

**3. A ruling from the U.S. District Court for the Southern District of California denying a motion for sanctions against the Plaintiff for failing to preserve evidence on her smartphone, where the Defendants did not move to compel production of the evidence before moving for sanctions and had not carried their burden to demonstrate that the evidence could not be replaced or recovered from another source.**

In *Tan v. Konnektive Rewards*, No.: 20-cv-1082-LL-DDL, 2023 WL 2669869 (S.D. Cal. March 28, 2023), U.S. Magistrate Judge David D. Leshner addressed whether Plaintiff could be sanctioned for not preserving a text message on her smartphone that was relevant to the litigation.

Plaintiff brought putative class claims against Defendants for allegedly scamming her through text message into purchasing a monthly installment of skin care products. *Id.* at \*1. After commencing the litigation, Plaintiff reportedly “traded in her smartphone” without preserving evidence stored in it, including the text message she allegedly received, a survey she allegedly saw after clicking a link in the text message, and the website she allegedly visited after clicking a link in the survey. Defendants claimed that the loss of Plaintiff’s smartphone deprived them of relevant evidence and requested an order precluding Plaintiff from offering testimony regarding what she saw but did not preserve. Plaintiff opposed the motion, arguing that Defendants had not demonstrated that the survey and website were in fact stored on her phone, nor that the information contained in the text message, survey, and website could not be restored through other discovery. *Id.* at \*2.

Magistrate Judge Leshner started his analysis with the propositions that the law imposes on litigants a duty to preserve evidence which they know or reasonably should know is relevant to pending or reasonably anticipated litigation and that spoliation is a party’s sanctionable breach of this duty. He noted that Rule 37(e) of the Federal Rules of Civil Procedure governs the spoliation of ESI and empowers the court to sanction a spoliating party when ESI “that should have been preserved in the anticipation or conduct of litigation is lost because the party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.” *Id.* (quoting Rule 37(e)).

Magistrate Judge Leshner explained that Rule 37(e) establishes three prerequisites to sanctions for spoliation of ESI: that (1) the ESI should have been preserved, (2) the ESI was lost through a failure to take reasonable steps to preserve it, and (3) the ESI cannot be restored or replaced through additional discovery. He noted that the party moving for sanctions bears the burden of proving that the ESI existed and was spoliated by a preponderance of the evidence.

Magistrate Judge Leshner first found that text message, survey, and website at issue were relevant and that Plaintiff had a duty to preserve them if they were stored on her phone. *Id.* at \*3. He noted that Plaintiff’s complaint alleged that she received a “fake text message” and that by following the links in the text message, she was taken to a website and invited to sign up for a “free trial” that was actually an undisclosed subscription for skin care products. Plaintiff further alleged that she relied on, and was deceived by, the affirmative misrepresentations and material omissions in the text message, survey, and website.

Magistrate Judge Leshner next found that Plaintiff had custody and control over her phone, but he noted that the spoliation analysis concerns whether there was relevant information stored on the phone. Plaintiff did not dispute that the alleged text message was stored on her phone and therefore Plaintiff had a duty to preserve the text message “when her lawsuit became imminent.”

Magistrate Judge Leshner reached a different conclusion regarding the survey and website. *Id.* at \*4. Defendants assumed that these were stored on Plaintiff’s phone, but “mere speculation that deleted ESI may exist is insufficient.” Magistrate Judge Leshner noted that Plaintiff’s complaint disclaimed knowledge about the website to which she was directed, which undermined any assumption that information about the offending website and survey were stored in a “cache” on Plaintiff’s phone. Thus, Magistrate Judge Leshner concluded that Defendants did not meet their burden to establish that the survey and website were stored on Plaintiff’s phone when she traded it, and therefore he could not find that Plaintiff was under a duty to preserve her phone to avoid the loss of the website and survey.

Focusing solely on the text message, Magistrate Judge Leshner found that Defendants met their burden of showing that Plaintiff failed to take reasonable steps to preserve it. Plaintiff conceded that the text message was stored on her phone when she upgraded it and failed to take reasonable steps to preserve the message, such as taking a screenshot, saving the message to the cloud, or backing up her phone.

Magistrate Judge Leshner next turned to the question of whether the text message could be replaced or recovered from another source, noting that he could sanction Plaintiff for spoliation under Rule 37(e) only if the parties were unable to restore or replace the lost ESI through feasible means.

On this question, Magistrate Judge Leshner found that Defendants had not met their burden to show that the text message was “irretrievably lost.” *Id.* at \*5. He first noted that Defendants’ reliance on the “self-executing” sanctions under Rule 37(c)(1) was inappropriate because that rule involves ESI that was withheld, not spoliated. Magistrate Judge Leshner next explained that Defendants had “a significant amount of information about the marketing that was directed to Plaintiff,” including records indicating what materials were sent to Plaintiff and the transactions with Plaintiff, including the “upsell” and “checkout” websites from which she placed her initial order in January 2020. *Id.* at 18. Logically, if Plaintiff received these marketing messages, somebody sent them — and not just to Plaintiff.

Magistrate Judge Leshner found it “significant” that the parties were unable to state definitively whether the text message was available from any other source, noting that “ESI is not lost if it is available from another source.” He noted that Defendants did not provide any evidence that the text message was sought from any of their affiliates, other parties or nonparties, or within their own files but remains unavailable.

Magistrate Judge Leshner agreed with Plaintiff that “the plain terms of Rule 37(e) require a moving party to explore other avenues of discovery before sanctions are appropriate.” *Id.* at \*6. He explained that Defendants chose not to bring a motion to compel production of the text message but instead “proceeded directly to a motion for sanctions under Rule 37(e), for which

they bear the burden of showing by competent evidence that the ESI sought was actually lost,” which they had not done.

As a result, Magistrate Judge Leshner denied Defendants’ motion for sanctions because Defendants did not satisfy all the prerequisites of Rule 37(e).