

1. A ruling from the U.S. District Court for the Southern District of New York addressing competing motions for spoliation sanction in a large, complex antitrust case and finding that the Defendant had spoliated evidence by, among other things, failing to promptly serve litigation hold notices on certain custodians and failing to adequately interview certain custodians about their documents.

In *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*, 341 F.R.D. 474 (S.D.N.Y. Apr. 11, 2022), U.S. Magistrate Judge Sarah L. Cave addressed competing motions for sanctions from the parties based on alleged spoliation of hard drives, hardcopy documents, and various other categories of documents as well as arguments that the parties failed to satisfy their respective document preservation obligations by, among other things, failing to promptly serve litigation hold notices on certain custodians and failing to adequately interview certain custodians about their documents.

Plaintiffs brought this action against Keurig for alleged violations of the Sherman Act, the Clayton Act, and the Lanham Act for, among other things, entering into “non-competition,” tying, and exclusive dealing agreements, threatening companies that would do business with Keurig’s competitors, and redesigning its coffee makers to render competitors’ cups unusable in Keurig’s machines. *Id.* at 489.

At an initial status conference where a schedule was set for filing consolidated amended complaints, District Court Judge Vernon Broderick stated that he “hope[d] that all parties, the plaintiffs and defendants, have done what they need to do vis-à-vis their clients on document preservation,” and he encouraged the parties to meet and confer to submit a proposed protocol for electronically stored information (ESI). Judge Broderick later adopted the parties’ joint ESI stipulation, pursuant to which the parties agreed to “take reasonable steps in good faith to prevent the loss, destruction, alteration, overwriting, deletion, shredding, incineration, or theft of any document or data the party knows, or reasonably should know, falls within the scope of Federal Rule of Civil Procedure 26(b)(1).” *Id.* at 490. The parties also represented that they had “implemented a data preservation plan, issued preservation memoranda to relevant employees, and [] confirmed with IT personnel that auto-deletions are suspended and that measures have been implemented to prevent the manual deletion of email by individual custodians.” In addition, the parties also agreed “to ask each of their document custodians whether he or she maintains potentially responsive documents or data in any of the electronic or hard-copy sources listed [in the ESI stipulation], whether at the custodian’s office, home, or online.” If a party concluded that a source of information listed in the ESI stipulation was “inaccessible or that collection from or search of any of those sources would be unduly burdensome,” the parties agreed to meet and confer to attempt to resolve the issue.

After over a year of discovery, Plaintiffs and Keurig filed motions seeking spoliation sanctions, with Plaintiffs seeking sanctions under both Federal Rule of Civil Procedure 37(b) and 37(e) and Keurig seeking sanctions solely under Rule 37(e). Among other bases, Plaintiffs' motion for spoliation sanctions was based on Keurig's alleged (i) failure to conduct proper and timely custodian interviews, (ii) loss of hard drives for nine custodians, (iii) inability to access hard drives for 15 custodians, and (iv) destruction of hard-copy notes. *Id.* at 491. Plaintiffs sought to preclude Keurig from introducing evidence on certain issues, to deliver an adverse inference instruction, and to award Plaintiffs' attorneys' fees and costs, including those incurred in bringing the motion and investigating Keurig's production deficiencies.

Magistrate Judge Cave began her analysis with a quote from *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010):

In an era where vast amounts of electronic information is available for review, discovery in certain cases has become increasingly complex and expensive. Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party.... By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records — paper or electronic — and to search in the right places for those records, will inevitably result in the spoliation of evidence.

Id. at 492-93. Magistrate Judge Cave next explained that spoliation is “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Id.* at 493. For “spoliation sanctions to be appropriate, it is a necessary, but insufficient, condition that the sought-after evidence actually existed and was destroyed.”

Magistrate Judge Cave then explained the relevant standards under Rule 37. Under Rule 37(b), where a party breaches its court-ordered discovery obligations, the court supervising discovery is permitted to “issue further just orders,” including an order “(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; [or] (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing matters in evidence” *Id.* (quoting Fed. R. Civ. P. 37(b)). “Even in the absence of a discovery order, a court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs.” A party seeking an adverse inference sanction under Rule 37(b) must establish (1) that

the party having control over the evidence had an obligation to preserve it at the time it was destroyed, (2) that the records were destroyed “with a culpable state of mind,” and (3) that the destroyed evidence was “relevant” to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. A showing of prejudice is not required.

