4. An opinion from the U.S. District Court for the Southern District of New York granting spoliation sanctions where the defendant added relevant custodians to its document hold three days after their ESI was deleted but declining to find that the plaintiff established intent to deprive because the defendant presented credible explanations for the delay.

In Kosher Ski Tours Inc. v. Okemo Limited Liability Co., No. 20-cv-9815, 2024 WL 3905742 (S.D.N.Y. August 22, 2024), U.S. District Judge Vincent L. Briccetti addressed spoliation sanctions for ESI lost because of delay in identifying relevant custodians who should be subject to a document preservation obligation.

This action involved claims that Defendant had breached a lodging agreement with Plaintiff to provide lodging at one of its ski resorts, after Defendant informed Plaintiff that it could not accommodate the reservations outlined in the lodging agreement due to business disruptions caused by COVID-19. Id. at *1. On October 7, 2020, Plaintiff's counsel sent a demand letter to the general counsel of Defendant's parent company threatening a lawsuit and stating that Plaintiff intended "to explore in discovery whether there were other improper motives for the sudden termination of the lodging agreement." Plaintiff filed the lawsuit on October 19, 2020.

During discovery, Plaintiff learned that Defendant had not retained ESI for two of its employees — Wendy Ackerman and Amy Morgan. Defendant claimed it became aware of litigation with Plaintiff "on or about October 23, 2020" and placed a legal hold on employees reasonably believed to have information relevant to the breach-of-contract claim asserted in Plaintiff's complaint on October 30, 2020. However, after further investigation, Defendant learned that Ackerman and Morgan might have relevant information about the parties' claims or defenses and added them to the legal hold on January 20, 2021 — 93 days after the suit was filed. At that time, Okemo had a maximum email retention period of 90 days, meaning that Ackerman's and Morgan's emails were deleted before the legal hold was extended to them. Plaintiff filed a motion for spoliation sanctions based on these facts.

Judge Briccetti began his analysis by quoting Rule 37(e), which provides for various sanctions when a party fails to take reasonable steps to preserve ESI that should have been preserved in anticipation of litigation, and when that ESI is lost and cannot be restored or replaced through additional discovery. He explained that Rule 37(e) requires "a three-part inquiry": (i) whether "a party failed to take reasonable steps to preserve ESI that should have been preserved in the anticipation or conduct of litigation"; (ii) whether "there has been prejudice to another party from loss of the information, in which case the Court may order measures no greater than necessary to cure the prejudice"; and (iii) regardless of prejudice, "whether the destroying party acted with the intent to deprive another party of the information's use in litigation," in which case the Court may consider the imposition of the sanctions listed in Rule 37(e)(2). Id. (quoting Rule 37(e)).

Judge Briccetti noted that the "[t]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." In particular, he explained that the duty to preserve is triggered "[w]hen counsel receives a communication explicitly stating a party intends to initiate a lawsuit."

With respect to demonstrating prejudice from the loss of information, Judge Briccetti explained that Rule 37(e) "does not place a burden of proving or disproving prejudice on one party or the other," but the inquiry "necessarily includes an evaluation of the information's importance in the litigation."

Finally, with respect to the appropriate sanctions for spoliation under Rule 37, Judge Briccetti noted that Rule 37(e)(1) permits "forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument." Id. (quoting from the Advisory Committee Notes to the 2015 amendment to Rule 37(e)(1)). He further explained that a party seeking sanctions under subsection (e)(2) bears the burden to show by clear and convincing evidence that the alleged spoliator acted with the intent to deprive the movant of the information for use in the litigation. Id. at *3. Intent may be inferred when a party has significantly failed in its obligation to preserve and collect documents or when the data loss cannot be credibly explained other than by bad faith.

Turning to the merits of Plaintiff's spoliation motion, Judge Briccetti first concluded that Defendant had failed to take reasonable steps to preserve ESI that should have been preserved in anticipation of this litigation. He found that Defendant's duty to preserve was triggered when it received the October 7, 2020, demand letter and at that point had a duty to "preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." Because "Ackerman and Morgan attended weekly management meetings in the months leading up to the termination of the lodging agreement," Judge Briccetti found that Defendant "knew or should have known that Ackerman[']s and Morgan's emails were relevant or potentially relevant" to Plaintiff's breach of contract claim.

Judge Briccetti also concluded that Plaintiff was prejudiced by the loss of Ackerman's and Morgan's emails. Id. at *4. He noted that Ackerman and Morgan participated at weekly meetings when relevant discussions regarding the lodging agreement occurred and that chat messages produced in discovery showed that Ackerman and Morgan used email to communicate about the meetings during the relevant time period. Based on these facts, Judge Briccetti found that Ackerman's and Morgan's ESI "could have been helpful in documenting the contemporaneous reasoning behind [Defendant's] decision to terminate the lodging agreement — information that is relevant to the breach of contract claim."

However, Judge Briccetti found that Plaintiff had not shown "by clear and convincing evidence" that Defendant acted with the intent to deprive it of using Ackerman's and Morgan's emails in the litigation. Judge Briccetti noted that one possible inference that may be drawn based on the evidence was that Defendant intentionally allowed the 90-day retention period to expire because the litigation hold on Ackerman's and Morgan's ESI was instituted 93 days after the complaint was filed, effectively ensuring that all pre-litigation ESI had been deleted. But he found that this evidence did not rise to the level of clear and convincing, because the delay could also credibly be explained by the fact that Defendant's initial investigation did not reveal their involvement.

But Judge Briccetti concluded that Defendant's conduct with respect to preserving Ackerman's and Morgan's emails was sanctionable under Rule 37(e)(1). In particular, he found that the appropriate remedy would be to allow "the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision." Id. (quoting from the Advisory Committee Notes to the 2015 amendment to Rule 37(e)(2)). Judge Briccetti noted that he would also "specifically instruct the jury that it may consider such evidence."