

## Electronic Discovery – Obligations and Opportunities

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As long as there has been human communication there have been documents. As advancing technology has allowed, we have developed increasingly sophisticated methods for capturing and preserving our thoughts and creations. The invention of computers, and their immense proliferation and use over recent years, has revolutionized the ways in which we both create and store our communications. The impact of computer use on the business world is obvious. Letters, faxes, memoranda, calendars, address books, slide-show presentations, e-mails, and many other types of electronic documents are routinely created, viewed, presented, and stored in electronic form. Whereas once the vast majority of important documents were created and kept in hard-copy form, the time has come that most documents are now both created and stored in electronic form – many never being reduced to hard copy.

Once a document has been created electronically – even if it is eventually printed out – there is no way to review the full document as accurately, conveniently, and completely as through electronic analysis. Parties seeking discovery, therefore, routinely request that electronic documents be produced in their electronic form. An understanding of the obligations, opportunities, and pitfalls involving the request for and production of electronic documents is vital to the interests of any company that may ever seek or be subject to discovery as a lawsuit participant or third party. This article discusses various legal aspects surrounding the discovery of electronic documents and data (together, “electronic information”):

- discoverability of electronic information;
- construction (and review) of electronic document requests;
- preservation of relevant electronic information;
- importance of sound methods for the collection of electronic information;
- costs of electronic discovery, privilege and confidentiality review; and
- timely production of responsive electronic information.

## Discoverability of Electronic Information

There is no question that electronic information is discoverable. Federal Rule of Civil Procedure 34 was amended in 1970 specifically to provide for the discovery of electronic documents, and courts have enforced electronic document requests accordingly.<sup>2</sup> The fact that paper documents may be available or may even already have been produced does not preclude a party from obtaining discovery of the documents in electronic form. Courts recognize the enhanced value of electronic information, and do not credit arguments that electronic production in addition to hard-copy production would be redundant.<sup>3</sup>

While the same rules typically apply to electronic and paper documents, the effect of those rules may exact a higher toll on holders of electronic information. For instance, Federal Rule of Civil Procedure 26(a)(1)(B) requires each party to a lawsuit to identify the location of all documents held or controlled. That requirement applies to all electronic information, including e-mail, voice mail, letters, memoranda, databases, spreadsheets, calendars, address books, and all other computer files, whether the information is stored on a desktop, laptop, network, or ISP hard drive, floppy, Jaz or Zip disk, CD, DVD, PDA, backup tape, video tape, or any other storage medium.<sup>4</sup> The ease with which electronic information can be stored and transported presents a great challenge for cataloging the full range of locations in which a company's documents are stored.

Many documents – most notably e-mails – are never reduced to paper form and exist only electronically. While an occasional e-mail may be printed out, it is often the case that e-mails can only be discovered electronically. And the treasures (or disasters, depending on point of view) that sometimes exist buried in the mountains of e-mail can be priceless. The recent case of JPMorgan Chase Bank v. Liberty Mutual Life Insurance Company<sup>5</sup> demonstrates the value of discovery of e-mails. Defendant bond surety claimed that plaintiff bank fraudulently portrayed transactions with Enron as loans when in fact they were fraudulent schemes in which the defendant received a kickback in return for propping up Enron's accounting claims. At issue were a group of e-mails in which senior bank officials referred to the transactions as "disguised loans." Over plaintiff's objection that the phrase was innocuous under proper interpretation, the court held that

the plaintiff would have the opportunity to explain the e-mail communications to the jury, noting that although the court credited the plaintiff's explanation, a reasonable jury could find that the e-mail statement helped to demonstrate that the transaction had in fact been portrayed fraudulently.<sup>6</sup>

Another e-mail miscue negated a summary judgment in an employment discrimination action. In White v. Westinghouse Electric Company<sup>7</sup> the Third Circuit Court of Appeals determined that an employer e-mail that referred to candidates who were "mature" in years not being as impressive as "younger managers and professionals" was among evidence sufficient to reverse the trial court's order of summary judgment. The court determined that the e-mail evidence, when taken together with other evidence, was sufficient raise a genuine issue of fact for the jury.<sup>8</sup>

Recent investigations involving WorldCom and Microsoft have turned up similarly damaging e-mail evidence. As one reporter noted in the New York Times, "the real lesson corporate America is taking away from the Microsoft antitrust trial is that old e-mail can be a minefield of legal liability, not to mention a source of public embarrassment."<sup>9</sup> Indeed, it is not only legal complications that harm a company whose employees' e-mails contain injurious statements; the company's public image is just as likely to take a beating.