The culpable state of mind for purposes of spoliation sanctions under Rule 37(b) requires a finding that the party acted knowingly in bad faith, through gross negligence, or through ordinary negligence. “In the discovery context, negligence is a failure to conform to the standard of what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding.” Failing to institute a litigation hold is not gross negligence per se but a factor the court should consider, along with “whether the party implemented good document or evidence preservation practices....” *Id.* at 494. Under Rule 37(b)(2), both “intentional or grossly negligent destruction of evidence in bad faith” as well as “intentional or grossly negligent acts that hinder discovery ... even if those acts are not ultimately responsible for the unavailability of the evidence,” may “support an inference that the destroyed evidence was harmful to the destroying party.”

Rule 37(e) requires that “[i]f [ESI] that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court” may, on a finding of prejudice, “order measures no greater than necessary to cure the prejudice.” *Id.* (quoting Fed. R. Civ. P. 37(e)(1)). On a “finding that the party acted with the intent to deprive another party of the information’s use in the litigation[,]” the court may “(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.” *Id.* (quoting Fed. R. Civ. P. 37(e)(2)).

Magistrate Judge Cave explained that Rule 37(e) requires a three-part analysis: (1) “decid[ing] if the rule applies at all — that is, if a party failed to take ‘reasonable steps’ to preserve ESI ‘that should have been preserved in the anticipation or conduct of litigation’”; (2) “decid[ing] if there has been ‘prejudice to another party from loss of the information,’ in which case the Court ‘may order measures no greater than necessary to cure the prejudice’”; and (3) “consider[ing] — regardless of prejudice to any other party — whether the destroying party ‘acted with the intent to deprive another party of the information’s use in the litigation,’ in which event a court may consider whether to impose the most severe of measures such as mandatory presumptions or instructions that the lost information was unfavorable or the entry of default judgment.”

Having set forth the relevant standards, Magistrate Judge Cave first addressed Plaintiffs' motion, which challenged, among other things, Keurig's alleged (i) failure to conduct proper and timely custodian interviews, (ii) loss of hard drives for nine custodians, (iii) inability to access hard drives for 15 custodians, and (iv) destruction of hard-copy notes.

With respect to Keurig's preservation and collection efforts as to litigation holds and custodian interviews, Magistrate Judge Cave found that Keurig failed to distribute litigation holds to six custodians and timely interview 11 custodians, which constituted a failure to comply with the court's order implementing the ESI stipulation under Rule 37(b)(2)(A) as well as a failure to take "reasonable steps" to preserve ESI under Rule 37(e). *Id.* at 503-504. She noted that even though some of the custodians at issue were former Keurig employees, this did not mitigate Keurig's preservation obligations because "[c]ourts have insisted that corporations, at the very least, ask their former employees to cooperate before asserting that they have no control over documents in former employees' possession." She found that Keurig had the obligation to ensure that these former employees continued to preserve potentially responsive documents.

With respect to Keurig's preservation and collection efforts as to hard drives, Magistrate Judge Cave found that Keurig failed to preserve 25 hard drives, including 16 that were preserved but inaccessible and nine that were lost altogether. *Id.* at 505. Keurig collected over 90 hard drives and laptops, from which it collected and produced data, but Magistrate Judge Cave found that Keurig had not taken any steps "when this action commenced to determine which devices Keurig had issued to an individual were under litigation hold." She found that Keurig's failure was, at least, a negligent violation of the court's order implementing the ESI stipulation under Rules 37(b)(2)(A) and a failure to take reasonable steps under Rule 37(e).

With respect to Keurig's preservation and collection efforts as to hard-copy documents, Magistrate Judge Cave found that Keurig had violated Rule 37(b)(2)(A) by failing to preserve relevant hard-copy documents for one custodian. *Id.* at 505-08. Although Keurig sent a litigation hold notice to this custodian, the custodian did not recall receiving it, and Keurig's counsel did not contact him until much later to ask whether he had any potentially responsive documents. The evidence reflected that this custodian had thrown out a binder of notes he had taken during meetings when he left Keurig. Based on this record, Magistrate Judge Cave found that identifiable, potentially responsive documents were lost because Keurig failed to take reasonable steps to confirm that the custodian had received and complied with the litigation hold notice.

