SPRING 2024 E-NEWSLETTER

At Digital Mountain, we assist our clients with their electronic discovery, digital forensics, cybersecurity, and data analytics needs. For this E-Newsletter, we discuss how rapidly changing technology causes eDiscovery nuances, the complexities of smartphone preservations, and how courts are handling inadvertent production failures.

Courts Not Amused with eDiscovery Oopsies

Judges have heard every justification imaginable, so perhaps that is why when it comes to failing to produce evidence, especially evidence covered in discovery orders, judges are not amused with creative explanations or convoluted excuses. And yet, motions and orders dealing with failure to produce or other eDiscovery oopsies continue to show up in court pleadings. 2024 may continue this trend as we're already seeing some interesting developments in the courts regarding production failures – and judges appear to be practicing selective deafness when it comes to the excuses.

Incomplete Search Equals Failure to Produce

February 14, 2024, was not a sweet day for the plaintiff in *Marissa Giannerini v. Embry-Riddle Aeronautical University, Inc.* (No. 6:22-cv-2075-RBD-LHP, U.S. Dist. Ct., M.D. Florida, Orlando, 2024). In the Order filed in response to the defendant's Motion to Compel Complete Text Message Production, Judge Leslie Hoffman agreed that by not searching logical variations of search terms, the plaintiff had failed to conduct a complete search and production. Judge Hoffman ordered Plaintiff Giannerini to conduct another search "by utilizing the search terms previously set forth…to include all reasonable variations of those words…" Furthermore, Judge Price's Order includes a detailed list of the expected elements of the search, including the review tool and processes used, and concludes with a warning that failure to comply will result in sanctions against the offending party. The original search terms were "termination," "lawyer," "alcohol," "drink," and "anxiety."

Should Have Known Better

Another Florida case, *Sarabeth DeMartino v. Empire Holdings and Investments, LLC, Juan Carlos Marrero*, (No 22-cv-14301-Cannon/McCabe, U.S. Dist. Ct. S.D. Florida) came before Judge Aileen Cannon and the Motion for Sanctions was referred to Judge Ryon M. McCabe. In this pregnancy discrimination suit, Defendant Marrero produced screenshots of texts "*to or from* Plaintiff, but not necessarily text messages…*about* Plaintiff." During questioning regarding the disposition of his

text messages, Defendant Marrero claimed he had no idea what happened to his text messages and that he had not deleted them. eDiscovery experts conducted forensic examinations of the defendant's two phones, producing additional relevant results. However, the text messages provided earlier via the defendant's self-collected screenshots were not found, leading to the conclusion that the defendant had deleted text messages. Judge McCabe concluded it would therefore be reasonable to surmise that other responsive messages had been deleted or that an auto-delete setting had not been disabled (the defendant also failed to purchase adequate iCloud storage despite a warning from Apple that he was running low). Finally, the Court found that the defendant's "relative level of sophistication" was such that he should have understood what his preservation obligations entailed.

While it might seem reasonable to assume that what came next in the Order was sanctions, alas, that's not the case. Judge McCabe also found that the plaintiff did not prove her burden to show that the ESI couldn't be produced through other sources. Plaintiff neither sought the text messages from "third parties who reasonably might have communicated with" Defendant Marrero, nor did she attempt to obtain the texts from the carrier. Although Judge McCabe acknowledges that the carrier may not have cooperated with a subpoena under the Stored Communications Act, he notes that the plaintiff's failure to try constitutes an unmet burden of proof. Motion for sanctions was denied – everyone should have known better.

You Can't Always Get What You Want

Finally, in a case where monetary sanctions were awarded in response to a failure to produce, there was another interesting turn of events. Judge Teresa James in her Memorandum and Order in *Roadbuilders Machinery and Supply Company, Inc. v. Sandvik Mining and Construction USA, LLC* (No. 2:22-cv-2331-HLT-TJJ., 2024), reviews a complicated series of productions that covered many months, proceedings, documents, depositions, and "soft-deleted" emails (electronic mail that is deleted from a device but is recoverable from another source). Ultimately, her Order focuses on the emails of two individuals that amounted to a failure to produce.

Again, the lengthy discussion of the conduct of the defendant would logically foreshadow that discovery sanctions are in the offing…but no…because the sanction requested by Plaintiff was deemed by Judge James to be unjust. The plaintiff requested that the Court admit as fact a key element in its case against the defendant as the sanction. Judge James writes, "The basis of the sanction is Defendant's failure to timely obey the Court's Discovery Order. Indeed, Defendant failed altogether to produce emails relevant…until after their existence was discovered through third-party subpoenas." However, she goes on to declare that the content of the emails in question do not prove the premise that Plaintiff requests be admitted as fact via sanction. "Clearly, a factual question exists…" she continues. Despite the denial of the specific sanction requested, Judge James did open the door to an award of fees and expenses to be determined by a supplemental filing, as a sanction to address how "Defendant's conduct wasted a considerable amount of the Court's time and resources," as well as the prejudice suffered by the Plaintiff by the late production.

Beyond the long-held principle that discovery is a vital phase of trial procedure, judges expect parties to conduct themselves respectfully and professionally. Wasting the court's time is considered neither. While potentially not egregious enough to lead to sanctions, banking on judges appreciating the creativity of the justification, a custodian's lack of technical knowledge, or simply making mistakes in the process is clearly not a winning strategy either. The best bet? Seek the assistance of experienced, professional eDiscovery practitioners, like Digital Mountain, to help ensure that an "oopsie" doesn't become a failure to produce.

Please direct questions and inquiries about electronic discovery, digital forensics, cybersecurity, and data analytics to info@digitalmountain.com.

UPCOMING INDUSTRY EVENTS

MASTERS CONFERENCE MAY 2024
Chicago, IL: May 15, 2024

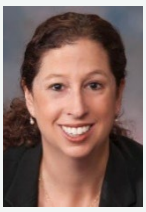
NET DILIGENCE CYBER RISK SUMMIT
San Diego, CA: May 20-22, 2024

SNOWFLAKE DATA CLOUD SUMMIT 2024
San Francisco, CA: June 3-6, 2024

TECHNO SECURITY & DIGITAL FORENSICS CONFERENCE EAST
Wilmington, NC: June 4-6, 2024

IOT TECH EXPO 2024
Santa Clara, CA: June 5-6, 2024

Click here to see more upcoming events and links.



Digital Mountain, Inc. Founder and CEO, Julie Lewis, will be presenting at various upcoming industry events. Please send requests for speaker or panel participation for her to marketing@digitalmountain.com.

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