation of these documents before copying. The plaintiff therefore was held to have effectively waived its claims of privilege regarding these documents.

***In re* Teleglobe Communications Corp., 2008 WL 3198875 (Bankr. D. Del. Aug. 7, 2008).** In a complex adversary proceeding in bankruptcy court, the defendant debtors sought sanctions for the alleged spoliation of information "considered" by the creditor plaintiffs' expert witnesses in forming their opinions. Reviewing the developing case law and noting a split in authority, the court found that Rule 26(a)(2)(B) does not impose an obligation on a party to preserve or produce an expert's personal notes or draft reports. Factual communications from counsel to the experts may be required to be produced, but comments to the experts' draft by counsel or non-testifying experts retained by counsel were protected as work product.

Texas v. City of Frisco, 2008 WL 828055 (E.D. Tex. Mar. 27, 2008). The State of Texas filed a declaratory judgment action to determine its preservation obligations after receiving a “litigation hold” letter from the City of Frisco. The letter demanded that the State preserve all data associated with planning a highway and stated “a potential exists for litigation in connection with the conversion of SH 121 into a tollway.” The court held that the mere threat of litigation was “insufficiently immediate to establish an actual controversy” between the City and the State, and that it therefore had no jurisdiction over the State’s complaint.

Thielen v. Buongiorno USA, Inc., 2007 WL 465680 (W.D. Mich. Feb. 8, 2007). In a civil action under the Telephone Communication Privacy Act alleging unsolicited text messaging to cell phones, the defendant sought direct access to the plaintiff’s computer to determine whether the plaintiff had consented to the defendant’s text messaging service. The plaintiff objected, claiming undue burden. The court applied Fed. R. Civ. P. 26(b)(2)(B) and found that the plaintiff had not demonstrated that the requested discovery was from sources “not reasonably accessible,” and therefore discovery should be allowed. However, applying Rule 26(b)(2)(C), the court found good cause for entry of a protective order to prevent “wholesale rummaging” through the plaintiff’s computer. The inspection would be conducted by an independent forensic examiner, who would provide a report first to counsel for the plaintiff who would be allowed time to file for any additional protective order before the report would be turned over to counsel for the defendant, who would bear the cost of this discovery.

Thomas v. IEM, 2008 WL 695230 (M.D. La. Mar. 12, 2008). In this civil rights action alleging violation the Family and Medical Leave Act, the plaintiff served a Rule 45 subpoena on the defendant, her former employer, seeking production of a complete electronic copy of the e-mail boxes of nine named individuals as they appeared on a specified date. The defendant objected to the use of the Rule 45 subpoena process on a party as an attempt to circumvent the discovery deadlines, and argued that the information sought was irrelevant, confidential, duplicative, and unduly burdensome. The court denied the plaintiff’s motion to compel production under the subpoena, as the information sought constituted discovery within the meaning of Rules 26 and 34 and the request was not limited in time or subject matter.

3M Company v. Kanbar, 2007 WL 1725448, (N.D. Cal. June 14, 2007). In a trademark infringement suit, the defendant moved to compel 3M to “organize” or “itemize” the documents produced in response to its requests. The court found that while broad descriptions of categories of documents may be sufficient to meet the disclosure requirements of Rule 26(a), the production of 170 boxes of undifferentiated printed documents, mostly from electronic sources, did not meet the requirements of amended Rule 34(b). The court noted that the defendant’s problem is “essentially of its own making,” reflecting the defendant’s broad requests. Nevertheless, the court ordered 3M to produce requested information in a “reasonably usable” electronic format and required counsel for both parties and their respective information technology consultants to immediately confer and agree on what “reasonably useable” means in this context.

