

3. A decision from the U.S. District Court for the Eastern District of New York denying a motion to compel a forensic examination of plaintiff's cell phone based on alleged alteration of metadata for certain video files from the cell phone that were produced by plaintiff during discovery.

In *Aminov v. Berkshire Hathaway Guard Insurance Companies*, 21-CV-479-DG-SJB, 2022 WL 818944 (E.D.N.Y. Mar. 3, 2022), U.S. Magistrate Judge Sanket J. Bulsara denied a motion to compel Plaintiff to produce his cell phone for forensic examination based on alleged alteration of metadata for certain video files Plaintiff produced during discovery.

Magistrate Judge Bulsara began his analysis by noting that “[f]orensic examinations of computers and cell phones are generally considered a drastic discovery measure because of their intrusive nature.” *Id.* at *1. In this regard, Magistrate Judge Bulsara cited the Advisory Committee’s note to Rule 34(a) to the effect that “[i]nspection or testing of certain types of electronically stored information or of a responding party’s electronic information system may raise issues of confidentiality or privacy” and that “[c]ourts should guard against undue intrusiveness resulting from inspecting or testing such systems.” He further noted that compelled forensic imaging is not appropriate in all cases and that courts must consider the significant interests implicated by forensic imaging before ordering such procedures. *Id.* (citing *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008)).

Magistrate Judge Bulsara stated that in situations where a party can show improper conduct on the part of the responding party, a forensic examination may be appropriate. For example, discrepancies or inconsistencies in the responding party’s discovery responses may justify a party’s request to allow an expert to create and examine a mirror image of a hard drive. Magistrate Judge Bulsara further noted that courts have ordered computer imaging when there is reason to believe that a litigant has tampered with the computer or hidden relevant materials that are the subject of court orders. However, he stated that there must be good cause to order computer imaging or similar forensic examinations when a party has already produced the electronic information sought in a native format.

Magistrate Judge Bulsara found that there was no such justification to order forensic imaging in this case. *Id.* at *2. First, he noted that the Defendants’ motion was based on “misplaced and unsupported speculation” that the metadata for the video at issue was altered. Defendant’s counsel had used a free online metadata tool to analyze the video file, but Defendant provided no information about the reliability of the online tool. Moreover, Defendant’s conclusions regarding the metadata were based on the “less-than-unequivocal statement” produced by the online tool that “Metadata could have been changed or deleted in the past.” Magistrate Judge Bulsara noted that “this is hardly the kind of analysis or support that provides a reasonable basis either to conclude that there was alteration of metadata or to warrant forensic examinations.”

Magistrate Judge Bulsara also found that the online tool used by the Defendant was not designed to show alteration of metadata but instead to determine whether metadata exists. He noted that the tool’s website described the tool as one that “allows you to access the hidden ... meta data of your files.” In other words, the online tool reveals metadata, and therefore — at best — it may have revealed that videos were produced without metadata. Magistrate Judge Bulsara further noted that the message that the metadata “could have been changed or deleted” appears automatically for

every file that is analyzed by the tool, as a means of liability protection for the company operating the website, and that it was not specific to Plaintiff's video. According to Magistrate Judge Bulsara, "[t]his is hardly the thing on which one should base a motion to compel."

Finally, Magistrate Judge Bulsara found that although Defendant's counsel had spoken to a forensic consultant about the relevant video files, Defendant's motion did not offer the consultant's opinion about the website but referred to it only to support the idea that the original phone is necessary for metadata examination. Nor did the consultant opine that Plaintiff's files had missing or altered metadata. Ultimately, "[s]ince there is no evidence of spoliation or alteration, there is no cause to require forensic examination of the cell phone on the speculation that additional metadata may exist or that the original metadata was altered."