

New York Law Journal

Technology Today

WWW.NYLJ.COM

VOLUME 255—NO. 21

An ALM Publication

TUESDAY, FEBRUARY 2, 2016

FEDERAL E-DISCOVERY

Judge Imposes Sanctions, Questions Limits on Authority



By
**H. Christopher
Boehning**



And
**Daniel J.
Toal**

The lengthiest and most contentious debates surrounding the Dec. 1, 2015 amendments to the Federal Rules of Civil Procedure concerned new Rule 37(e), governing the sanctions available when parties fail to preserve electronically stored information (ESI).¹ Given those debates, many parties and practitioners were eager to see how new Rule 37(e) would be interpreted by the courts. They did not have to wait long. In his new decision, *CAT3 v. Black Lineage*,² Magistrate Judge James Francis—no stranger to the e-discovery world—has provided the first thorough judicial interpretation of new Rule 37(e) and offered his opinion on some controversial language from the corresponding Advisory Committee Note concerning potential limits on judges' inherent power to sanction.³

'CAT3 v. Black Lineage'

The plaintiffs brought several claims, including trademark infringement and cybersquatting under the Lanham Act along with claims under New York law.⁴ The plaintiffs alleged that the defendants' "use of the trademark FLASHXHYPE and the domain name www.FLASHXHYPE.com"⁵ infringed on the plaintiffs' "trademark 'SLAMXHYPE' and the domain name www.SLAMXHYPE.com"⁶ utilized for their clothing sales, website, and online magazine business operations.

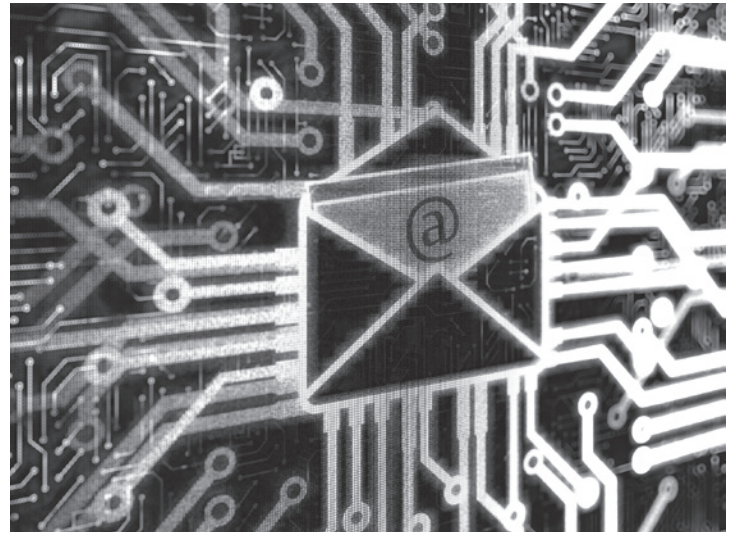
The plaintiffs indicated that their trademark stemmed from a rebranding effort and that

several employees of their predecessors, Marc Ecko Enterprises and/or The Collective, had informed the defendant company's president, Vahe "Fletch" Estepanian (also a defendant), of this plan and that the plaintiffs had acquired their trademark prior to the defendants' registration of the similar trademark and domain name.⁷ Establishing the precise timing as to when the defendants had notice of the plaintiffs' trademark was central to the case since the claims rested on whether the defendants piggybacked on the plaintiffs' trademark's success or independently created their own trademark.

Before the court was the defendants' motion under Rules 26 and 37 of the Federal Rules of Civil Procedure and the court's inherent authority to impose sanctions against the plaintiffs for "alter[ing] certain emails relevant to the claims in this case before producing them in response to discovery demands."⁸

The Altered Email Messages

During Estepanian's deposition, plaintiffs' counsel showed the deponent an email message that, as produced and shown by the plaintiffs, "was addressed to Mr. Estepanian at the email address fletch@blacklineage.com and to one of plaintiffs' employees, Jeremiah



Myers, at the email address jeremiah@slamxhype.com."⁹ The email also copied several of the defendants' employees with "@thecollective.com"¹⁰ as their email address domain name.