Toth, et al., v. Calcasieu Parish, et al., 2009 U.S. Dist. LEXIS 16116 (W.D. Louis. Mar. 2, 2009). In a case alleging abuse by hotel casino security guards and reserve Sheriff's Department officers alleged to have occurred during Hurricane Rita, the plaintiffs sought discovery of surveillance videotape and electronic personnel records. Defendants responded that the surveillance cameras were not operational during the storm and that the relevant personnel records either did not exist or were maintained in an out-of-state office. The court held that plaintiffs failed to present evidence that the requested surveillance tape recordings or personnel records existed or that defendants had acted in bad faith, but agreed to reconsider a motion for sanctions should sufficient evidence of culpable destruction be presented at trial.

Toussie v. County of Suffolk, 2007 U.S. Dist. LEXIS 93988, 2007 WL 4565160 (E.D.N.Y. Dec. 21, 2007). In a civil rights action against a local government, the defendant took no action to preserve email in an accessible format after a duty of preservation arose, allowing the email to accumulate instead on disaster recovery backup tapes. The plaintiffs obtained an order compelling the production of responsive email from the backup tapes, necessitating the defendant to hire a computer forensics firm to restore 417 backup tapes at a cost of between \$400,000 and \$963,000 and resulting in the production of 2403 pages of responsive email. The plaintiff then moved for sanctions, including an adverse inference jury instruction or default judgment, against the defendant. The court found that the defendant had a duty to preserve email and its failure to suspend its routine ESI destruction policy was at least negligence. But since the plaintiff failed to establish prejudice resulting from that conduct, the court limited the sanctions to the costs of obtaining the discovery.

Tomlinson v. El Paso Corp., 245 F.R.D. 474 (D. Colo. 2007). In an employee benefits dispute, employees sought the production of electronic pension plan records from the employer, which were in the possession of a non-party plan administrator. The court held the data was in the defendant's "possession, custody or control" within the meaning of Fed. R. Civ. P. 26(a)(1)(B), citing the defendant's statutory obligation under the Employment Retirement Income Security Act (ERISA) to maintain the data for inspection or examination.

Treppel v. Biovail Corp., 2008 WL 866594 (S.D.N.Y. Apr. 2, 2008). Following an order compelling responses to specific discovery requests but declining to issue a preservation order, 233 F.R.D. 363 (S.D.N.Y. Feb. 6, 2006), the plaintiff moved to compel additional ESI and for sanction for failure to preserve evidence. The court found that the plaintiff's request for further discovery from servers in Barbados and Canada were unlikely to yield additional relevant information and narrowed the request to specific date ranges. On the preservation issues, the court found the defendant's preservation efforts to be "clearly inadequate," applying the standards of *Zubulake*, but that the defendant did not violate any specific order of the court. The actions of the defendant were merely negligent, and the plaintiff failed to establish prejudice as a result. The plaintiff's remedies are limited to an order compelling the defendant to restore and search likely sources of responsive data and forensic inspection of particular computers at the defendant's expense.

U & I Corp. v. Advanced Medical Design, Inc., 2007 U.S. Dist. LEXIS 86530, 2007 WL 4181900 (M.D. Fla. Nov. 26, 2007). Plaintiff and defendant filed cross-motions to compel the production of email from the hard drives of three plaintiff employees and for a protective order in this breach of contract action. In addition, a nonparty filed a motion to quash a subpoena for the email under Rule 45. The court rejected the vague assertions of undue cost and burden offered by the plaintiff and nonparty. The court ordered the nonparty to proceed with its production, and deferred consideration of the protective order pending the results of the nonparty production and receipt of a detailed affidavit from the plaintiff as to why the backup tapes were “unloadable,” as asserted.

