

1. An order from the U.S. District Court for the Northern District of California ordering that the parties' protocol for the production of electronically stored information (ESI) would not contain an obligation to produce contemporaneous versions of documents hyperlinked in email or chat messages and archived using Google Vault, because there was no commercially available technical solution that could allow the Defendant to restore contemporaneous versions of the hyperlinked documents on a systematic basis.

In *In re: Uber Technologies, Inc., Passenger Sexual Assault Litigation*, No. 23-md-3084, 2024 WL 1772832 (N.D. Cal. Apr. 23, 2024), U.S. Magistrate Judge Lisa J. Cisneros analyzed the production of ESI containing links to “evolving” hyperlinked documents.

The dispute, arising out of a long-running multidistrict litigation (MDL) concerning allegations of sexual assault by drivers connected to Uber, Inc., arose in the construction of the MDL’s governing ESI protocol. The specific dispute at issue concerned the production of data stored on Google Vault servers. *Id.* at *1. Uber used Google Workspace in the conduct of its business, which provided a suite of cloud-based web applications, including Gmail, Google Chat, Google Drive, and Google Vault. Uber used Google Vault “as an information governance and e-discovery tool for its Google Workspace data” and to store ESI for production purposes.

Discovery revealed that the Google Vault storage system did not automatically capture the contemporaneous version of documents hyperlinked within a Gmail or Google Chat message. In particular, a Gmail or Google Chat message could contain a hyperlink to a document that was “active” or “evolving,” meaning that the hyperlinked document was “centrally located so multiple people can access and edit it.” If a Google Drive document archived using Google Vault was edited after the email with the hyperlink to the document was sent, then a Google Vault export would not reflect the version of the hyperlinked document that existed at the time of the email but rather the version at the time of the export. Uber used “a manual process ... to identify a historic version of a hyperlinked Google Drive document contemporaneous with the email communication.”

Magistrate Judge Cisneros surveyed the technological issues presented by hyperlinked Google Drive documents, noting that while existing tools were capable of collecting contemporaneous versions of hyperlinked Google Drive documents in active environments, the tools were not able to do the same for hyperlinked documents archived with Google Vault. *Id.* at *2. This made clear that “cloud computing and document retention through Google Drive and Google Vault introduce a host of challenges to producing hyperlinked documents from Google Drive and other sources.”

But Magistrate Judge Cisneros explained that collection and production of contemporaneous versions of hyperlinked documents can be “important evidence bearing on claims and defenses” and can “support an inference regarding who knew what, when.” In addition, “[a]n email message with a hyperlinked document may reflect a logical single communication of information at a specific point in time, even if the hyperlinked document is later edited.”

As a result of these considerations, the court had previously ordered Uber to conduct an investigation into “the process of collecting the contemporaneous version of the document linked to a Gmail or other communication within Uber’s systems” and ordered the parties to meet and confer regarding potential solutions and submit any disputes to the court. *Id.* at *3. The parties subsequently did so.

Uber’s position was that it had conducted an “exhaustive investigation” and found that “no technical, scalable solution is available to automate the process of collecting contemporaneous versions of hyperlinked documents.” Plaintiffs countered by submitting a proposed methodology titled a “proof of concept” to produce contemporaneous versions of documents with Google Drive hyperlinks, which would require Uber to create a new computer program.

Magistrate Judge Cisneros was “not persuaded that Plaintiffs’ Proposed Methodology is a reasonably available option.” She noted that Plaintiffs’ proposal, presented by Plaintiffs’ consultant, was based on a post in Stack Overflow, a “well-known and widely used forum for developers,” which was submitted anonymously, and that the anonymous poster “admitted that it did not work.” Magistrate Judge Cisneros also credited statements in Uber’s declarations that even “a functioning version of the proposed [computer program] would not address the issues presented here, in part because the [computer program] was designed for a single document using the Google Drive” application programming interface, which “would not work with Google Vault.”

These “kinks,” although potentially resolvable, meant that the court would “not order Uber to expend potentially significant time and resources to develop such a program in order to produce discovery in this MDL, as the program’s effectiveness is not assured.” *Id.* at *4. Magistrate Judge Cisneros was “satisfied by Uber’s showing” that it “thoroughly investigated the issue” and determined that “no technological solution is currently readily available to automate the process.” Despite this, Magistrate Judge Cisneros did not fully credit the burden that Uber identified with the production process because “Uber has chosen Google Vault as its storage method” and because “the potential limitations and pitfalls with respect to production of hyperlinked documents from Google Vault have been widely known for many years, yet Uber has elected to transfer and retain its electronic data using this service.”

Thus, Magistrate Judge Cisneros ordered that the parties' ESI protocol state that Uber is generally "not required to produce the contemporaneous document version at the time the email or message was sent, as this is not possible through an automated process with existing technology." However, she ordered Uber to locate and produce through manual review "up to 200 hyperlinks" identified by Plaintiffs for which Plaintiffs sought "the contemporaneous referenced document even though the email or message has been archived with Google Vault." Finally, Magistrate Judge Cisneros ordered that Plaintiffs could seek additional documents and Uber could "seek relief from the production of certain versions or other obligations under the ESI protocol based on undue burden or costs, overbreadth or disproportionality." *Id.* at *5.