Magistrate Judge Cave next turned to an analysis of whether Plaintiffs were prejudiced by Keurig's failure to preserve hard drives. She first noted that there was a significant amount of evidence related to potential prejudice, including deposition testimony from the custodians whose hard drives were allegedly spoliated. She stated that she must consider the "full record in determining prejudice and corresponding sanctions" and that her "evaluation of prejudice from the loss of information necessarily includes evaluation of the information's importance in the litigation." *Id.* at 508.

Magistrate Judge Cave then analyzed separately the evidence related to each of the 23 custodians that had hard drives Keurig allegedly spoliated. *Id.* at 508-20. She found that Plaintiffs were prejudiced by the spoliation of the hard drive evidence for certain custodians where the evidence reflected that a custodian's practice was to save documents on his or her shared drive that were not available from other sources, such as one of Keurig's shared drives. However, she found that there was no prejudice for certain other custodians where the evidence reflected that a custodian typically saved documents to a shared drive or where more recent hard drives were available and accessible. In this regard, Magistrate Judge Cave also took note of evidence that reflected whether there were gaps in the documents for the custodians that might suggest missing documents.

Magistrate Judge Cave next turned to an analysis of whether Keurig had "the intent of depriving Plaintiffs in this litigation of that evidence," noting that such a finding was required to award the harsher sanctions for spoliation of ESI under Rule 37(e)(2). *Id.* at 519. She first noted that although Keurig's efforts "may not have been perfect," Keurig did largely comply with its discovery obligations, which distinguished this from cases in which the allegedly spoliating party exhibited "persistent non-responsiveness to discovery requests with no adequate explanation." In particular, she described that Keurig "did endeavor to meet all its obligations" as Plaintiffs inquired about perceived gaps for certain custodians, as Keurig and its vendor determined that hard drives were inaccessible, and as information was produced from alternative sources, all of which tended to disprove that Keurig engaged in "intentional destruction" to "gain an advantage in the litigation." *Id.* at 520.

In addition, Magistrate Judge Cave declined to find that Keurig "acted unreasonably in assuming that its employees complied with the policy that instructed them to save documents to network drives rather than local hard drives, despite Plaintiffs' claim that employees frequently violated the policy." She noted that "it is a better practice for a company to make a searching inquiry of all relevant employees to determine whether they violated a company policy regarding use of devices," but she found that Keurig did not act "unreasonably in assuming the policy was followed and limiting its document search until the issue was brought to its attention."

With respect to the specific evidence of intent, Magistrate Judge Cave first addressed Keurig's failure to interview multiple custodians until shortly before their depositions, instead of contemporaneous with the date the custodians received litigation hold notices, which led to the spoliation of one custodian's hard-copy notes and hard drive. She stated that "parties and their counsel must timely monitor compliance with litigation holds, and that the failure to do so constitutes, at a minimum, negligence" and found that Keurig's counsel's failure to conduct a timely interview of the custodian was negligent, perhaps grossly negligent. *Id.* at 520.

However, Magistrate Judge Cave declined to conclude that Keurig's actions constituted clear and convincing evidence of an intent to deprive Plaintiffs of favorable information in this litigation. She noted that Keurig "cast a wide net in timely issuing litigation holds to over 700 custodians," and even though it "sloppily implemented that litigation hold by not following up with certain of its custodians sooner to make sure that net was capturing what was required" under the ESI stipulation, that conduct constituted negligence only, not an intent to deprive.

With respect to the specific evidence of intent, Magistrate Judge Cave next addressed Plaintiffs' allegation that Keurig "knowingly" allowed its access to a McAfee encryption server to lapse and that in doing so, Keurig "willfully violated" its obligations under the ESI stipulation sufficient to satisfy the "intent to deprive" standard under Rule 37(e)(2). Keurig performed a "rolling implementation" of the transition from McAfee to BitLocker to minimize "the risk of corrupting the drive when switching encryption from one to another." When Keurig sought to decrypt older hard drives for production to Plaintiffs, it discovered that some of the encryption keys did not work and several hard drives remained inaccessible. However, Keurig produced tens of thousands of documents from alternative sources for each of the custodians whose hard drives could not be decrypted.