United Medical Supply Co., Inc. v. United States, 77 Fed. Cl. 257 (Fed. Cl. 2007). The plaintiff filed for bankruptcy in 2001, after a 4-year requirements contract to supply military medical facilities in Texas and Oklahoma ended. In September 2002, the plaintiff filed an adversary proceeding in bankruptcy court to recover damages from the United States, alleging that the defendant had diverted funds and procured its own supplies from other vendors, in breach of contract. The proceedings were transferred to the Court of Federal Claims in December 2002. For approximately four years the defendant made numerous half-hearted and incomplete attempts to collect relevant documents from 21 sites with little success, resulting in the loss or destruction of discoverable information. Reviewing the precedents on spoliation in great detail, the court concluded that a finding of bad faith was not necessary for the imposition of sanctions, holding that “repeated acts of gross negligence, particularly if accompanied by inaccurate representations to the court that serve to mask and perpetuate the spoliation, can be met with the same or a more severe sanction than a single act of bad faith.” After detailed analysis of the circumstances of this case, the court ordered that the defendant be precluded from offering expert testimony or cross-examining the plaintiff’s expert on issues extrapolated from the missing documents, and the defendant must pay the plaintiff’s attorneys’ fees and other discovery-related costs.

United States *ex rel.* Kelly v. Hawaii Pacific Health, 2008 U.S. Dist. LEXIS 4933 (D. Haw. Jan. 22, 2008). In a *qui tam* action over the submission of false reports, defendants initially denied the existence of requested records, but later revealed that they had them in microfiche format when faced with a Rule 30(b)(6) deposition and plaintiff’s request to inspect computer hard drives. In addition, the court questioned the defendant’s production of PDF-format images of documents, the integrity and authenticity of which were in question, but deferred the plaintiff’s motion for production of the documents in native format pending additional briefing.

United States v. Premera Blue Cross, 2007 WL 852080 (S.D. Ohio Mar. 16, 2007). In this False Claims Act case, the plaintiff subpoenaed nonparty PriceWaterhouseCoopers (“PwC”), the defendant’s audit firm, to obtain relevant emails, including archived emails. PwC informed the court that it could produce “some” of its client’s emails, but objected to undetermined costs. The court took PwC’s representation to mean that PwC had already retrieved all of the emails at its own expense and was objecting only to the cost of

production. Therefore, the court ordered nonparty PwC to provide all 6,500 emails to the plaintiff and send a bill to plaintiff's counsel for the cost of production only.

University of Pittsburg v. Townsend, 2007 WL 1002317 (E.D. Tenn. March 20, 2007). In this misappropriation of trade secrets case, defendants alleged that they were entitled to discovery of drafts of the plaintiff's expert's report and email communications between the expert and counsel. Relying on Rule 26(a)(2), which states that "the data or other information considered by the witness in forming the opinions" must be disclosed. The court held that drafts were not "data or other information . . . considered by the witness" and therefore need not be disclosed. Further, the court held that to require that expert witness drafts be disclosed "would virtually nullify the expert disclosure deadline established by the court." However, the emails between counsel and the expert containing "data or other information considered . . . in forming the [expert's] opinions" should be disclosed, pursuant to Rule 26(a)(2).

Valdez v. Town of Brookhaven, 2007 WL 1988792 (E.D.N.Y. July 5, 2007). In a civil rights case alleging that town officials targeted Latino residents for discriminatory housing code enforcement actions, the plaintiffs sought an order that defense counsel send a litigation hold notice to town employees and conduct an investigation to determine what documents, "electronic or otherwise," may have already been lost or destroyed, based on an alleged remark by defense counsel that the town "has a history of terrible record keeping." Because the duty of preservation is established in law and "preservation orders are burdensome and expensive," the court denied the request "in the absence of clear need."

Vaughn v. City of Puyallup, 2007 U.S. Dist. LEXIS 84380, 2007 WL 3306743 (W.D. Wash. Nov. 6, 2007). In an employment discrimination suit against a municipal police department, the plaintiff filed a motion requiring the defendant "conduct and document, such that it is comprehensible to Plaintiff, a reasonably comprehensive search of its electronic records for documents responsive to Plaintiff's discovery." The court denied the motion, holding that while the defendant was obligated to produce responsive and non-privileged documents, there is no "authority for the proposition that the court should enforce Plaintiff's subjective notion of how defendant should conduct discovery" absent any demonstration of wrongdoing.

