3. An order from the Southern District of New York granting sanctions against certain defendants under Rule 37(e) for failing to implement litigation holds that led to the deletion of a key custodian's email files.

In Charlestown Capital Advisors LLC v. Acero Junction Inc., 337 F.R.D. 47 (S.D.N.Y. 2020), U.S. Magistrate Judge Barbara Moses granted sanctions against certain Defendants under Rule 37(e) for failing to implement litigation holds that led to the deletion of a key custodian's email files.

The Plaintiff, a private equity firm, allegedly entered into an agreement with Defendants (the Agreement), which was signed by the co-president of two of the Defendants (the Acero Defendants) and purportedly entitled Plaintiff to "a fee upon the consummation of an M&A Transaction." *Id.* at 53. The day after the Agreement was allegedly signed, one of Plaintiff's employees emailed a fully executed copy of the Agreement signed by both sides to the co-president. Weeks later, the Acero Defendants entered into a stock purchase agreement with a third party, and Plaintiff claimed that it was owed a fee. In response, Defendants claimed that Plaintiff induced the co-president's signature on the Agreement through misrepresentation and forgery and that Plaintiff "knew or should have known" that the co-president was not authorized to bind the Acero Defendants. *Id.* at 54. This lawsuit followed.

Defendants' counsel prepared a litigation hold memorandum directed to the Acero Defendants' co-president, "and all employees under [his] supervision," and instructed them to refrain from activities that could lead to the deletion of ESI that might be relevant to the lawsuit. However, the Acero Defendants' co-president never forwarded the document to any of his colleagues. In fact, counsel exclusively communicated with the co-president regarding the discovery process and not any other employee. *Id.* at 56. In discovery, Plaintiff sought the co-president's emails regarding the Agreement, the M&A transaction, and Defendants' affirmative defenses. *Id.* at 55. In response, the Acero Defendants produced approximately 1,400 pages of documents, which included only "six emails to, from, copying ... [the co-president]." After Defendants missed several court-imposed discovery deadlines, Defendants' counsel moved to withdraw due to a conflict of interests. *Id.* at 55. Following a conference on the withdrawal motion, the court stayed the case pending resolution of the motion. Around this time, the co-president stopped working for the Acero Defendants. *Id.* at 56.

Nevertheless, the (now former) co-president's emails were still searchable, so counsel asked an employee to search the account using keywords. That employee segregated the emails he found with the keywords into a PST file. Counsel did not do anything else regarding those segregated emails for about two months — until the stay was lifted. When counsel asked the employee to share the segregated files, the employee discovered that the Google server on which the PST file was stored automatically deleted documents after 15 days. The employee attempted to segregate the emails from the source again, but a human resources employee had deleted the former co-president's account as part of a regular process of deleting former employees' accounts. To approximate a search of the email account, counsel asked the employee to search all other company accounts for emails from and to the former co-president.

The former co-president later testified during his deposition that he regularly downloaded emails from his account to his computer. *Id.* at 57-58. Upon learning this, Defendants' counsel and its e-

discovery vendor collected approximately 50,000 emails from the co-president's computer. Id. at 58. After a privilege review and a "de-duplication procedure," which was designed to eliminate emails previously produced in the litigation and duplication from within the 50,000 emails themselves, the Acero Defendants produced approximately 13,700 pages (or 2,806 emails). Plaintiff took exception to this production, claiming that most of the emails were from the former co-president's personal email account and only 24 of the produced emails were from his work account and involved individuals who worked for Plaintiff. Among the emails missing from the Acero Defendants' production was the email attaching an executed copy of the Agreement — an email Plaintiff had previously produced in discovery. In response, Plaintiff filed a motion seeking spoliation sanctions pursuant to Federal Rule of Civil Procedure 37(e).

Magistrate Judge Moses began her analysis with a summary of Rule 37(e), which governs "sanctions for failure to preserve ESI." *Id.* at 59. That Rule contains a three-part test to determine whether a party's failure to preserve ESI warrants sanctions. First, courts must determine if the party "failed to take 'reasonable steps' to preserve [ESI] 'that should have been preserved in the anticipation or conduct of litigation. *Id.* (quoting Fed. R. Civ. P. 37(e)). Second, courts must determine if the loss of the information prejudiced the other party; if so, courts "may order measures no greater than necessary to cure the prejudice." *Id.* (quoting Fed. R. Civ. P. 37(e)(1)). These sanctions may involve imposing attorney fees or more serious sanctions such as precluding the sanctioned party "from putting on certain evidence." Id. (quoting Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment). Third, courts must consider whether the more severe sanctions in subsection (e)(2) are applicable by determining "whether the destroying party 'acted with the intent to deprive another party of the information's use in the litigation." *Id.* (quoting Fed. R. Civ. P. 37(e)(2)). If intent is present, the court may impose the sanctions listed in subsection (e)(2), which can include entry of default judgment, regardless of whether the loss of the information prejudiced the other party.

