

4. An opinion from the U.S. District Court for the Southern District of Ohio denying a motion to quash a subpoena to one Defendant’s former counsel seeking production of any litigation hold notice that had been issued to the Defendant, finding that Plaintiff had met its burden of making a preliminary showing of spoliation sufficient to require production.

In, *Safelite Group, Inc. v. Nathaniel Lockridge, et al.*, No. 21-cv-04558, 2022 WL 17842945 (S.D. Ohio Dec. 22, 2022), U.S. Magistrate Judge Elizabeth A. Preston Deavers addressed whether to quash on privilege grounds a subpoena request directed to one Defendant’s former attorney seeking production of a litigation hold notice.

Plaintiff, an auto glass and repair and replacement company, brought this action against a competitor and certain of its former employees alleging misappropriation of trade secrets and interference with its employment contracts and business relationships. *Id.* at *1.

Plaintiff had filed a different litigation against one of its former employees, William Billingsley, on September 14, 2021, and Billingsley had retained Robert Wood, a Texas attorney, to represent him in that action. But Plaintiff later dismissed that litigation and amended its complaint in this action to name Billingsley as a defendant. Plaintiff provided Wood with a copy of the then-operative complaint in this action on December 1, 2021, and Wood advised Billingsley via email that Billingsley had been named as a defendant. *Id.* at *2. On either December 22 or December 24, 2021, Billingsley had “an initial conversation” with Gil Gradisar, who became his counsel in this action.

During discovery, Billingsley testified that he had deleted documents from his personal email account after January 7, 2022, despite being advised by his counsel on December 24, 2021, to preserve all documents in his possession relative to his employment with Plaintiff. Billingsley claimed to have told his counsel that his emails were set to delete after 30 days, but that “all relevant documents had been printed out and preserved.” Billingsley also claimed to have retained the services of a cybersecurity contractor to search for any lost or deleted texts, which were then provided to his counsel.

Plaintiff later claimed to have discovered evidence of spoliation when another defendant produced a relevant email thread involving Billingsley’s personal email account, but which had not been produced by Billingsley. Plaintiff then issued a subpoena to Wood seeking his communications with Billingsley about his preservation obligations and any litigation hold notice in connection with Plaintiff’s lawsuits, including a copy of the litigation hold notice (if one existed) provided by Wood to Billingsley. *Id.* at *3. Billingsley moved to quash the subpoena.

Magistrate Judge Deavers began her analysis with a brief discussion of Rule 45 of the Federal Rules of Civil Procedure governing subpoenas, noting that a subpoena must be quashed where it “requires disclosure of a privileged or protected matter” without any waiver or exception to support it. She rejected Plaintiff’s threshold argument that Billingsley lacked standing to seek to quash the subpoena, finding that a party with a claim of privilege with respect to the materials being sought by a subpoena has the right to object.

With respect to Plaintiff's request for production of the litigation hold notice, Magistrate Judge Deavers first noted that "the fact of a litigation hold is not privileged or protected by work product," but litigation hold letters generally are privileged and are not discoverable. *Id.* at *4. However, this rule is not absolute and can be overridden if a party makes a preliminary showing of spoliation, that is, "the intentional destruction of evidence that is presumed to be unfavorable to the party responsible for its destruction." Magistrate Judge Deavers explained that spoliation sanctions are appropriate upon the satisfaction of three conditions: (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the accused party destroyed the evidence with a culpable state of mind; and (3) the evidence destroyed is relevant to the other side's claim or defense. *Id.* at *5.

Magistrate Judge Deavers ultimately found that Plaintiff had met its burden of making a preliminary showing of spoliation sufficient to support its request for production of the litigation hold notice. She based this finding on Billingsley's own testimony that he deleted documents from his personal email account after he had been advised not to by his counsel. She also relied on email thread Plaintiff obtained from another defendant that was not produced by Billingsley, as well as the fact that Billingsley had preservation obligations arising from his receipt of a cease-and-desist letter in August 2021 and a complaint in an earlier action filed in September 2021. Magistrate Judge Deavers concluded that these circumstances "combine to elevate the issue of spoliation beyond the level of mere speculation."

Magistrate Judge Deavers rejected Billingsley's argument that any deleted documents were "innocuous and unrelated to the allegations of Plaintiff's Complaint," finding that she would not take Billingsley at his word that he deleted only documents unrelated to Plaintiff's claims. She noted in particular that the mere absence of a reference to Plaintiff did not conclusively establish that a document is not relevant to Plaintiff's misappropriation of trade secrets claim and that Billingsley is not an attorney and could not make relevance determinations.