

1. An order from the U.S. District Court for the Northern District of California requiring the Defendant to provide, at the outset of a multidistrict proceeding, information about the approximately 15,700 recipients of its litigation hold notices and the sources of custodial and noncustodial ESI, pursuant to Federal Rule of Civil Procedure 26 and the Northern District of California Rule 26(f) Checklist regarding ESI.

In *Doe LS 340 v. Uber Technologies, Inc.*, --- F. Supp. 3d ----, 2024 WL 107929 (N.D. Cal. Jan. 29, 2024), U.S. Magistrate Judge Lisa J. Cisneros addressed the standards under Rule 26 and local practice for the initial disclosure of information regarding document preservation efforts and ESI sources.

Plaintiffs in this multidistrict litigation (MDL) alleged that Uber failed to implement appropriate safety precautions to protect passengers and that, as a result, Plaintiffs suffered sexual assault or harassment by drivers. *Id.* at \*1. Two years prior to the order initiating the MDL, a California state court had ordered a coordinated proceeding under California law based on substantially similar allegations.

After consolidation in the federal MDL proceeding, the court issued a pretrial order regarding document preservation as an “interim measure pending the parties’ proposal of a more tailored order concerning the preservation of relevant information” and a way to “ensure the preservation of all documents and ESI that may be discoverable in relation to any of the issues in this litigation.” *Id.* at \*2. The parties thereafter conferred to discuss the scope of Uber’s efforts to preserve evidence, which included the number of employees who were subject to a litigation hold and the fact that 10,200 of its employees were subject to legal holds that did not relate to this litigation. Uber declined to disclose the names of the employees subject to a litigation hold or the dates when the litigation holds were issued to each employee.

In their motion, Plaintiffs sought an order compelling Uber to produce details surrounding its litigation holds, including the names, job titles, and dates of employment of the recipients of the hold notices, the dates of issue, and what litigation or claim the holds related to, as well as the ESI sources Uber preserved and when it preserved them, when such ESI sources were used, what they were used for, the general types of information they housed, and which employees used or had access to these sources. Plaintiffs also sought an order requiring Uber to suspend its companywide document destruction policies for a period of time to allow Plaintiffs to determine what, if any, relevant ESI had been destroyed.

Magistrate Judge Cisneros first addressed the legal standards related to the disclosure of document preservation efforts. She explained that “[a]s soon as a potential claim is identified, a

litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.” She further explained that “once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” The duty to preserve evidence “includes an obligation to identify, locate, and maintain information that is relevant to specific, predictable, and identifiable litigation.” Id. at \*3. However, she noted that organizations “are not generally required to preserve every email or electronic document” because “[t]o require such broad preservation would cripple organizations that almost always are involved in litigation, and make discovery even more costly and time-consuming.” Id. (quoting The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production (The Sedona Principles), 19 Sedona Conf. J. 1, 95 (2018)).

Turning to the merits of Plaintiffs’ motion, Magistrate Judge Cisneros first held that Uber was required to provide Plaintiffs with basic information concerning its litigation holds. Id. at \*3-4. Plaintiffs argued that Uber was required to provide basic facts surrounding its litigation holds, such as the names, job titles, and dates of employment of the recipients of the hold notices, the dates of issue, and what litigation or claim the holds relate to, which information did not implicate any privilege and was contemplated by the federal and local rules, as well as the Northern District of California Rule 26(f) Checklist regarding ESI. In response, Uber argued that the Rule 26(f) Checklist required only provision of “the names and/or general job titles or descriptions of custodians for whom ESI will be preserved,” and the more detailed information regarding its litigation holds sought by Plaintiffs was “plainly privileged,” as it concerned matters contained within the litigation holds themselves.

Magistrate Judge Cisneros rejected Uber’s position, finding that “the basic details surrounding the litigation hold” are not protected by the attorney-client privilege or the work product doctrine. She noted that while Plaintiffs were not “entitled to probe into what exactly” Uber’s employees were told by its attorneys through the litigation holds, Plaintiffs were “certainly entitled to know” what Uber’s employees are doing “with respect to collecting and preserving ESI.” She further explained that the focus of this inquiry “can and should be on the facts of what Uber’s document retention and collection policies are, including the kinds and categories of ESI preserved, rather than how the litigation holds were worded or how they describe the legal issues in the action.”

Magistrate Judge Cisneros also ordered Uber to include in its disclosure whether the litigation hold related to a case or complaint involving allegations of sexual assault or sexual harassment, because such allegations had the potential to put Uber on notice of its duty to preserve potentially relevant evidence, and without such information it would not possible to tell whether Uber’s litigation holds from other actions related to the fulfillment of its preservation obligations in this MDL.

Magistrate Judge Cisneros next addressed Plaintiffs' argument that Uber was required to disclose information about the ESI sources, including noncustodial sources, it had preserved and when it preserved them. *Id.* at \*5. She noted that the disclosure of information indicating noncustodial sources of ESI is expected in the ordinary course of discovery and that courts "routinely hold that parties are entitled to know what kinds and categories of ESI a party has collected and preserved and what specific actions were undertaken to that end." Magistrate Judge Cisneros added that the Sedona Principles contemplated that parties should discuss and consider noncustodial as well as custodial sources of relevant ESI and that the Rule 26(f) Checklist calls for the parties to identify and discuss a "list of systems, if any, that contain ESI not associated with individual custodians," such as enterprise databases.

Accordingly, Magistrate Judge Cisneros ordered Uber to disclose information about the ESI sources it had preserved, specifically what sources of ESI it preserved, when each source was preserved, when each ESI source was used, what each source was used for, and the general types of information housed or contained in each source. She declined to order Uber to provide information about which employees used or had access to each source because this would be burdensome in light of the number of current and former employees at Uber, but she noted that Plaintiffs could inquire about that topic in a deposition.

Finally, Magistrate Judge Cisneros addressed Plaintiffs' request that Uber be ordered to suspend its automatic document destruction policies companywide until the parties could meet and confer to work on a more tailored preservation order. Citing to the Sedona Principles, she noted that litigants are not generally required to preserve all electronic records, and the principles of proportionality guide the scope of a party's duty to preserve potentially relevant evidence. Uber argued that such an order would be overbroad and without a legal basis because Uber conducts business that is unrelated to its rideshare application.

Magistrate Judge Cisneros agreed that Plaintiffs' request was "exceedingly broad and generally disfavored" and declined to order Uber to suspend its automatic document destruction policies companywide. She noted that Uber had already "suspended automatic deletion of emails and electronic data for thousands of employee custodians." Accordingly, she found that the record did not support that companywide suspension of the automatic deletion policy would be proportionate to the needs of the case.