

1. A ruling from the U.S. District Court for the Northern District of California finding that the Defendant failed to preserve relevant evidence that was lost through an automatic deletion process and concluding that the jury could draw an adverse inference if it found the failure intentional.

In *Meta Platforms, Inc. v. BrandTotal Ltd.*, 2022 WL 1990225 (N.D. Cal. June 6, 2022), Chief U.S. Magistrate Judge Joseph C. Spero found that Defendant at least negligently failed to preserve relevant evidence and that the jury would be instructed that Defendant failed to preserve evidence regarding a relevant issue and may draw an adverse inference if it found that failure was intentional. He ordered Defendant to reimburse 75% of Plaintiff's fees and costs for bringing its sanctions motion.

Plaintiff in this action alleged that the Defendant impermissibly accessed and collected user and other data, such as access tokens and cookies, from Plaintiff's social media platforms. During discovery, Plaintiff learned that Defendant had permitted deletion on a regular schedule of data from a "debugging log" called Rapid7, including after the action commenced and, purportedly, even after learning that it was relevant. Defendant used Rapid7 as a tool to track the operation of Defendant's various software products, storing information about processes executed by Defendant's software for 30 days, after which time the information was deleted automatically. *Id.* at *3. Defendant represented that the Rapid7 log was used only for troubleshooting and debugging rather than for its normal business.

As of October 2020, when Plaintiff filed its complaint, at least some developers that used Defendant's products knew that access tokens and cookies from users of certain of Defendant's products had been sent to the Rapid7 log, but the company took no steps to preserve those logs and prevent their automatic deletion prior to the Defendant's 30(b)(6) deposition in November 2021, over a year later. At that time, Plaintiff knew that Defendant collected these access tokens and cookies but did not know how Defendant stored that data. Defendant, in its Rule 30(b)(6) deposition, stated that Plaintiff could have determined the information sent to Rapid7 from Defendant's source code. While Defendant modified some products to cease collecting user access credentials after the complaint was filed, it did not do so with Rapid7 or take steps to prevent the automatic deletion.

During a January 2021 Rule 30(b)(6) deposition, Defendant testified that its products had never transmitted user session tokens or session IDs to Defendant's servers. However, in its November 2021 deposition, taken by a different company representative, Defendant conceded that the January 2021 testimony was inaccurate and did not reflect what Defendant knew at that time. During a March 2022 deposition, the first 30(b)(6) representative stated that he did not recall whether Defendant used Rapid7

and that he did not have a technical enough role to have “connected to these logs” during his employment.

Defendant produced excerpts of Rapid7 data after Plaintiff learned that data was stored in Rapid7 logs in September 2021. *Id.* at *4. Plaintiff confirmed in the November 2021 Rule 30(b)(6) deposition that older Rapid7 logs had been lost due to the 30-day retention and automatic deletion process. After that point, Defendant produced all available Rapid7 data and agreed to make ongoing weekly productions.

Plaintiff sought an order imposing an adverse inference presumption against Defendant to the effect that the court would treat certain facts as established for purposes of adjudicating Plaintiff’s summary judgment motion (filed alongside its motion for sanctions). The facts that Plaintiff sought to have decided in its favor included that Defendant was obligated to preserve Rapid7 data beginning in October 2020 but intentionally failed to do so because the data was unfavorable and that the deleted data would have demonstrated various information relevant to Plaintiff’s substantive claims. Plaintiff also sought to preclude Defendant from relying on testimony from the January 2021 Rule 30(b)(6) deposition and to recover its fees and costs, including expert costs, incurred in connection with bringing this motion. Defendant argued that it did not intentionally or affirmatively delete anything and that Plaintiff was not prejudiced because other evidence showed the conduct at issue.

Chief Magistrate Judge Spero laid out the legal standard for the court’s authority under Rule 37(e) of the Federal Rules of Civil Procedure and its inherent authority to sanction litigants for discovery abuses. He specifically listed Rule 16(f), allowing courts to order sanctions when a party or its attorney fails to obey a pretrial order, and Rule 37(b)(2)(A), which allows sanctions on parties that have failed to comply with a discovery order.

Chief Magistrate Judge Spero went on to provide the three factors courts consider, once a finding of spoliation has been made, to determine whether and what type of sanctions to issue: “(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party.” *Id.* at *5. He stated that courts have the discretion to permit juries to draw an adverse inference against the responsible party “so long as the party responsible had simple notice of potential relevance to the litigation, with no requirement to prove bad faith.” *Id.* (internal quotations omitted).

Chief Magistrate Judge Spero criticized Plaintiff for asking the court to treat certain facts as established for the purpose of its summary judgment motion while also seeking a trial instruction “only that the jury *may* presume such facts to be true,” finding this to

be in tension with the usual rules for summary judgment. *Id.* (emphasis in original). He stated that he would evaluate the motion without regard to the phase of the litigation.

Chief Magistrate Judge Spero had “little trouble concluding that the Rapid7 database ... included information relevant to the case, that Defendant knew it included that information, and that Defendant should have taken steps to preserve it once litigation was contemplated, i.e., no later than when Plaintiff filed its first complaint against Defendant in state court.” *Id.* at *6. He further concluded that the loss of at least some of Defendant’s data collection prejudiced Plaintiff’s ability to understand and prove the scope and nature of Defendant’s conduct. Additionally, there was no dispute that the deleted data could not be replaced or recovered through additional discovery. As a result, he concluded that Plaintiff had established the basic elements of spoliation for the purpose of Rule 37(e).

However, Chief Magistrate Judge Spero found that Plaintiff had not established the requisite intent under Rule 37(e)(2) necessary for an adverse inference presumption or instruction. He found it plausible that while Defendant should have recognized its obligation to preserve the Rapid7 records, Defendant might have overlooked this log as a source of relevant and discoverable information while it took steps to preserve more obvious sources of relevant information. Such negligence was insufficient to support an adverse inference instruction, and Plaintiff had not provided evidence that intentional failure to collect this information was the most likely explanation.

But Chief Magistrate Judge Spero found that Defendant’s negligence could potentially support an adverse inference instruction under the court’s inherent authority, even if not under Rule 37(e). *Id.* at *7. He rejected the specific instruction Plaintiff proposed, that is, to accept as proven that the deleted Rapid7 logs would have revealed a yearlong practice of exfiltrating users’ access credentials and using that information to pose as those users and scrape data, because there was no evidence of this except for the absence of the logs. Therefore these inferences were best left to the jury or for resolution after trial. Chief Magistrate Judge Spero modified the instruction such that a jury would be told “that [Defendant] had a duty to preserve its Rapid7 logs from October of 2020 through October of 2021 but failed to do so.” *Id.* at *8. Further, the jury may consider whether one party intentionally concealed or destroyed, or allowed to be lost, certain evidence and, if so, that the evidence would have been unfavorable to that party.

Chief Magistrate Judge Spero then found that an award of attorneys’ fees was appropriate to cure the prejudice to Plaintiff resulting from spoliation. *Id.* at *9. However, because Plaintiff overreached in seeking a more extreme remedy under Rule 37(e)(2), he found not all of the fees were reasonably incurred and therefore ordered Defendant to reimburse only 75% of the fees and costs Plaintiff incurred in bringing its motion for sanctions. He ordered the parties to meet and confer and file either a

stipulation as to the amount of such fees and costs or a joint letter brief laying out their respective positions on the value of fees and costs to be awarded.