As a threshold matter, as in all spoliation disputes, Magistrate Judge Moses analyzed whether the Acero Defendants had a duty to preserve the ESI. *Id.* at 60. "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to the litigation or when a party should have known that the evidence may be relevant to future litigation." *Id.* at 61 (quoting *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2nd Cir. 2001)). Here, the Acero Defendants' former co-president's signature appeared on the Agreement, but the Acero Defendants denied that he ever signed it. Under those circumstances, "it would have been obvious to any competent attorney ... that [the former co-president] would be a crucial witness for the Acero Defendants, that his credibility would be hotly contested and that his email account would be highly relevant to his narrative and his credibility." Additionally, "by the time the destruction occurred, which was a full year into the litigation, the Acero Defendants had specifically identified [the former co-president's] [a]ccount (which at that point had never been properly searched) as ESI that required preservation, and had made some (ineffective) attempts to preserve it." Accordingly, Magistrate Judge Moses found it was "undeniable" that the Acero Defendants had a duty to preserve the former co-president's emails at the time of deletion.

Magistrate Judge Moses then considered whether the Acero Defendants failed to take reasonable steps to preserve the ESI. In general, this inquiry is "roughly a negligence standard." *Id.* (quoting *Leidig v. Buzzfeed, Inc.*, 2017 WL 6512353, at *10 (S.D.N.Y Dec. 19, 2017). And "once the duty to preserve attaches, any destruction of documents is, at minimum,

negligence." *Id.* (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)). Moreover, taking reasonable steps requires parties to "suspend [their] routine document retention/destruction policy and put in place a litigation hold," a process that counsel is obligated to oversee. *Id.* (quoting *Lokai Holdings v. Twin Tiger USA LLC*, 2018 WL 1512055, at *11 (S.D.N.Y. Mar. 12, 2018)).

Here, Magistrate Judge Moses concluded that the Acero Defendants did not take reasonable steps to preserve the ESI. *Id.* at 61-62. While the Acero Defendants' counsel sent two litigation hold memos in June 2018 and September 2018, neither of those memos was distributed to anyone other than the Acero Defendants' former co-president. *Id.* at 62. The Acero Defendants did not distribute the hold memos or any other hold instructions to "human resources staff, IT staff, or any other employees with day-to-day responsibilities for maintaining the relevant records." In Magistrate Judge Moses' view, the failure to disseminate the holds and change normal data retention procedures likely led to the deletion of the email account. She also faulted the attorneys for failing to discuss document production with anyone at the Acero Defendants' plants (other than the former co-president) and otherwise failing to oversee document retention.

Next, Magistrate Judge Moses considered whether the lost ESI was replaceable, because Rule 37(e) permits sanctions only when the lost information cannot be "restored or replaced through additional discovery." *Id.* at 62-63 (quoting Fed. R. Civ. P. 37(e)). The Acero Defendants contended they restored the information when they produced emails that their former co-president downloaded to his computer. Magistrate Judge Moses disagreed, noting that the former co-president "provided no details as to how he downloaded his emails to his laptop, when (and how frequently) he did so, or what (if any) deletions took place before or after the download." *Id.* at 63. Further, she noted that there was substantial evidence before her that the Acero Defendants' production was incomplete. In addition to issues associated with volume, among the items missing from the production were hundreds of emails between the parties that were produced by Plaintiff but were removed from the Acero Defendants' production set through a "de-duplication" procedure. *Id.* at 64. Thus, Magistrate Judge Moses observed that "there can be no assurances the recovered emails constitute all of the meaningful emails that could and should have been obtained in the first instance ...." *Id.* at 64 (quoting Coan v. Dunne, 602 B.R. 429, 440 (D. Conn. 2019)) (internal quotations omitted). Magistrate Judge Moses admonished the Acero Defendants' use of "horizontal deduplication," which is the process of de-duplicating their production against "prior productions by all parties," not just against their documents, because the emails' metadata information, such as when (and whether) a custodian opened an email, was important to this case. *Id.* at 64 n.18. Accordingly, Magistrate Judge Moses concluded that the Acero Defendants had failed to show their production adequately replaced the contents of the deleted email account. *Id.* at 65.

