

1. A ruling from the U.S. District Court for the District of Massachusetts ordering terminating sanctions of a default judgment against certain Defendants for committing repeated and unexcused discovery misconduct by failing to produce relevant Slack messages and Google Suite documents in response to multiple court orders and for repeatedly certifying that all relevant documents had been produced.

In *Red Wolf Energy Trading, LLC v. Bia Capital Management, LLC*, --- F. Supp. 3d ---, 2022 WL 4112081 (Sept. 8, 2022), U.S. District Judge Mark L. Wolf resolved the Plaintiff's motion for sanctions against certain Defendants that had failed to produce relevant Slack messages and Google Suite documents despite multiple court orders requiring production.

Plaintiff Red Wolf Energy Trading, LLC, a firm trading virtual electricity products, filed this action for alleged misappropriation of its trade secrets and violations of the Massachusetts statute prohibiting unfair and deceptive trade practices, claiming that Defendants had schemed to steal its software and algorithms to start a competing business. *Id.* at *3. Red Wolf alleged that Defendant Christopher Jylkka, a former Red Wolf employee, took confidential information and trade secrets and disclosed them to other Defendants, who were improperly using them at various companies including Defendants Bia Capital Management, LLC, and GrowthWorks, LLC.

With its complaint, Red Wolf filed a motion for a temporary restraining order and preliminary injunction, seeking to enjoin Defendants from using or disclosing any of Red Wolf's confidential information, including Red Wolf's proprietary trading strategies. *Id.* at *4. Defendants opposed the motion and submitted affidavits from Defendants Gregory Moeller, the founder and managing director of both Bia and GrowthWorks, and Michael Harradon, who worked on the development of Bia's trading algorithm. Among other things, the affidavits stated that Jylkka was involved with Bia and GrowthWorks only as a "potential customer," that he did not assist in developing Bia's software, and that Bia's trading was accomplished exclusively with Bia-developed software and public data.

Judge Wolf had denied Red Wolf's motion for a temporary restraining order and preliminary injunction, relying in part on Moeller's and Harradon's representations. Judge Wolf had found, based on those representations, that Red Wolf was not likely to prove that it had been or would be irreparably harmed during the pendency of the litigation by any misuse of its trade secrets.

During discovery, Red Wolf requested various categories of documents, including communications concerning whether Jylkka had misappropriated Red Wolf's confidential information and whether the other Defendants had unlawfully used such

confidential information in developing Bia's competing business. *Id.* at *5. Although Defendants produced some documents in response to Red Wolf's requests, Red Wolf ultimately filed a motion to compel on the grounds that it had not received, among other things, all requested communications with Jylkka between January 8, 2019, and January 31, 2019 (the period between when the litigation was threatened and filed), and "Google Suite" documents that were linked to other documents that had been produced.

Judge Wolf had granted Red Wolf's motion to compel additional communications because "the fact that there was a . . . threat of a complaint [being filed] on January 8th doesn't mean there's not relevant evidence afterwards." *Id.* at *6. He had also required Defendants to see if any additional documents from the Google Suite had not been produced. At the same time, he warned Defendants that they would be sanctioned if they did not produce all required documents and information and ordered Defendants to review the discovery that had been produced carefully to determine whether the prior productions were incomplete and needed to be supplemented. Judge Wolf had instructed Defendants to file an affidavit stating either that the review had been conducted and additional documents had been disclosed or that there were no additional documents to be produced.

Defendant Moeller later filed an affidavit affirming Defendants' compliance with the order, including that he had, "with counsel, worked to gather documents responsive to [Red Wolf's document] requests in the past" and that he had "reviewed our Slack communications and provided all Slack channel communications where Mr. Jylkka was a participant for the January 17, 2019 through January 31, 2019 period to counsel." *Id.* at *7.

Red Wolf subsequently took depositions of Jylkka, Moeller, and Harradon. Based on those depositions, Red Wolf claimed in a court filing that Defendants had not produced all relevant Slack messages. In response, Judge Wolf had once again ordered Defendants to supplement their productions and provide an affidavit confirming that everything had been produced. *Id.* at *8. In response, Defendant Moeller filed another affidavit stating that Defendants had "conducted a good faith search for relevant, responsive documents" and that he did not believe that "there is any further supplementation required under Rule 26(e)."