However, during cross-examination, defense counsel presented what appeared to be the same email from its document production, except that it listed Myers' domain name as "@ecko.com."¹¹ The differing domain names prompted the defendants to investigate the discrepancy further because authenticating the emails was necessary to establish when the defendants allegedly had notice of the plaintiffs' use of the trademark in question. After the plaintiffs' failure to respond to the defendants' subsequent request for native versions of the produced emails, the court ordered compliance and the plaintiffs obliged via another production.

H. CHRISTOPHER BOEHNING and DANIEL J. TOAL are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison. ROSS M. GOTLER, e-discovery counsel, and LIDIA M. KEKIS, e-discovery attorney, assisted in the preparation of this article.

The defendants hired a forensic expert to analyze this native production. The analysis revealed the existence of two versions of each produced email message, or a “top version” email and a “near-duplicate version” found beneath, with the only difference between the two versions being varying email domain names. The expert found that the “underlying near-duplicate versions were the original emails, which had been deleted, albeit not without leaving a digital imprint”¹² and that “this anomaly is the result of Plaintiffs having initially copied the version of the emails that contained the true and correct email addresses/domain names, and then deleting the true and correct versions prior to production. The deleted emails were then replaced with a second, altered version of the email correspondence, which was then produced to Defendants.”¹³ The forensic expert’s findings contributed to the defendants’ decision to move for sanctions.

Applicability of New Rule 37(e)

Judge Francis began his analysis by determining whether to apply the newly amended Federal Rules of Civil Procedure, which went into effect as the case was pending, or to apply

establish a new rule of conduct, either version of the rule could apply.”¹⁷ Judge Francis proceeded under new Rule 37(e) on the rationale that “because the amendment is in some respects more lenient as to the sanctions that can be imposed for violation of the preservation obligation, there is no inequity in applying it.”¹⁸ He further stated that “[i]f relief available under the amended rule were less adequate than that available under the prior rule in remedying any prejudice to the defendants, a different outcome might be warranted. However, . . . the amended rule can provide sufficient relief in the current circumstances.”¹⁹

After determining that he would consider the motion under the new version of Rule 37(e), Judge Francis next addressed the issue “whether the conduct alleged by the defendants is sanctionable under Rule 37(e).”²⁰ The plaintiffs argued that they could not be sanctioned under Rule 37(e) because two preconditions to the rule had not been met—the ESI was not lost and the ESI at issue could be restored or replaced.²¹ Judge Francis took issue with this, saying that “[i]n effect, the plaintiffs argue that even if they are the ‘gang that couldn’t spoliage straight,’ see *Victor Stanley v. Creative Pipe*, 269 F.R.D. 497, 501 (D. Md. 2010), they cannot be sanctioned because their misdeeds were discovered and the information recovered. They are incorrect.”²² Judge Francis determined that the lost ESI had not been “restored or replaced” to an extent that would preclude a sanctions analysis under new Rule 37(e). He found that “as long as the plaintiffs are permitted to rely on the emails to argue that the defendants had notice of their use of the SLAMXHYPE mark as of the date of those emails, a different version of the same email is not an adequate substitute.”²³

Inherent Authority

Judge Francis, though, went a step further, arguing that even if “Rule 37(e) were construed not to apply to the facts here, I could nevertheless exercise inherent authority to remedy spoliation under the circumstances presented.”²⁴ One of the noteworthy aspects of amended Rule 37(e) was the statement in its corresponding Advisory Committee Note that, with respect to imposing sanctions for a failure to preserve ESI, the new rule “forecloses

reliance on inherent authority or state law to determine whether certain measures should be used.”²⁵

Staking out his position on the topic, Judge Francis defended the authority of courts to manage their own affairs, including “the authority to impose sanctions for the bad faith spoliation of evidence.”²⁶ Quoting *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*,²⁷ Judge Francis opined that “[w]here exercise of inherent authority is necessary to remedy abuse of the judicial process, it matters not whether there might be another source of authority that could

