

3. A ruling from the U.S. District Court for the Middle District of Florida denying Plaintiff's request for a forensic examination of Defendants' devices to identify the scope of lost ESI after having successfully moved for spoliation sanctions.

In *EmCyte Corp. v. XLMedica, Inc.*, No. 19-CV-769, 2024 WL 1328347 (M.D. Fla. Mar. 28, 2024), U.S. Magistrate Judge Nicholas P. Mizell addressed when production of limited access files may be appropriate and whether forensic examination of a device under Rule 37(e) was warranted.

This action involved a dispute over trademark rights concerning plaintiff EmCyte's blood-concentrating systems. *Id.* at *1. Plaintiff alleged that Defendants Anna Stahl (a former employee of EmCyte) and her company, XLMedica, engaged in trademark infringement by selling products offered under infringing marks that were confusingly similar to the trademarks of Plaintiff's blood-concentrating systems. In countersuit, Defendants alleged that Plaintiff and its chief executive officer, Patrick Pennie, engaged in tortious interference when Plaintiff communicated to XLMedica's customers and distributors regarding the conduct alleged in their complaint, with the intent to harm XLMedica's business relationships with distributors of its products.

Earlier in the case, the court had found Plaintiff entitled to \$11,329 in fees and expenses for Defendants' "improper document-production practices" after Defendants produced a limited-access version of a QuickBooks file that included only a subset of data Defendants deemed to be relevant, despite multiple orders directing Defendants to produce a full-access native version of the file. Defendants requested that the court reconsider the sanctions order, but only to the extent it found the improper production of the QuickBooks file to be sanctionable and contemplated further proceedings to tailor an appropriate sanction. Plaintiff requested a finding that Defendants engaged in spoliation and an order requiring a forensic examination of Defendants' devices to potentially identify the loss of responsive ESI.

Regarding Defendants' motion for reconsideration of the sanction order, Judge Mizell emphasized that the court clearly directed Defendants to make the entire native QuickBooks dataset available to Plaintiffs twice previously. *Id.* at *2. He noted "[t]he court had categorically rejected defense counsel's suggestion that — on a going forward basis — an outside accounting firm could create a limited-access version so as to limit the production to that which Defendants deemed relevant." Judge Mizell found that the sanctions were appropriate because

Defendants knowingly defied the court's orders when they produced a limited-access QuickBooks file after the court explicitly rejected this notion. Pursuant to Rule 37, Judge Mizell ordered defense counsel to pay \$1,600 to Plaintiff as an expense-of-motion award and certify the completion of the production of the QuickBooks files.

Judge Mizell then addressed Plaintiff's motion for an order requiring a forensic examination of Defendants' devices related to the alleged spoliation of ESI and considered whether Defendants should be sanctioned pursuant to Rule 37(e). The motion was brought after Plaintiff conducted nonparty discovery that yielded ESI originally generated by key figures associated with Defendant. *Id.* at *5. Plaintiff argued that Defendants never produced this ESI even though it was responsive to Plaintiff's discovery requests. Based on this, Plaintiff believed that "other responsive ESI may have been lost due to possible failures to implement adequate litigation holds or properly supervise the collection and production of ESI" and requested a finding that the defendants engaged in spoliation and an order requiring a forensic examination of their devices to potentially identify the loss of responsive ESI.

Plaintiff had previously moved for sanctions "[t]o put an immediate and permanent stop to Defendants' [discovery] dodgery" and requested the court order "an immediate hand-over of a forensic copy of the laptop used by Defendants to warehouse Defendants' documents to [Plaintiff's] counsel for inspection, together with access to cloud-based, text and email systems where the remaining documents are maintained" as well as monetary sanctions. The court had granted in part Plaintiffs' motion for sanctions, but held off on determining the precise contours of relief until it received certain exhibits that included a collection of documents produced by third parties. *Id.* at *6. Upon receipt of the exhibits, the court found that "Defendants failed to adopt a reasonable plan to identify, collect, and produce documents responsive to requests for production and 'purposefully implement that plan in good faith.'" *Id.* (quoting A Handbook on Civil Discovery Practice in the United States District Court for the Middle District of Florida). When the court met with counsel, it "became abundantly clear that neither party had produced text messages nor had they devised any protocol for doing so." The court proposed that Defendants "double-check" to see if there was a way to obtain the lost ESI. Plaintiff believed that the Defendants did not "heed the court's suggestion" and filed a motion for sanctions based on the alleged spoliation of ESI.

Judge Mizell was not convinced that any additional sanctions or remedial measures were necessary for the alleged spoliation ESI by Defendants. *Id.* at *7. Judge

Mizell noted that Plaintiff relied on just 13 emails recovered from third parties to request that the court infer the existence of lost ESI, despite the fact that Defendants had previously produced thousands of documents. Judge Mizell noted that “perfection in preserving all relevant ESI is often impossible,” and that Plaintiff had “not shown that the relevant ESI was lost or was unrecoverable due to the Defendants’ failure to take reasonable steps to preserve it, as they recovered emails from third parties.”

As such, Judge Mizell held that Plaintiff was “nowhere close to showing that the heavy-handed step of forensically examining the Defendants’ devices was warranted” and denied Plaintiff’s request for a forensic examination of Defendants’ devices to potentially identify the loss of responsive ESI.