Red Wolf then filed a new motion to compel production of the entirety of Slack communications "sent or received between January 1, 2015 and January 31, 2020 between Jylkka" and various individuals. Defendants opposed the motion, arguing that the parties had agreed to narrow Red Wolf's request for Slack messages to ones that corresponded to an agreed-on list of topics or search terms. Defendant Moeller filed yet another affidavit with the opposition to Red Wolf's new motion, in which he explained that "there was no ready mechanism to search and produce Slack messages" and that

he had worked with a consultant to write a program to search and produce Slack messages in a readable format.

Around this time, Defendants produced documents to Red Wolf that had not been produced before, explaining that “additional documents responsive to Red Wolf’s requests were discovered during the process of identifying and providing information to Bia’s expert witness in late November 2021.” *Id.* at *9. Among these were 47 documents found in Bia’s Google Vault drive, including a PowerPoint presentation Jylkka prepared and provided to Moeller and Harradon containing screenshots of Red Wolf’s proprietary software and user interface. Judge Wolf had noted at that time that the PowerPoint was “important evidence that undermine[d] the credibility of Moeller’s sworn statement that information provided by Jylkka was ‘not needed or used in development in any way,’ and Harradon’s sworn statement that Jylkka ‘did not assist’ in developing Bia’s algorithm ‘in any way.’” Moeller claimed that this PowerPoint and other documents were not provided earlier because of an error in Bia’s original search that resulted in Bia conducting a search of only Gmail and not Bia’s other electronic records stored in Google Vault.

Red Wolf then filed a motion for sanctions, requesting that the court order Bia, Moeller, and their attorneys to (1) conduct a final and thorough search of Bia’s files and produce any relevant documents they find; (2) produce Moeller, Harradon, and Jylkka for additional depositions and pay associated attorneys’ fees and costs to Red Wolf; (3) pay for the costs associated with revision and supplementation of Red Wolf’s expert reports related to the belatedly produced documents; and (4) pay Red Wolf reasonable attorneys’ fees associated with its motion for sanctions. *Id.* at *10.

In response to Red Wolf’s motion, Judge Wolf had ordered Defendants to produce all Slack communications with Jylkka from January 1, 2015, to January 31, 2019, but he stated that he gave Defendants “the benefit of great doubt with regard to the Slacks I said there was a failure of meeting of the minds. I could have reasonably decided that the other way.” Judge Wolf also ordered sanctions for Defendants’ failure to produce Google Vault documents in response to his prior orders but “acted with restraint” to award only the costs of the sanctions motion. *Id.* at *10-11. He also ordered the reopening of the depositions of Jylkka, Moeller, and Harradon to allow Red Wolf to question them concerning the 47 Google Vault documents produced after the discovery deadline and any additional Slack communications Red Wolf was to receive. *Id.* at *11.

Defendants then provided Red Wolf with additional Slack communications involving Jylkka, including Slack messages containing agreed-on search terms that had not been previously produced. During a subsequent deposition, Moeller testified that the exclusion of these Slack messages had been inadvertent as a result of a “mistake” by the programmer who wrote the program to search the Slack messages and that

Defendants had experienced difficulty finding anyone with expertise in restoring and searching Slack messages. In particular, Moeller testified that he had consulted Eric Brown, who had conducted the electronic searches of Bia's systems, and Brown had told him that "he was not aware of any tools that could be used to search Slack messages." However, Brown contradicted this testimony, testifying himself that he had informed Moeller that he was not familiar with Slack and could not provide any guidance on how to search Slack. Moeller also testified that he had only "done some spot checking" of Slack messages in response to the court's prior orders.