In re Veeco Instruments, Inc. Securities Litigation, 2007 WL 983987 (S.D.N.Y. April 2, 2007). In this securities litigation, the plaintiff sought to compel discovery of backup tapes from all the individual defendants. The defendants contended that restoring the back-up tapes could cost upwards of \$124,000. The court noted "surprisingly" that the parties had neither entered into any electronic discovery protocol nor had they discussed searching backup tapes. Applying Rule 26(b)(2)(B), the court determined without analysis that the backup tapes were not reasonably accessible, but the plaintiff had established "good cause" for further discovery. The court listed the *Zubulake* factors and held that the defendant must initially assume the cost of searching for relevant documents on the back-up tapes and prepare an affidavit detailing the results and costs. Once a

partial search is done, the court can then query whether cost-shifting under *Zubulake I* is appropriate.

Verigy US, Inc. V. Mayder, 2007 WL 3144577 (N.D. Cal. Oct. 24, 2007). In a trade secret theft case, the plaintiff moved to compel production of a bitstream image of “all hard drives” of the defendant under a proposed protocol by which a third party expert would conduct any searches. The defendant agreed to almost all aspects of the protocol, but demanded that the protocol provide the defendant with the opportunity to review and object to the proposed search criteria before the expert executed it. The court agreed with the defendant, but admonished the parties to “proceed in good faith and to refrain from conduct designed to unnecessarily encumber or retard discovery or to impose unnecessary expense or burden on the opposing parties or the court.”

Viacom International, Inc. v. Youtube, Inc., 07 Civ. 2103 (S.D.N.Y. July 1, 2008). In a copyright infringement suit brought by the rights holders of television programs, motion pictures, music videos, recorded sports events, and other entertainment programs against YouTube, a video-sharing website, and Google, a search engine site and owner of YouTube, the plaintiffs sought discovery of several categories of electronically stored information relevant to its claims that YouTube and Google were aware that users were unlawfully posting and accessing copyrighted works on YouTube, that YouTube and Google benefited financially from that unlawful traffic, and that the volume of that unlawful traffic was substantial enough to defeat any defense that YouTube and Google might have of “substantial noninfringing use” for the web site. Among the categories of ESI sought by the plaintiffs was the defendants’ “logging database,” which contained, for each instance of a video being watched, the “login ID” of the user, the Internet Protocol (IP) address of the user’s computer, the identification code of the video, and the time the user started watching the video. The data, estimated at 12 terabytes, was stored on the defendant’s hard drives. The defendants objected to the request on the bases of burden and user privacy. The court found that the data could be copied onto “a few ‘over-the-shelf’ four-terabyte hard drives,” were unlikely to need review for privilege, and were unlikely to implicate any privacy concerns, as the login ID and IP addresses could not easily be used to identify any specific individuals. The court barred discovery of YouTube’s proprietary source code, and restricted discovery of the content of any videos identified as “private” by users, citing the prohibitions of the Electronic Communications Privacy Act, 18 U.S.C. §2510 *et. seq.*

Victor Stanley, Inc. v. CreativePipe, Inc., 2008 WL 2221841 (D. Md. May 29, 2008). The plaintiff sought an order from the court that 165 electronic documents produced by the defendant are not exempt from discovery as privileged attorney-client communication and/or work product protected material, as claimed by the defendant. The documents were produced by the defendant as part of a larger production of approximately 9000 documents in .pdf format, the result of a keyword search. Citing *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, the court found that the defendants failed to exercise reasonable care in performing the search, conducting no sampling of quality assurance; “[r]ather, it appears from the information that they provided to the court that they simply turned over to the

Plaintiff all the text-searchable ESI files that were identified by the keyword search ... as non-privileged.” In addition, the defendant declined an opportunity to enter into a “claw-back” agreement with the plaintiff and failed to adequately identify these documents and the privilege claims asserted on their privilege log.