While he was empowered by subsection (e)(2) to impose severe sanctions, such as the terminating sanctions requested by the defendants, Judge Francis chose not to do so, reasoning that “such drastic sanctions are not mandatory.”

address the same issue.”²⁸ Citing to Supreme Court precedent on the issue, Judge Francis argued that “the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct”²⁹ and determined that “sanctions would be available under the court’s inherent authority even if Rule 37(e) did not apply. A party’s falsification of evidence and attempted destruction of authentic, competing information threatens the integrity of judicial proceedings even if the authentic evidence is not successfully deleted.”³⁰

Clear and Convincing Proof

After determining that “it is appropriate to utilize the clear and convincing standard [of proof] with respect to”³¹ the plaintiffs’ alleged spoliation, Judge Francis found “that the plaintiffs intentionally altered the emails at issue.”³²

While praising the defendants’ forensic expert’s qualifications, analysis of the emails produced in native form, corresponding testimony, and explanation as to the existence of two versions for each email, which, in totality, set forth sufficient evidence,³³ Judge Francis conversely found that the plaintiffs’ expert “did not analyze the emails in their native form; indeed, there is no indication that he is qualified to do

Magistrate Judge Francis has provided the first thorough judicial interpretation of new Rule 37(e) and offered his opinion on some controversial language from the corresponding Committee Note.

the prior version of the rules. Supreme Court Chief Justice John Roberts’ April 29, 2015 order transmitting the proposed amendments for congressional review indicated that the enacted rules “shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.”¹⁴ The corresponding statutory authority is similar, authorizing such a determination unless “the application of such rule in such [pending] proceedings would not be feasible or would work injustice, in which event the former rule applies.”¹⁵

Given that new Rule 37(e) “places no greater substantive obligation on the party preserving ESI”¹⁶ and that “the amendment does not

so.”³⁴ Moreover, he generally cast doubt on the plaintiffs’ proposed alternative explanations as to the existence of the two versions of email messages.³⁵ As such, Judge Francis found “clear and convincing evidence ... that the plaintiffs manipulated the emails here in order to gain an advantage in the litigation.”³⁶

Determining whether such conduct was indeed sanctionable under new Rule 37(e), Judge Francis wrote, “[t]hese findings provide the basis for relief under Rule 37(e). First, each of the threshold requirements of the rule is met. The emails are plainly ‘electronically stored information.’ There is no dispute that the plaintiffs were obligated to preserve them in connection with this litigation ... [I]nformation was ‘lost’ and cannot adequately be ‘restored or replaced.’ And the plaintiffs’ manipulation of the email addresses is not consistent with taking ‘reasonable steps’ to preserve the evidence.”³⁷

Remedies

Judge Francis then continued his Rule 37(e) analysis to determine the available and appropriate remedies. While subsection (e)(1) hinges on a finding of prejudice, subsection (e)(2) is dependent upon a finding of intent. Judge Francis found the prerequisites for both alternatives satisfied. Regarding subsection (e)(1), not only did “the fabrication of the substitute emails”³⁸ prejudice the defendants, but it also “at the very least obfuscates the record,”³⁹ thereby imposing on defendants “the burden and expense of ferreting out the malfeasance and seeking relief from the Court.”⁴⁰ Regarding subsection (e)(2), Judge Francis had already concluded “that the plaintiffs intentionally altered the emails at issue,”⁴¹ thereby warranting remedy under this provision as well.⁴²

While he was empowered by subsection (e)(2) to impose severe sanctions, such as the terminating sanctions requested by the defendants, Judge Francis chose not to do so, reasoning that “such drastic sanctions are not mandatory.”⁴³ He instead ordered that “the plaintiffs shall be precluded from relying upon their version of the emails at issue to demonstrate notice to the defendants of use of the SLAMXHYPE mark,”⁴⁴ so as to provide the defendants with legal prejudicial protection. He also ordered monetary sanctions in the form of

attorney fees and expenses to cover the defendants’ reasonable costs spent “in establishing the plaintiffs’ misconduct and in securing relief,”⁴⁵ so as to “ameliorate[] the economic prejudice imposed on the defendants and also [to serve] as a deterrent to future spoliation.”⁴⁶