Red Wolf filed a second motion for sanctions, arguing that Defendants' recent productions of Slack communications revealed further failures to produce required documents, including "hundreds of 'new' Slack messages that contained the search terms initially applied by Defendants." *Id.* at *12. Red Wolf requested entry of default judgment on all counts against Bia and Moeller, among other sanctions. During briefing on the second motion for sanctions, Defendants produced additional Slack messages, including messages that Red Wolf claimed again contained relevant search terms. *Id.* at *13. Red Wolf also claimed that these new Slack messages were "relevant and b[ore] directly on one of the more contested issues in this case: whether or not Jylkka provided meaningful assistance to Greg Moeller and Michael Harradon in developing and refining the Bia database."

During the hearing on Red Wolf's second motion for sanctions, Red Wolf requested that the court order Defendants to provide a copy of Bia's original Slack data archive so that it could be searched by Red Wolf's vendor and compared with the documents Defendants had produced. *Id.* at *14. Defendants' counsel agreed with the request, and Judge Wolf ordered the production and further ordered Red Wolf to report its findings to the court. In addition, the parties were ordered to file supplemental memoranda concerning the prejudicial effect, if any, of the delayed disclosure of Slack messages containing relevant search terms that should have been produced earlier. Red Wolf later reported, "Bia failed to produce at least 128 relevant messages that contained a search hit." *Id.* at *15. Included among these messages, according to Red Wolf, was "a proverbial smoking gun" Slack message from days after Red Wolf's suit was filed in which Moeller and Harradon discussed creating a new algorithm to hide the fact that the original algorithm was derived from Red Wolf intellectual property.

An affidavit from Red Wolf's vendor claimed that Defendants could have used "a standard eDiscovery processing tool" to search and produce Slack messages for a cost of about \$10,000, that Slack had "a built-in search function that would allow a user to search channels and direct message conversations for certain search terms," and that Defendants' searches of the Slack archive "was outside of universally accepted standards and best practices for legally defensible data collection, preservation and production" and was "not technologically sound." *Id.* at *16. Red Wolf's vendor also

claimed that Defendants' flawed search of the Slack communications may have been done deliberately to withhold potentially relevant data during discovery and that numerous "empty folders" in the Slack archive supported an inference that deletion of channel data occurred after export from Slack but prior to transfer to Red Wolf.

The parties also submitted briefing regarding the prejudicial effect of the delayed disclosure of Slack messages. Red Wolf argued that the belatedly produced Slack messages proved that Defendants' prior statements were false, including the statements that Defendants (1) did not rely on Jylkka's help, (2) did not use Red Wolf's confidential and proprietary systems and software, and (3) did not conspire to cover up their wrongdoing after Red Wolf brought the lawsuit. Defendants argued in response that these Slack messages were "not new in whole or substance" because similar messages were produced in 2019. Defendants also denied that data may have been deleted from the Slack archive before it was provided to Red Wolf, arguing that empty Slack channels could have been caused by a Slack participant starting a message without sending it (although Slack stated that channels could be empty because of deletion of data). *Id.* at *17.

Judge Wolf began his analysis with a discussion of Federal Rule of Civil Procedure 26, noting that Rule 26(e)(1) requires a party to supplement or correct a response to a discovery request either "if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing," or as ordered by the court. Judge Wolf suggested that both of these scenarios under Rule 26(e)(1) were relevant here. He found that Defendants were required to produce all documents relevant to Red Wolf's claims if they were requested and the request was not subsequently narrowed by agreement. *Id.* at *18. Defendants were also required to review their initial responses and supplement them if requested documents were not initially produced, as Judge Wolf twice ordered and as Moeller in two affidavits claimed to have done (but did not do).

Judge Wolf next surveyed his "broad authority to issue sanctions in response to a party's failure to obey discovery orders," noting that under Federal Rule of Civil Procedure 37(b)(2), sanctions must be both "just" and "specifically related to the particular 'claim' which was at issue in the order to provide discovery." He noted that there "are no mechanical rules for determining whether sanctions should be imposed and, if so, which are appropriate" and that it is necessary to consider the totality of the circumstances, focusing on factors including, but not limited to, "the severity of the discovery violations, legitimacy of the party's excuse for failing to comply, repetition of violations, deliberateness of the misconduct, mitigating excuses, prejudice to the other party and to the operations of the court, and adequacy of lesser sanctions." *Id.* at *19.