***In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. Sept. 4, 2007).** In this multidistrict pharmaceutical products liability suit, the defendant claimed attorney-client privilege on approximately 30,000 electronic documents, which the trial court reviewed individually *in camera*. The defendant filed a writ of mandamus seeking review of the court’s privilege rulings. The writ was denied by the appellate court on jurisdictional grounds, *see In re Vioxx Prods. Liab. Litig.*, 2006 WL 1726675 (5th Cir. May 26, 2006), but the dispute remanded to the trial court with instructions to reexamine a subset of disputed documents, selected by the defendant, pursuant to a different review protocol. The trial court appointed a special master to reexamine the subset of documents, promulgate substantive guidelines and issue a set of initial recommendations regarding the documents claimed as privileged. The trial court adopted in part the special master’s recommendations on representative documents and modified it in part based on objections by the defendant.

***Wachtel v. Health Net, Inc.*, 239 F.R.D. 81 (D. N.J. Dec. 6, 2006) (“Wachtel II”).** In a long-standing ERISA suit brought by beneficiaries against healthcare insurance providers, the district judge noted “a lengthy pattern of repeated and gross non-compliance with discovery” resulting in a “staggering” waste of judicial resources through years of policing defendant’s discovery responses. Specifically related to electronic discovery, the defendants are found to have ignored preservation obligations, delayed conducting searches of email until after the email had been routinely destroyed, failed to inform its own outside counsel of the existence of relevant data, and ignored explicit judicial orders to produce email. Sanctions imposed by the court included striking of the defendant’s filings in support of summary judgment, striking of several other pleadings, imposition of costs, appointment of a special master at the defendant’s expense, and consideration of personal sanctions against one of the defendant’s attorneys.

***W.E. Aubuchon Co. v. Benefirst, LLC*, 245 F.R.D. 38 (D. Mass. 2007).** In an employee benefits administration case, the defendant, which was out of business, held tens of thousands of claim-administration records as scanned images, which were indexed only by the name of the claim-administrator. The plaintiff requested all records relevant to the administration of its employees’ claims. The court found that the estimated \$80,000 cost to manually review the entire collection and retrieve the responsive records sufficient to hold that electronically stored information was “not reasonably accessible” under Fed. R. Civ. P. 26(b)(2)(B).

***Wells v. Berger, Newmark & Fenchel, P.C.*, 2008 U.S. Dist LEXIS 21608 (N.D. Ill. Mar. 18, 2008).** In an employment discrimination suit alleging sexual harassment, the plaintiff complained that her former firm ignored the harassing emails sent to her by a senior partner and failed to preserve relevant ESI by allowing the partner to use his computer routinely for more than a year and to delete sexually explicit images and

messages, which the partner claimed were not relevant to the action. The court ordered that an adverse jury instruction would be issued about the firm's failure to search or preserve the computer hard drive.

Wells v. XPEDX, 2007 WL 1200955 (M.D. Fla. Apr. 23, 2007). In this employment discrimination suit, plaintiff sought discovery to obtain emails about or related to certain employees over the span of one year. Defendant contended that a deposition was not necessary, because the e-mail deletion policy was clear and provided to the plaintiff. Citing *Peskoff v. Faber*, 2007 U.S. Dist LEXIS 11623 (D.D.C. Feb. 21, 2007), the court explained that the producing party has an obligation to provide all relevant, non-privileged emails available to them, included deleted emails. The court held that the defendant had not provided sufficient information to the plaintiff about the scope of its search for email or its actual deletion procedures, and it ordered further discovery of the defendant's IT system by a telephonic deposition.

White v. Graceland Coll., 2008 WL 3271924 (D. Kan. Aug. 7, 2008). In an employment action under the Family Medical Leave Act alleging wrongful termination, the plaintiff moved to compel production of information on the defendant's document retention policy, identification of all computers and data storage devices used by the defendant's management or human resources departments, and identification of all documents related to the plaintiff found on those devices. The court found that the defendant's prior responses to discovery on these topics to be sufficient and refused to compel further production. The plaintiff also requested that the defendant produce email and attachments in native format that had previously been produced in paper, in order to determine the date on which the documents had been generated. The defendant contended that the plaintiff did not specify the form of production in her request and that paper printouts, derived from .pdf images of the computer files, were "reasonably useable" under Rule 34(b)(2)(E)(ii). Noting that this dispute could have been avoided if the parties had met and conferred before discovery under Fed. R. Civ. P. 26(f) and Kansas District Court Guideline 4(f), the court determined that the paper production was inadequate and ordered production in native form of specified documents within 30 days.