Magistrate Judge Cave stated that she had "little difficulty concluding that Keurig's conduct with respect to the McAfee encryption server was not the behavior of a party intending to deprive its adversaries of relevant documents favorable to the adversaries' claims." She noted that "[e]mployees change jobs, memories fade, and technology does not always work as expected, but the loss of access to evidence in the ordinary course of business does not by itself demonstrate intent." She found that the steps that Keurig took to restore access to the McAfee encryption server, as well as the remedial efforts it undertook (and offered to take) after informing Plaintiffs of the encryption issue, were reasonable and that Keurig's failure to ensure that an encryption server no longer in use remained accessible was, at most, ordinary negligence, "far from the intent to deprive required for the severe sanctions under Rule 37(e)(2)." *Id.* at 522.

Magistrate Judge Cave also addressed Plaintiffs' argument that intent was demonstrated by Keurig's delay in providing notice of document preservation issues, including its inability to locate or access the 23 custodians' hard drives. *Id.* at 524-26. She rejected this argument and declined to conclude, from the timing of Keurig's disclosures about the hard drives for 23 custodians, that Keurig intended to deprive Plaintiffs of information favorable to their case. In particular, Magistrate Judge Cave found that the evidence was ambiguous with respect to when Keurig first became aware of the issue with the hard drives, and "[w]hile Keurig might have been able to notify Plaintiffs a few months earlier, even had it done so, the record does not demonstrate what additional evidence might have been saved."

Surveying the case law on intent, Magistrate Judge Cave found that Plaintiffs' evidence was circumstantial, at best, and "inconclusive on the issue of spoliative intent." She could not find on the record that Keurig acted "for the specific purpose of gaining an advantage in this litigation," but instead found that "Keurig's negligence in executing its preservation obligations falls in line with cases where courts have found similar degrees of negligence and incompetence but, like here, an absence of evidence to show an intent to deprive Plaintiffs of information for use in this litigation." Magistrate Judge Cave distinguished cases that found clear and convincing evidence of intent to deprive, noting that "[t]here is simply no evidence that Keurig willfully and intentionally deleted ESI," that Keurig exhibited an "aggressively willful violation of court orders regarding the production of ESI," or that Keurig engaged in "a near-constant stream of factual misdirection that significantly delayed — and nearly derailed" efforts to obtain ESI.

Having found that Keurig failed to comply with Rule 37(b) and 37(e) by (i) failing to issue litigation holds and interview certain custodians, (ii) failing to preserve hard drives, and (iii) failing to preserve hard-copy documents and that Plaintiffs were prejudiced by these failures, Magistrate Judge Cave next turned to determining the appropriate sanctions under Rules 37(b) and 37(e). *Id.* at 527. She first noted that the more severe sanction of an adverse inference under Rule 37(e)(2) was not appropriate because "the record does not contain clear and convincing evidence that Keurig acted with the intent to deprive Plaintiffs of the information's use in this action." Instead, under Rule 37(e)(1), the sanctions must be "no greater than necessary to cure the prejudice" to Plaintiffs. *Id.* (quoting Fed. R. Civ. P. 37(e)(1)). But she noted that she may continue to consider the sanctions of preclusion and adverse inference for Keurig's violations of the ESI stipulation under Rule 37(b)(2)(A).

Magistrate Judge Cave first considered whether to award expenses, including attorneys' fees, which she noted was mandatory "unless the failure was substantially justified or other circumstances make an award of expenses unjust." *Id.* (quoting Fed. R. Civ. P. 37(b)(2)(c)). She further noted that Rule 37(e)(1) authorizes a court to

award attorneys' fees and costs to the moving party to the extent reasonably necessary to remediate any prejudice caused by the spoliation.

Magistrate Judge Cave found that an award of attorneys' fees and costs to Plaintiffs was warranted under both Rules 37(b)(2)(C) and 37(e)(1). The evidence reflected that when Keurig represented it had substantially completed its production, it knew that it had been unable to access at least four hard drives. Although the parties later worked on remedial measures for these hard drives, Plaintiffs incurred the expense not only of investigating the deficiencies but also of continued efforts to confirm the nature, scope, and volume of information that was not preserved. Although Magistrate Judge Cave determined that actual prejudice extended to only a handful of custodians, she found that Plaintiffs did incur "expenses associated with prodding" Keurig into confirming which hard drives were lost or inaccessible and with identifying where possible gaps in Keurig's production remained. She ordered the parties to meet and confer regarding Plaintiffs' "reasonable expenses caused by Keurig's violations of court orders." *Id.* at 528.