Judge Wolf cited to First Circuit precedent that “a party’s disregard of a court order is a paradigmatic example of extreme misconduct” but also noted that default judgment is generally disfavored and is considered a “drastic” sanction to be used only in “extreme” situations. However, he further explained that Rule 37(b)(2)(vi) provides, and puts parties on notice, that a default judgment may be entered against them if they disobey discovery orders. Judge Wolf noted that in this case, “despite repeated orders to review, and supplement if necessary, their production of documents, and repeated warnings that severe sanctions could be imposed if they failed to do so, Bia and Moeller violated” the court’s discovery orders. Judge Wolf characterized Defendants’ violations as “serious,” resulting from at least “reckless disregard of their obligations to produce documents and obey court orders.” He also noted that “there is reason to be concerned that the misconduct may have been deliberate.”

Judge Wolf next found that Red Wolf was “seriously prejudiced by [D]efendants’ misconduct,” which “also seriously injured the court’s ability to manage this case and others on its docket.” He stated that default judgments were “justified” and, indeed, “the only viable Rule 37(b)(2) sanction.”

Judge Wolf noted in particular that in response to Red Wolf’s first motion to compel, Moeller had filed a sworn affidavit asserting that all five Defendants had complied with the court’s order and their obligations to supplement discovery under Rule 26(e), but that was not true. *Id.* at *20. Red Wolf conducted depositions in reliance on the belief that it had all of the documents necessary to prepare properly for the depositions. After Red Wolf filed a second motion to compel, Defendants certified in response that “no further supplementation of the prior production of documents was required under Rule 26(e),” but that statement was also untrue.

Judge Wolf repeated that “a party’s disregard of a court order is a paradigmatic example of extreme misconduct” and added that “disregard of a prior warning from the court exacerbates the offense.” He noted that “[r]epeated violations of court orders following increasingly strong warnings is alone enough to justify default judgment as a sanction.”

Judge Wolf then detailed at length those aspects of Defendants’ conduct that justified default judgment as a sanction. First, in response to Red Wolf’s first motion to compel, Judge Wolf had informed Defendants of their obligation to supplement their discovery responses and ordered Defendants to ensure that their production was complete. *Id.* at *21. Moeller filed an affidavit claiming to have complied with this order, but that “representation proved to be untrue as additional documents that should have previously produced were repeatedly discovered.”

Second, after Red Wolf had taken depositions and discovered potential additional documents that had not been produced, Judge Wolf again ordered defendants to

supplement the production of documents if necessary. “Evidently, without doing any further review of defendants’ production of documents, Moeller filed another affidavit claiming to have complied with” that order. That representation was also untrue.

Third, in response to Red Wolf’s first motion for sanctions, Judge Wolf ordered Defendants to pay attorneys’ fees because Defendants had failed to produce Google Suite documents. But Judge Wolf did not know at that time that Defendants had also failed to produce numerous Slack messages, including messages that contained relevant search terms and that should have been produced earlier. And while Judge Wolf ordered Defendants to produce additional Slack messages, he also gave Defendants “the benefit of great doubt” and found that additional sanctions were not appropriate at that time because “there was not a meeting of the minds between the parties on what was required to be produced.” *Id.* at *22.

Fourth, Judge Wolf ordered additional depositions in light of the discovery failures and warned Defendants that “there could be severe consequences if more documents that should have been produced were discovered in the future.” Judge Wolf had added that if his orders were violated “and I find it’s willful, they can be punished by contempt. Then you’re not talking about paying money. It can be criminal contempt if there’s clear and convincing evidence that it’s willful. Somebody can get locked up.” But Defendants did not provide all of the required Slack messages before the reopened depositions and later produced additional Slack messages.

