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### FEDERAL E-DISCOVERY

# Rogue Executive's Spoliation Leads To Severe Rule 37(e) Sanctions



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As part of preparing for potential discovery obligations, many companies have implemented processes, policies, and technology to preserve potentially relevant information. Companies adopt these measures in order to demonstrate that “reasonable steps” were taken to preserve such information and to avoid the threat of sanctions under Federal Rule of Civil Procedure 37(e) should something go wrong and information is lost. What happens, though, if information is lost because of a rogue executive subverting the company’s preservation efforts? Can the company still face sanctions under recently amended Rule 37(e)? In a recent decision from Delaware,

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the answer to this question was a resounding “yes,” as, due to a rogue executive’s misconduct and some questionable follow-up efforts by the company itself, a district court imposed what are arguably the

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most severe sanctions seen in a decision since the enactment of the amended rule.



### ‘GN Netcom v. Plantronics’

In *GN Netcom v. Plantronics*,<sup>1</sup> defendant Plantronics, accused of monopolizing the headset market, instituted a legal hold in response to a demand letter from plaintiff GN. Plantronics issued the hold to impacted employees, hosted training sessions to ensure compliance, and distributed quarterly hold reminders. Nevertheless, a senior executive, allegedly a key

participant in the activities giving rise to the underlying antitrust claims, repeatedly responded to email messages he found inappropriate and potentially damaging by instructing everyone to delete the messages. The executive and some of the other employees did indeed delete email messages; the executive went so far as to “double delete” potentially relevant messages—first from his mailbox and then from his deleted files folder—to ensure their destruction.

Once aware of these rogue activities, Plantronics’ in-house counsel initiated several remedial actions, including adding the executive’s assistant to the legal hold, implementing technology to prevent email message deletion, collecting email for 21 additional custodians who corresponded with the executive, and obtaining backup tapes that held the executive’s email. Plantronics also engaged two vendors to take steps to preserve and recover the executive’s email, including preserving potentially relevant personal archive (PST) email files, forensically imaging the executive’s phone and tablet, and restoring the backup tapes. One vendor, a computer forensics expert, produced a preliminary report noting its findings that the executive “deleted between 36,397 and 90,574 unrecoverable emails [of which,] based on an estimated responsiveness rate of 6.5%, 2,380

to 5,887 of these unrecoverable emails”<sup>2</sup> were potentially responsive. However, Plantronics elected to cut the engagement short after refusing to take on the added cost of a few thousand dollars to finish the report and investigation. It also “unrestored” the backups the vendor had restored.

This signaled a more defensive posture by Plantronics, as the company soon thereafter began to either deny or defend actions related to the lost email messages. For example, the executive testified at several depositions that he did not believe he had deleted any relevant email messages. In addition, despite the forensics expert vendor’s preliminary report as to the magnitude of the deleted email message issue, Plantronics’ CEO repeatedly testified his belief that the company had recovered all of the executive’s deleted messages. During the CEO’s deposition, GN became aware that Plantronics hired a forensics expert vendor; Plantronics later refused to provide GN with the vendor’s name, claiming work-product privilege. Additionally, during a court teleconference, Plantronics’ outside counsel denied the existence of the vendor’s report. The court granted additional time for fact discovery into the email deletion and related remediation efforts and GN retained its own computer forensics expert, who agreed with the statistical methodology used by Plantronics’ vendor,

but opined a higher “responsive rate range of 6.5% to 16.5% ... [or] 2,380 to 15,309”<sup>3</sup> unrecoverable responsive email messages.

Perhaps not surprisingly, GN sought spoliation sanctions under recently amended Rule 37(e). Under the rule, when a party fails to take “reasonable steps” to preserve electronically stored information (ESI) that should have been preserved and the ESI cannot be restored or replaced, a court may impose sanctions as long as there is a finding either of prejudice due to the loss of the ESI or of intent to deprive the other party of the ESI. The most severe sanctions are reserved for the latter situation.

Plantronics argued that it had indeed taken reasonable steps to preserve the lost ESI. The court rejected this argument, writing that it was not convinced that Plantronics had taken all the reasonable steps available to recover the executive’s deleted email messages. For example, per the court, Plantronics could have extended the vendors’ investigation to other employees known to have deleted messages at the executive’s instruction, paid the forensics expert vendor to complete its analysis, and not have “unrestored” backups that the vendor had restored. The court wrote that Plantronics’ reliance on its standard preservation processes and its remedial efforts “to excuse the intentional, destructive behavior of

[the executive] requires a ‘perverse interpretation’ of Rule 37(e), one which would set a dangerous precedent for future spoliators.”<sup>4</sup> Plantronics’ “extensive document preservation efforts do not absolve it of all responsibility for the failure of a member of its senior management to comply with his document preservation obligations.”<sup>5</sup>

Equating the “intent to deprive” requirement under Rule 37(e)(2) to Third Circuit precedent requiring “bad faith” spoliation for severe sanctions, the court next analyzed whether such bad faith spoliation took place. Plantronics argued that since the executive acted against the company’s directives, his behavior should not be attributed to the company. The court disagreed, and found that since the executive acted in an effort to protect the company (and not himself personally) and due to the timing of his actions in relation to events in the lawsuit and his double deletion of messages, he acted in bad faith with an intent to deprive GN of the email messages, and that as a senior executive acting in bad faith, his actions should be attributed to the company. Plantronics’ marginal restoration efforts followed by its obfuscation and lack of cooperation reinforced the court’s finding of bad faith. The court also disagreed with Plantronics’ argument that there was no prejudice to GN, especially given

Plantronics’ acknowledgement of its inability to recover many of the executive’s potentially responsive email messages.

Having found sanctions against Plantronics under Rule 37(e) to be appropriate, the court next turned to analyzing which sanctions to impose. Under Rule 37(e)(1), the court imposed monetary sanctions for almost 18 months of attorney fees and costs related to litigating the missing email issue, \$3 million in punitive sanctions (which the court noted was three times the amount Plantronics docked from the executive’s pay for his misconduct), and possible evidentiary sanctions if subsequently requested by GN. Noting that these sanctions did not “fully redress” the lost ESI, the court additionally imposed, under Rule 37(e)(2), a permissive adverse inference jury instruction that the deleted email messages were unfavorable to Plantronics.

### Lessons Learned

While many courts have interpreted Rule 37(e) since its enactment last December, *GN Netcom* stands apart, not only due to the severe sanctions imposed, but also its unique facts, which provide valuable insight as to what may and may not constitute a failure “to take reasonable steps to preserve” ESI under the rule. In this decision, what may have, but for

the executive’s rogue actions, constituted reasonable preservation steps by Plantronics, were ultimately of no help to the company in its bid to avoid sanctions. Moreover, seeing as the court highlighted that Plantronics’ later behavior contributed to its decision to impose severe sanctions, the decision suggests that, had there been more transparency and cooperation on Plantronics’ part after discovery of the rogue executive’s troubling behavior, the court likely would have been more lenient.

While the general sentiment about amended Rule 37(e) is that it helps reduce the preservation burden on companies, decisions like *GN Netcom* serve as a reminder to litigants that courts still have severe sanctions at their disposal and will not hesitate to impose them, especially when faced with facts that imply bad faith and intentional spoliation.

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1. *GN Netcom v. Plantronics*, 2016 WL 3792833 (D. Del. July 12, 2016).
2. *Id.* at \*3.
3. *Id.* at \*4.
4. *Id.* at \*6.
5. *Id.*