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FEDERAL E-DISCOVERY

## 'Staggering' Spoliation Leads To Case Terminating Sanctions

In the aftermath of notable sanctions rulings that roiled the discovery waters, the 2015 amendments to the Federal Rules of Civil Procedure introduced a new Rule 37(e), designed to provide litigants with some clarity and comfort that severe sanctions for spoliation of electronically stored information (ESI) were available to courts only when a party had failed to take reasonable steps to preserve such information. Since then, courts have been reluctant to find discovery misconduct worthy of severe punishment either under Rule 37(e) or Rule 37(b), which allows courts to issue sanctions against parties for failure to comply with a court order.

In a recent decision, though, a district court found some of the defendants' actions taken while under a duty to preserve indicative of intentional spoliation, including the company and CEO's use of ephemeral



messaging, the failure to disable auto-deletion of emails, and the reformatting and other spoliation of devices

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allegedly used to transfer trade secret information. Citing both Rule 37(b) and Rule 37(e), the clearly frustrated court issued case terminating sanctions for this "staggering" discovery misconduct.



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### 'WeRide'

In *WeRide v. Huang*, 2020 WL 1967209 (N.D. Cal. April 24, 2020), autonomous vehicle company WeRide brought suit against its former CEO Jing Wang, its former Head of Hardware Technology Kun Huang, their new competing company AllRide, and related corporate entities. WeRide's complaint stated numerous claims, including trade secret misappropriation due to AllRide's alleged theft of WeRide's proprietary source code and other confidential information.

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More specifically, WeRide alleged that Wang, after leaving WeRide in January 2018, surreptitiously founded AllRide and “began disparaging WeRide to actual and potential investors ... caus[ing] investors to withhold or delay tens of millions of dollars of funding.” Id. at \*1. In response, “[o]n October 1, 2018, WeRide sent Wang a cease-and-desist letter concerning his alleged defamatory statements” and raised the possibility of litigation. Id. at \*2.

WeRide further alleged that Huang, after Wang recruited him to join AllRide—but, before officially leaving WeRide—had “downloaded an unusually large amount of data from WeRide’s servers [onto three USB drives and] ... attempted to solicit other WeRide employees to AllRide.” Id. When WeRide informed Huang that it was ending his employment due to his solicitation efforts, this prompted Huang to run a number of “internet searches for ‘what is employee solicit and consequence’ and ‘what is employee solicit consequence penalty.’” Id. Huang also reformatted one company-owned laptop and deleted many files from another prior to returning them to WeRide at the end of his employment. See id. Afterwards, Huang officially joined AllRide.

Shortly thereafter, an investigator hired by WeRide attended an AllRide recruiting event and observed Huang promoting autonomous cars with capabilities matching those in WeRide’s cars. See id. WeRide sent Huang a separate cease-and-desist letter. In response, Huang’s counsel acknowledged the letter, met

with AllRide’s co-founder Patrick Lam, sent Lam a legal hold notice, and met with other AllRide executives to discuss the notice. See id. Nonetheless, “AllRide took no further action to preserve documents until May and June 2019” and did not distribute the legal hold notice broadly within the company until August 2019. Id.

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While the defendants’ behavior in ‘WeRide’ was especially extreme, the decision nonetheless is instructive as a warning that even with the higher bars to sanctions presented by Rule 37(e), it still is important for organizations to implement defensible processes, policies, and technologies capable of preserving relevant information in line with their legal obligations.

A few months after WeRide filed its first complaint on November 29, 2018, the court granted WeRide’s motion for preliminary injunction, which “enjoined AllRide and Huang from using or disclosing WeRide’s alleged trade secrets or confidential information.” Id. Discovery commenced and several discovery-related disputes followed. On the eve of the August 16, 2019 hearing on the disputes, AllRide notified the court of its determination two months prior “that it had not turned off an auto-delete setting on the company’s email server leading to the company-wide destruction of emails ... and separately that several individual

email accounts associated with Wang and his wife had been destroyed.” Id. at \*3. The court subsequently granted WeRide’s motion to also enjoin Wang under the same preliminary injunction. See id.

