

2. In *Javo Beverage Co., Inc. v. California Extraction Ventures, Inc.*, 2020 WL 2062146 (S.D. Cal. April 29, 2020), Magistrate Judge William V. Gallo granted Defendants' requests to compel Plaintiff to produce certain filepath information metadata and to modify the parties' ESI protocol to reflect the parties' mutual obligation regarding preservation of deleted and ephemeral data that may be relevant to the litigation.

In this patent and trade secret case, the parties were unable to resolve a number of discovery-related disputes pertaining to a previously entered protective order and an ESI protocol despite months of negotiation. *Id.* at \*1. Among other issues, the parties disagreed on (1) whether Plaintiff's "filepath information is discoverable to any extent" and (2) whether the parties were "obligated to preserve their deleted and ephemeral data and, if so, to what extent."

On the first issue, Defendants contended that Plaintiff's "filepath information," which Magistrate Judge Gallo used as shorthand to describe information indicating the original file path of an electronically stored record as it was maintained in the routine course of business, was discoverable and should be produced in conjunction with Plaintiff's ESI productions. *Id.* at \*7. Defendants argued that the filepath information was "highly relevant to assessing the claims at issue" and that the parties had "already agreed to produce metadata alongside its relevant ESI, where filepath information is encompassed within that metadata." Plaintiff, in contrast, had three primary arguments for why the filepath information should not be ruled discoverable: "(1) the filepath information is misleading and thus irrelevant; (2) extracting the original filepath information would be unduly burdensome and costly; and (3) producing the filepath information would leave [Plaintiff] vulnerable to breaches of attorney-client privilege."

With regard to relevance, Magistrate Judge Gallo concluded that Defendants had met their burden under Rule 26(b)(1) of the Federal Rules of Civil Procedure to establish that the filepath information was relevant, for three reasons. First, Federal Rule of Civil Procedure 34 emphasizes that production of ESI is relevant, and the rule necessarily encompasses the metadata that inherently exists within the ESI because it requires production of ESI "as maintained in the usual course of business." *Id.* at \*8. Second, the parties agreed to produce ESI with accompanying metadata, which plainly evidenced that Plaintiff also believed that the metadata underlying the ESI "is as relevant as the ESI itself." Third, the filepath information was directly relevant because as part of its claim, Plaintiff "must prove that it took reasonable measures to maintain the secrecy of its alleged trade secrets." *Id.* (internal quotation marks omitted).

Magistrate Judge Gallo further held that Plaintiff failed to adequately rebut the presumption of relevance. In his view, Plaintiff's "weightiest" objection was that discovering and producing filepath information would be unduly burdensome and costly. But just because locating data may take time and effort does not mean a party should necessarily be relieved of its discovery obligations. Plaintiff "insist[ed] that the filepath information 'does not exist as metadata and cannot be automatically generated during the collection process.'" "Consequently," Plaintiff argued, "it w[ould] require a manual, document-by-document determination regarding the 'original' filepath where a document was stored 'in the normal course of business.'" But, as Magistrate Judge Gallo observed, Plaintiff offered no explanation for why that would be the case. And even accepting Plaintiff's representations that the filepath information does not presently exist in any of Plaintiff's ESI, it failed to provide any insight into "monetary cost, man hours, and length of time recovering and producing the filepath information would entail."

With respect to Plaintiff's privilege-based objections, Magistrate Judge Gallo was "not persuaded that such objections should stand in the way of Plaintiff producing any relevant and non-privileged filepath information to accompany [Plaintiff's] relevant ESI productions." Id. at \*9. As is routine in document discovery, Plaintiff could address its privilege concerns by withholding, in good faith, certain filepath information on privilege grounds, raising privilege objections to Defendants, and producing a privilege log identifying the withheld information to be served along with Plaintiff's productions.

Magistrate Judge Gallo also rejected Plaintiff's contentions about the filepath information being "misleading and thus irrelevant." Plaintiff argued that "certain filepath information would be misleading because it would reflect the ESI's current location rather than where the ESI existed during the relevant time." Magistrate Judge Gallo held that Plaintiff could assert standard discovery objections reflecting the irrelevance of the information based on the timing but that there was no reason to halt the discovery process on the basis of that particular objection. Accordingly, Magistrate Judge Gallo granted Defendants' request to compel Plaintiff's production of its filepath information to the extent it already existed.

With respect to deleted and ephemeral data, Magistrate Judge Gallo observed that the parties were in agreement that "to the extent ephemeral or deleted data is relevant to the claims and defenses at issue here, such data should be preserved." Id. (emphasis in original). As he explained, "[c]ourts generally agree that deleted, ephemeral, and other similar kinds of data are discoverable, and, necessarily then, subject to the parties' preservation duty." Because the parties' shared position readily aligned with this authority and Magistrate Judge Gallo's determination that the parties each bore an ongoing duty to preserve ephemeral or deleted data that may be relevant to any extent, Magistrate Judge Gallo granted Defendants' proposed request that the ESI protocol reflect the parties' mutual understanding on this issue.