



Case Alert

Deleted Emails Cost Company \$3M in Sanctions

Recently, the Federal District Court for the District of Delaware imposed \$3 million in punitive sanctions in order to redress harms caused by a company's bad faith deletion of tens of thousands of emails during the course of litigation. The sanctions were ordered pursuant to Federal Rule of Civil Procedure 37, which was amended effective December 1, 2015 to permit sanctions for the failure to preserve electronically stored information ("ESI").

In *GN Netcom, Inc. v. Plantronics, Inc.*,¹ the plaintiff, GN Netcom, brought an antitrust suit alleging that the defendant company, Plantronics, interfered with distributors to stop GN Netcom from marketing its product. Upon receipt of GN Netcom's demand letter, Plantronics issued a litigation hold and began providing training sessions to its employees to ensure compliance. Upon filing of GN Netcom's suit, Plantronics issued an updated litigation hold and continued training sessions.

As the discovery process progressed, it became apparent that the Senior VP of Sales at Plantronics had intentionally deleted tens of thousands of emails, many of which were relevant to the issues raised in GN Netcom's suit. In addition, the Senior VP instructed other employees to delete their own emails on several occasions.

GN Netcom moved for sanctions pursuant to Federal Rule of Civil Procedure 37(e), which "specifically addresses the applicability of sanctions for spoliation of [ESI]."² In relevant part, the rule provides:

(e) Failure to Preserve Electronically Stored Information. If electronically stored informa-

tion that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.³

Plantronics argued that the elements of Rule 37 were not satisfied because Plantronics took reasonable steps to preserve the ESI (issuing multiple litigation holds and conducting training sessions), Plantronics had no intent to deprive GN Netcom of discovery and therefore did not act in bad faith, and GN Netcom failed to demonstrate that it had been prejudiced.

The court found that despite the issuance of litigation holds and training sessions, Plantronics had not taken all reasonable steps to preserve ESI, placing great importance on the fact that the Senior VP was a company executive, not a low-level employee. Likewise, it was determined that the Senior VP acted in bad faith and those actions were

attributable to Plantronics, even though he acted in contravention of the company's directives. In conjunction with the Senior VP's actions, the court found that Plantronics acted in bad faith due to its misrepresentations and lack of recovery and restoration efforts.

Because Plantronics acted in bad faith, in accordance with Third Circuit case law regarding sanctions for spoliation, the burden shifted to Plantronics to show that its conduct was non-prejudicial to GN Netcom. Out of approximately 36,000 to 90,000 emails deleted by Plantronics, experts estimated that between 2,380 to 15,309 were responsive to discovery requests. This constituted the permanent loss of records whose value to GN Netcom could never be determined with certainty. Thus, Plantronics failed to meet its "heavy burden" of showing that GN Netcom was not prejudiced by the deletion of these emails.

Having determined that Plantronics violated Rule 37, the court's next step was to assess the appropriate sanctions to impose. In doing so, key considerations included: the degree of fault of Plantronics, the degree of prejudice suffered by GN Netcom, and whether there was a lesser sanction that

would avoid unfairness to GN Netcom and would serve to deter similar conduct in the future.

The court considered the imposition of discovery sanctions but found that they would be insufficient to redress GN Netcom's loss and would further delay the resolution of the case. Instead, the court issued punitive monetary sanctions in the amount of \$3 million given Plantronics' high degree of fault, bad faith intent, and the prejudice it caused GN Netcom's case.

This case is a reminder that counsel needs to advise corporate clients of the importance of document retention policies and procedures, especially during litigation. While issuing a litigation hold is a necessary step, it is not a guarantee against the imposition of sanctions. Corporations must monitor their employees and, upon learning of a breach of company policy, take immediate action to redress any harm caused and recover any lost documents.

For more information about this case contact Grace Hebbel at gvh@sdrvlaw.com or 203-287-2128.

1. No. CV 12-1318-LPS, 2016 WL 3792833 (D. Del. July 12, 2016).
2. See id. at *5.
3. Fed. R. Civ. P. 37(e).