Whitney v. JetBlue Airways Corp., 2008 WL 2156324 (E.D.N.Y. April 29, 2008). An airline passenger was injured by another passenger while about a flight, and sued the airline for failure to protect and negligence. During the flight on which the altercation occurred, a flight attendant completed a handwritten "Inflight Irregularity Report" documenting the incident, which was then entered into the airline's safety database. The handwritten report was admittedly destroyed as part of a bulk storage destruction program. The plaintiff moved for spoliation sanctions, claiming that there was now no way to verify whether the database entry accurately reflected the handwritten report. The court found that there was a duty on the part of the airline to preserve the document, but did not find that the plaintiff was materially prejudiced or that the destruction was any more than "a disturbing amount of carelessness." The Court denied the plaintiff's motion for judgment, adverse inference and exclusion of evidence, but nonetheless awarded attorneys fees and costs.

Williams v. Armstrong, 2007 WL 1424552 (W. D. Mich. May 14, 2007). In a prisoner civil rights case, the defendant denied the existence of requested emails, and the Magistrate Judge denied the plaintiff's subsequent motion to compel, holding that the plaintiff "advanced neither argument nor evidence calling into question the veracity of Defendant's responses." The District Judge remanded the decision back to the Magistrate Judge, citing other documents produced by the defendant which referenced potentially responsive email and stating the "computer data, even when deleted, is maintained in computer system as replicant data... which is subject to production and discovery."

Williams v. Sprint/United Management Co., 2006 WL 3691604 (D. Kan. Dec. 12, 2006). In an employment suit alleging age discrimination in reduction-in-force ("RIF") activities, the plaintiffs sought and obtained a prior order to compel the production of Excel spreadsheets in native format, to enable review non-apparent information lost in .tif (tagged image file) format initial production. In this subsequent opinion, the plaintiffs have moved to compel the production of emails in native format as well, claiming that they are unable to electronically access attachments referenced in email messages produced as images. The court denied the plaintiffs' motion in this instance, citing the failure of the plaintiffs to demonstrate a need for native format production to supplement what they already had, as the defendant was providing the plaintiffs with adequate information for the plaintiff to manually relate the imaged email messages to the attachments.

Williams v. Taser International, Inc., 2007 U.S. Dist. LEXIS 40280 (N.D. Ga. June 4, 2007). Noting that discovery in this wrongful death action has "proceeded far too slowly, far too contentiously, and too often required this Court's involvement to resolve numerous discovery disputes," the court ordered a detailed protocol for identifying responsive documents from the defendant's database of internal electronic communications, including 21 key word, phrase, and short Boolean proximity searches. The court ordered a "clawback" procedure to address the inadvertent production of privileged information, but warned the defendant that it must make "all reasonable efforts to comply" with discovery obligations, including "retaining additional IT professionals to search electronic databases and adding additional attorneys to perform document review."

Williams v. Taser International, Inc., 2008 U.S. Dist. LEXIS 4263 (N.D. Ga. Jan. 22, 2008) ("Williams II"). In this wrongful death action, the court held that defendant failed to provide a timely and meaningful privilege log as required by Fed. R. Civ. P. 26(b)(5)(A) and as a consequence had waived its privilege claims. The court ordered the defendant to produce all the documents identified on the privilege log.