Judge Wolf found that Defendants’ discovery conduct could not be excused, first pointing to Moeller’s “changing, unconvincing explanations for why Bia did not employ an experienced vendor to search the Slack messages.” *Id.* at *23. In this regard, he noted that Red Wolf’s expert had testified that Defendants could have used “a standard eDiscovery processing tool” to search and produce Slack messages for a cost of about \$10,000 and that Slack had a built-in search functionality that could be used to verify the accuracy of a Slack production based on search terms. Judge Wolf also noted discrepancies in the testimony of Moeller and Brown regarding the advice Moeller received about searching Slack messages. Finally, Judge Wolf pointed to Moeller’s changing testimony about why Bia used “an unpaid novice in Kazakhstan to conduct its search for Slack messages, rather than an experienced vendor in the United States at a modest cost.”

Judge Wolf also discussed the evidence that Bia and Moeller may have deliberately failed to produce some Slack messages. Red Wolf’s expert had identified Slack “channels” that contained no data, meaning content, which could mean that messages were deleted. Judge Wolf stated that “[a]ny deliberate deletion of messages would be an especially serious form of misconduct. However, litigating whether that occurred would be time-consuming for the court and expensive for Red Wolf.” However, he

concluded that whether Defendants' repeated failure to produce documents in violation of his orders and "stern warnings" was deliberate or reckless was not material to his conclusion that Defendants' misconduct was "extreme."

Judge Wolf found that Defendants' discovery misconduct was prejudicial to Red Wolf. Judge Wolf first noted the additional time and expense caused by documents' not being available for depositions and that "[i]t would be expensive to order that defendants and possibly others be deposed a third time." Judge Wolf also noted that Red Wolf appeared to be suffering continuing competitive injury during the pendency of this case. *Id.* at *24. He stated that "it appears likely that Red Wolf would be able to prove at trial that Jylkka, Bia, Moeller, and Harradon, at least, misappropriated Red Wolf's trade secrets" and that "Defendants' failure to produce documents required by the Federal Rules of Civil Procedure and the court's orders deprived Red Wolf of the opportunity to file a fully informed motion for summary judgment that may have been meritorious and ended this case long ago." Judge Wolf also noted that "[b]y engaging in misconduct that has delayed resolution of this case, defendants have prolonged their opportunity to profit from the misappropriation of Red Wolf's trade secrets and other unfair practices that Red Wolf alleges and appears likely to be able to prove."

Judge Wolf also found that Defendants' misconduct had "severely injured the court's ability to manage this case and the many other cases on its docket," delaying the completion of the case and "consuming judicial time that could and should be devoted to many other cases deserving attention."

In sum, Judge Wolf concluded that Defendants' repeated violations of their duty to produce documents was "severe" and prejudiced Red Wolf because Red Wolf "was long deprived of documents that are evidence of the merit of its claim and could have led to the discovery of more such evidence" and that Defendants' "misconduct [was] exacerbated because defendants continued their misconduct despite multiple, increasingly severe warnings that any further failure to supplement their incomplete production of documents would be severely sanctioned."

Judge Wolf next repeated that default judgment was the appropriate sanction, noting that the documents that Defendants failed to produce related directly to Red Wolf's misappropriation of trade secrets and unfair trade practices claims and that Defendants' excuses for their repeated misconduct were unconvincing. Judge Wolf found that there were "no other available appropriate sanctions" and that sanctions such as precluding Defendants from offering evidence on those issues would "merely prolong litigation in which Red Wolf would inevitably prevail." In addition, he found that "conducting civil and/or criminal proceedings to decide whether Moeller and Bia should be held in contempt for violating the court's two discovery orders would also prolong this case without providing any benefit to Red Wolf." Finally, he found that entering a default

judgment was justified “in order to deter others from emulating defendants’ misconduct.” *Id.* at *25.

In addition to the default judgment, Judge Wolf found that Bia and Moeller must pay Red Wolf’s reasonable attorneys’ fees and expenses concerning Red Wolf’s second motion for sanctions. *Id.* at *26. He noted that Rule 37(c)(2)(C) provides that “the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure [to produce documents], unless the failure was substantially justified or other circumstances make an award of expenses unjust.” Judge Wolf found that Defendants violated his court orders and that the failure was not substantially justified.