Conclusion

In administering sanctions far more forgiving than those he was authorized to impose due to the intentional spoliation in this matter, Judge Francis writes “[t]he relief outlined here satisfies the dictates of Rule 37(e)(2) and of principles of inherent authority not to impose unnecessarily drastic sanctions. Furthermore, it is also consistent with Rule 37(e)(1), as it is no more severe than is necessary to cure the prejudice to the defendants.”⁴⁷

Such a statement in this first noteworthy decision to interpret newly amended Rule 37(e) may provide relief to many parties, especially those who in the past may have been impacted by the often significant costs related to over-preservation of ESI in an effort to avoid potential future sanctions. Even so, *CAT3* should not be interpreted as a license to spoliolate ESI or an invitation to laxity in the preservation of ESI when an obligation to do so exists. Despite limiting the actual sanctions imposed, Judge Francis expansively interpreted what it means for ESI not to be able to be “restored or replaced” as a precondition for sanctions under Rule 37(e) and he also opened the door for a judicial rejection of the notion that courts are foreclosed from relying on their inherent power to impose sanctions for failure to preserve ESI.



1. See H. Christopher Boehning and Daniel J. Toal, “FRCP Amendments Take Effect, Impacting E-Discovery Practice,” *NYLJ*, Dec. 1, 2015.

2. *CAT3 v. Black Lineage*, 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016).

3. Judge Francis has authored a number of important e-discovery decisions, including *Orbit One Communications v. Numerex*, 2010 WL 4615547 (S.D.N.Y. 2010).

4. See *CAT3*, 2016 WL 154116, at *1.

5. *Id.*

6. *Id.*

7. See *id.*

8. *Id.* at *1.

9. *Id.*, citing Declaration of Michael Kunkel dated Sept. 16, 2015, Exh. D.

10. *CAT3*, 2016 WL 154116, at *1.

11. *Id.*

12. *Id.* at *2, citing Kunkel Decl., ¶¶ 10-11; Evidentiary Hr’g Tr. at 3-4 Dec. 1, 2015.

13. *CAT3*, 2016 WL 154116, at *2, citing Kunkel Decl., ¶ 10.

14. *Id.*, quoting 2015 U.S. Order 0017.

15. *Id.*, quoting 28 U.S.C. § 2074(a).

16. *Id.* at *5.

17. *Id.*

18. *Id.*, citing *cf. Ultra-Temp v. Advanced Vacuum Systems*, 194 F.R.D. 378, 381 (D. Mass. 2000).

19. *CAT3*, 2016 WL 154116, at fn. 5.

20. *Id.* at *5. The full text of new Rule 37(e) is:

Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e).

21. See *CAT3*, 2016 WL 154116, at *5.

22. *Id.* at *6.

23. *Id.*

24. *Id.*

25. *Id.*, quoting Fed. R. Civ. P. 37(e) advisory committee’s note to 2015 amendment.

26. *CAT3*, 2016 WL 154116, at *6.

27. *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

28. *CAT3*, 2016 WL 154116, at *7.

29. *Id.*, quoting *Chambers v. NASCO*, 501 U.S. 32, 49 (1991).

30. *CAT3*, 2016 WL 154116, at *7.

31. *Id.* at *8.

32. *Id.*

33. See *id.*

34. *Id.*, citing Evidentiary Hr’g Tr. at 22-23 Dec. 1, 2015.

35. See *CAT3*, 2016 WL 154116, at *8-9.

36. *Id.* at *9.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at *8.

42. Moreover, even if Rule 37(e) did not apply, “relief would nonetheless be warranted under the Court’s inherent power,” *id.* at *10, because “[s]poliation designed to deprive an adversary of the use of evidence in litigation qualifies as bad faith conduct.” *Id.*

43. *Id.* “Finding an intent to deprive another party of the information’s use in the litigation does not require a court to adopt the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.” *Id.*, quoting Fed. R. Civ. P. 37(e) advisory committee’s note to 2015 amendment.

44. *CAT3*, 2016 WL 154116, at *10.

45. *Id.*

46. *Id.*

47. *Id.* at *11.