Wingnut Films, Ltd. v. Katja Motion Pictures Corp., 2007 WL 2758571 (C.D. Cal. Sept. 18, 2007). In a highly contentious contract dispute, the plaintiff alleged that the defendant repeatedly certified that they had fully complied with court-ordered discovery without producing any correspondence, memoranda, e-mail, notes, work papers or litigation settlement documents. The court, relying on *Tulip Computers Int'l B.V. v. Dell Computer Corp.*, 2002 WL 818061 (D. Del. Apr.30 2002), ordered the defendant to

retain an outside vendor to access servers and hard drives of specified employees and conduct keyword searches for responsive documents and e-mails. The court also imposed monetary sanctions on the defendant under Fed. R. Civ. P. 37(b)(2) and 26(g)(3) in the amount of \$125,000.

World Courier v. Barcone, 2007 WL 1119196 (N.D. Cal. Apr. 16, 2007). The plaintiff sought sanctions and an adverse inference instruction for the intentional destruction of electronic evidence by the defendant's husband. Relying on *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), the court held that parties have a duty to preserve evidence if they have access to or indirect control over it. Applying the 2d Circuit's test from *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F. 3d 99, (2d Cir. 2002), the court found that monetary sanctions and an adverse inference instruction would be appropriate after a full development of the record to determine the extent of bad faith.

In re World Trade Center Disaster Site Litig., 2008 WL 793578 (S.D.N.Y. Mar. 24, 2008). In this ongoing multi-district insurance litigation, the plaintiffs objected to the court-appointed special master's recommendation that a third party be hired to build, maintain, and operate a database of "Core Discovery." The plaintiffs' objection focused on the expense and lack of necessity to create such a large database. In approving the creation of the database, the court held that with 10,000 cases before it, the potential benefits of centrally managing vast quantities of information outweigh the cost.

Xpel Tech. Corp. v. Am. Filter Film Distrib., 2008 WL 744837 (W.D.Tex. Mar. 17, 2008). In this copyright infringement claim, the plaintiff filed a motion for expedited computer forensic imaging of various electronic media, alleging that immediate action to preserve volatile system data, log files, and metadata was needed. Finding the plaintiff had demonstrated good cause under Rule 26(d), the court ordered the defendant to produce computers, servers and other electronic storage devices for bit-for-bit imaging and MD5 hash value authentication by a specified forensic examiner, with costs to be borne by the plaintiff.

Yeisley v. PA State Police, 2008 WL 906465 (M.D. Pa. March 31, 2008). In this civil rights litigation alleging malicious or retaliatory prosecution, the plaintiff moved for sanctions against the defendant for failure to produce requested e-mail. The defendants claimed that delays were attributable to a substitution of counsel and efforts to fully comply with discovery requests. The court ordered supplemental depositions of select witness at the defendant's expense, and ordered the defendants to promptly search and produce electronic records, including e-mail, or face further sanctions.

Young v. Pleasant Valley Sch. Dist., 2008 WL 2857912 (M.D. Pa. July 21, 2008). In a civil rights action against a school district alleging improprieties involving a particular teacher, the plaintiffs requested that the defendant school district be required to conduct a search through deleted emails for previous complaints similar to the plaintiff's about that teacher. The court agreed that the request was within the scope of permissible discovery, but concluded that it lacked sufficient information to determine whether the costs and burdens associated with such a search outweighed the benefits. In a subsequent filing,

the defendant represented that the search would initially cost about \$10,000, require the search of “easily millions” of emails using key words and other filtering techniques, and require the review of an undetermined number of potentially responsive files. The court refused to permit the plaintiff’s expert to conduct the search as “contrary to the spirit of the Federal Rules.” It applied the factors of Rule 26(b)(2) to find that the costs and burdens of restoration and production outweighed the potential benefits, and recommended that the parties pursue more cost-effective avenues of discovery.

Zurich American Insurance Co. v. Ace American Reinsurance Co., 2006 U.S. Dist. LEXIS 92958 (S.D.N.Y. Dec. 22, 2006). In a reinsurance action alleging bad faith failure to pay claims, the plaintiff sought production of documents related to a particular category of claim denials. The defendant objected, stating that it was unable to segregate claim files by category of claim denial. The court expressed “little sympathy” for a defendant with an “opaque data storage system” and ordered the parties to devise a protocol for sampling the data.