### **Deletion, Destruction, And DingTalk**

In response to the defendants’ discovery misconduct, WeRide moved the court to issue terminating sanctions for spoliation of evidence under Federal Rules of Civil Procedure 37(b) and 37(e) and its inherent authority to issue sanctions.

In addition to the company-wide destruction of emails that AllRide had admitted to prior to the August 2019 hearing, WeRide additionally alleged that AllRide and Huang had spoliated or failed to produce five different categories of source code relevant to the underlying matter. As the case progressed, Huang also admitted to not only deleting numerous files on his two WeRide-issued laptops, but also returning his personal laptop to an Apple store on the same day that he received WeRide’s cease-and-desist demand. See id. at \*7. Huang further represented that he had “no knowledge” of two of the three USB drives he allegedly used to transfer WeRide’s proprietary information. Id.

Moreover, Wang and AllRide used the application DingTalk, which allows for ephemeral messages that are automatically deleted after receipt. The court noted, “[a]s to Wang, in April of 2019 before he officially became AllRide’s CEO, he told AllRide that

the company ‘better try’ using the application DingTalk to correspond internally. … AllRide then began using it; Wang started using it when he officially became CEO of AllRide. … Wang testified that he liked using DingTalk because it is ‘more secure’ than other messaging platforms.” Id. at \*8 (internal citations omitted). AllRide was not able to recover or produce any of the DingTalk ephemeral messages; Wang located non-ephemeral DingTalk messages on his device, “but he has not produced them because, he says, he cannot find a vendor to extract them.” Id.

### Legal Analysis

In its analysis, the court quickly set aside the need to consider issuing sanctions under its inherent authority as had been requested by WeRide. Since the court would issue terminating sanctions under Rule 37(b) and Rule 37(e), there was no need to turn to its inherent authority. In doing so, the Court deftly avoided a potential issue on appeal, as whether a court may still issue sanctions for spoliation of ESI under its inherent authority subsequent to the enactment of Rule 37(e), which purports to have foreclosed on such a use of inherent authority, is still an open question.

The court then analyzed the appropriateness of terminating sanctions under Rule 37(b), which authorizes courts to sanction parties for the failure to comply with a court order, and under Rule 37(e), which authorizes courts to sanction parties for the failure to

preserve ESI. Completing detailed analyses under both bases for sanctions, the court made the following findings: (1) that AllRide, Wang, and Huang violated the preliminary injunction; (2) that AllRide, Wang, and Huang committed intentional spoliation; (3) that WeRide was significantly prejudiced due to their intentional spoliation; (4) that the spoliated evidence could not in any meaningful way be replaced; and (5) that no punishment less than terminating sanctions could sufficiently cure the prejudice to WeRide. In reaching these conclusions, the court cited a number of actions by the various defendants, including AllRide’s deletion of email, AllRide and Wang’s use of DingTalk’s ephemeral messaging feature after the Court issued a preliminary injunction, Wang’s knowledge of AllRide’s spoliation, and Huang’s spoliation of devices and source code.

With no lesser sanctions available to cure the prejudice to WeRide, the court issued case terminating sanctions under both Rules 37(b) and 37(e) against AllRide, Wang, and Huang. It further ordered the defendants to pay WeRide’s reasonable attorneys’ fees and costs for the spoliation motion and related discovery and motion practice. See id. at \*16. In doing so, the Court highlighted the “staggering” amount of spoliation the defendants conceded and chastised AllRide for “repeatedly and in violation of its duty to preserve and this Court’s preliminary injunction destroy[ing] emails and other files.” Id. at \*3.

### Conclusion

While the defendants’ behavior in WeRide was especially extreme, the decision nonetheless is instructive as a warning that even with the higher bars to sanctions presented by Rule 37(e), it still is important for organizations to implement defensible processes, policies, and technologies capable of preserving relevant information in line with their legal obligations. As demonstrated in WeRide, courts can—and will—issue severe punishments, including case terminating sanctions, for egregious discovery misconduct.