Magistrate Judge Cave next found that Plaintiffs would be permitted to present evidence to the jury concerning hard-copy documents that were not preserved and the gaps left by the failure to preserve hard drives for three custodians and that the jury would be permitted to consider that evidence, along with the other evidence in the case, in evaluating Plaintiffs' claims and Keurig's defenses in their deliberations. She noted that this sanction was permitted under Rule 37(e)(1) without any predicate finding of intent to deprive and was appropriate for three reasons: (1) it recognizes that Plaintiffs suffered prejudice from the loss of evidence that should have been preserved and thus "help[s] rectify the evidentiary imbalance that Keurig created by spoliating relevant ESI" and hard-copy documents; (2) it provides the jury, as finder of fact, with context for that evidentiary imbalance, which is itself relevant evidence going to the parties' credibility and other factual issues; and (3) it does not encroach on the district court's authority to determine the scope of any spoliation evidence to be presented at trial.

Having decided Plaintiffs' motion against Keurig, Magistrate Judge Cave turned to Keurig's motion claiming that one of the Plaintiffs, TreeHouse, failed to implement litigation holds on a timely basis, resulting in the spoliation of discoverable evidence. *Id.* at 529. Keurig argued first that TreeHouse's duty to preserve documents arose in the fall of 2013, when it began preparing to file its lawsuit, although TreeHouse started distributing hold notices on February 4, 2014. *Id.* at 530. TreeHouse argued that its duty to preserve began no earlier than February 5, 2014, when its board of directors began considering the possibility of litigation against Keurig.

Magistrate Judge Cave noted that the Second Circuit “has rejected the suggestion that simply being on notice of potential injury that might give rise to litigation triggers a duty to preserve” and that in the case of alleged spoliation by a plaintiff, the preservation obligation is deemed to arise on the date the plaintiff sent a demand letter or notice of claim or filed the complaint. *Id.* at 532. She noted that the “preservation trigger” in cases involving spoliation sanctions by a plaintiff is when the plaintiff “decided” to sue the defendant. Accordingly, Magistrate Judge Cave found that TreeHouse’s duty to preserve arose no earlier than when it decided to sue Keurig and engaged counsel to begin drafting a complaint.

Magistrate Judge Cave next addressed Keurig’s argument that TreeHouse failed to take reasonable steps to preserve evidence when it sent additional litigation hold notices to six custodians that it identified after the litigation was filed. *Id.* at 533. Magistrate Judge Cave first summarized the evidence with respect to TreeHouse’s preservation efforts, including that TreeHouse issued litigation hold notices to 99 employees, including to 21 employees before the original complaint was filed; required employees to save materials “they believed to be relevant to potential litigation” regardless of whether they had received a litigation hold notice; implemented the Enterprise Vault system in September 2013 to archive all employees’ emails; has used the “litigation hold” feature of Microsoft Exchange; used email and file servers that were not enabled to perform automatic deletions; and “conducted an early round of hard drive collections.”

Magistrate Judge Cave then analyzed separately the evidence related to each of the six custodians that were the subject of Keurig’s motion. *Id.* at 533-37. She concluded that the steps TreeHouse took to preserve documents for each custodian were reasonable. In reaching this conclusion, she relied on evidence from the record that each of the custodians’ emails were automatically archived through Enterprise Vault, TreeHouse produced large volumes of documents from the custodians’ files, and TreeHouse produced documents from other current and former employees that worked with the custodians. However, Magistrate Judge Cave also found that TreeHouse should have sent one of the custodians a litigation hold notice at the time the complaint was being drafted because TreeHouse relied on an email involving the custodian for a key allegation in its complaint.

Magistrate Judge Cave determined that Keurig failed to establish prejudice, finding that “Keurig has simply not established that ESI existed that TreeHouse failed to preserve, let alone that Keurig suffered prejudice as would justify sanctions under Rule 37(e)(1).”

Finally, Magistrate Judge Cave denied a separate motion by Keurig against another Plaintiff, JBR, based on the claim that JBR failed to preserve relevant evidence

concerning a January 31, 2014, meeting between JBR and Costco referenced in JBR's complaint against Keurig. *Id.* at 538-39. Magistrate Judge Cave denied the motion because even though the evidence reflected that JBR may have been considering bringing an action against Keurig at an earlier date, Keurig had not shown any evidence that JBR "decided it was going to bring an action against" Keurig as of the date of the Costco meeting. Because Keurig had not offered any evidence establishing that JBR decided to sue earlier than the date it filed its complaint, Magistrate Judge Cave found that JBR's preservation obligation arose on the date it filed its original complaint.