Magistrate Judge Moses then considered whether the Acero Defendants' failure to preserve the ESI prejudiced Plaintiff. Because the concept of prejudice is not well defined in the rule itself, Magistrate Judge Moses relied on the advisory committee notes, which state, in relevant part, that "an evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in litigation" and that Rule 37(e) "leaves judges with the discretion to determine how best to assess prejudice in particular cases." *Id.* (quoting Fed. R. Civ. P. 37(e) advisory committee's notes to 2015 amendment)). "[Plaintiff] need not, of course, establish that a smoking gun email ... was irretrievably destroyed ... [i]t is sufficient that [Plaintiff] has provided

evidence that plausibly suggests that the spoliated ESI could support its case." *Id.* at 66 (quoting *Karsch v. Blink Health Ltd.*, 2019 WL 2708125, at *21 (S.D.N.Y. June 20, 2019) (internal quotations omitted).

Applying the prejudice standard to the facts, Magistrate Judge Moses determined that Plaintiff's inability to access the lost ESI "handicapped ... its ability to assess and test [the former co-president's] credibility ... particularly in relation to the affirmative defenses that challenge the validity of [his] signature on the Agreement." *Id.* at 65. The deleted metadata from the former co-president's email account, such as when he opened and replied to emails, was especially important to evaluating the merits of the claims and affirmative defenses, according to Magistrate Judge Moses. *Id.* at 66. Indeed, the information from the email account "would, in all likelihood either corroborate or contradict his testimony" and thus "could have resolved. ... significant factual disputes between the parties." *Id.* at 65. (quoting *Karsch*, 2019 WL 2708125, at *21). Accordingly, Magistrate Judge Moses concluded that the spoliated ESI was useful to Plaintiff and that its destruction prejudiced Plaintiff. The fact that Plaintiff produced some of former co-president's emails did not change this result because the metadata associated with the account had "independent evidentiary significance." *Id.* at 66.

Finally, Magistrate Judge Moses analyzed whether the Acero Defendants acted with intent in order to determine whether Subsection (e)(2) sanctions were warranted. The standard for sanctions under Rule 37(e)(2) "is not merely the intent to perform an act that destroys ESI but rather the intent to actually deprive another party of evidence." *Id.* (quoting Leidig, 2017 WL 6512353, at *11). Because the sanctions detailed in Subsection (e)(2) are particularly harsh, courts apply the clear and convincing evidence standard. *Id.* at 67. (quoting *Lokai Holdings*, 2018 WL 1512055, at *8). In making this determination, Magistrate Judge Moses considered four inquiries: whether "(1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator." *Id.* (quoting *Moody v. CSX Transp., Inc.*, 271 F. Supp. 3d 410, 431 (W.D.N.Y. 2017)).

Magistrate Judge Moses ultimately concluded that the first three elements were undoubtedly established but the fourth was not. The affirmative action in question was the human resource employee's deletion of the email account as part of routine data maintenance. Magistrate Judge Moses attributed this action to management's gross negligence rather than any bad faith. Although, according to Magistrate Judge Moses, the Acero Defendants "exhibited ... protracted disregard for their obligation to preserve, search, and produce relevant evidence," she was not convinced their actions were done "for the specific purpose of gaining an advantage in litigation." *Id.* at 67 (quoting *Karsch*, 2019 WL 2708125, at *22).

Finally, Magistrate Judge Moses turned to the question of remedy. In addition to imposing attorney fees stemming from the spoliation, she imposed a harsher sanction to "cure the prejudice." *Id.* at 68 (quoting Fed. R. Civ. P. 37(e)(1)). First, the Acero Defendants were estopped "from arguing or presenting evidence to show [that their former co-president] did not receive ... emails that have been produced in discovery." Second, if the case were to proceed before a jury, Plaintiff would be permitted to present evidence regarding the lost emails, which the jury could use in making factual

determinations. Without the requisite intent showing, however, Magistrate Judge Moses refused to issue harsher sanctions requested by Plaintiff, such as entry of default judgment.