### **Construction (or Review) of Electronic Document Requests**

The rewards of electronic discovery can only be realized pursuant to an appropriate document request. A discovering party must be careful to request a sufficiently broad range of electronic information so that it can discover all relevant information. However, as with traditional discovery, courts sometimes find certain requests for electronic information to be overbroad and therefore unenforceable.<sup>10</sup> Circumstances may allow for broad electronic discovery with minimal burden to the producing party.<sup>11</sup> To maximize the likelihood that its electronic discovery requests will be enforceable, a discovering party should draft the requests carefully and with an eye toward minimizing the burden on the producing party. At the same time, a party should be prepared to object to inappropriate electronic document requests received from opposing parties and suggest less burdensome alternatives, where possible.<sup>12</sup>

When a discovering party does receive a production of electronic documents, data, or media, it must conduct a timely review of the production so that it can follow up on any leads therein. Even when productions are made by less frequently used electronic media such as Jaz disks, a party can lose its ability to take advantage of valuable information in such media if it does not analyze and act on it quickly.<sup>13</sup>

### **Preservation of Electronic Information (Avoiding Spoliation)**

A company must follow reasonable document retention procedures to protect itself from spoliation of electronic information (the improper destruction or loss of electronic information once litigation can reasonably be anticipated). In addition to identifying electronic information responsive to particular discovery requests, a party to a lawsuit must ensure that once litigation is anticipated, electronic information is not deleted, overwritten, or altered.<sup>14</sup> In particular, a company that engages in routine rotation or erasure of archived backup media must interrupt normal cyclical erasure procedures if there is reason to believe that responsive electronic information might exist on those backups, even if erasure would otherwise be proper in the normal course of business. The penalty for failing to prevent loss of responsive electronic information may be severe – the failure to preserve responsive electronic information can lead to sanctions as extreme as negative disposition of a material claim<sup>15</sup> or default judgment<sup>16</sup> if the party that lost electronic information acted with gross negligence, recklessness, or intention in destroying or failing to preserve the information.

Less severe sanctions of adverse inferences, fines, costs, and fees may also be imposed. In In re Prudential Insurance Company Sale Practices Litigation<sup>17</sup> the court imposed a \$1,000,000 fine plus fees and costs of plaintiff incurred in moving for sanctions when Prudential failed to institute appropriate document retention procedures following a court order that relevant documents be preserved. In Linnen v. A.H. Robins Co.,<sup>18</sup> where the defendant continued to erase e-mail backup tapes after receiving plaintiff's discovery request that sought e-mails on the backup tapes, the court authorized the plaintiff to propose an adverse inference instruction to the jury to the effect that defendant had destroyed e-mails contained information unfavorable to defendant.<sup>19</sup> And in RKI, Inc. v. Grimes,<sup>20</sup> the court, in a bench trial, drew an adverse inference that the

defendant had erased prejudicial evidence when the defendant was not able to give any explanation for defragmenting and erasing portions of his computer hard drive.<sup>21</sup>

These cases demonstrate the importance of preserving relevant electronic information. As soon as litigation can be reasonably anticipated, a company has an obligation to preserve potentially discoverable electronic information (that which is, or are reasonably likely to lead to, the discovery of admissible evidence).

An important point for parties seeking electronic discovery: a party is more likely to receive greater protection from the court against spoliation by the opposing party if it seeks and obtains a court order delineating a producing party's obligations.<sup>22</sup>

### **Importance of Sound Collection Methods**

Because of their nature, electronic documents typically contain much more discoverable and potentially relevant information than the hard-copy incarnations of the documents. The “metadata” (information about the characteristics of an electronic file contained in that or another related electronic file) of every electronic document contains rich information about dates, access, edits, and myriad other topics related to each electronic document – information that may be crucial to proving a legal claim but that could not be gleaned without access to the electronic version of the document.

Furthermore, electronic documents are particularly vulnerable to a discovering party's probing because of the relative ease with which they can be reviewed. If the documents are recovered in the most effective manner, they yield readily to powerful searches of both main document text and potentially crucial metadata that can quickly reveal key documents that contain valuable damaging (or helpful) evidence.

In addition to metadata, electronic documents are likely to be accompanied by earlier versions of the “final” document. Both as separate files and as edit history embedded in the “final” electronic file, an electronic document is far more likely than its paper counterpart to be dogged by its earlier incarnations. Whether or not an attempt is ever made to delete earlier versions, a hard drive is likely to contain both obvious and hidden files and file fragments that contain earlier versions of documents. And word processing and other software is likely to contain a history of document edits, whether or not the user chooses to “track” changes or otherwise show edits or redlining on the

screen. These earlier versions and edits may, like e-mails, contain embarrassing or legally damaging evidence.

The metadata of every electronic document contain much more information than edit history. An electronic document is likely to show the date it was created, the dates it was modified, the authors who have modified it, the date it was last printed, and a host of other potentially critical information – information that would not be available from the printed-out version.<sup>23</sup>

The vastness and richness of available electronic information make it imperative that a party conduct electronic discovery (both on the discovering and producing end) responsibly. A company's selection of a document services company that fails to assist it appropriately with electronic document production can lead to disastrous results. The recent case of Residential Funding Corporation v. DeGeorge Financial Corporation<sup>24</sup> is illustrative. The Second Circuit Court of Appeals remanded the case for the district court to determine whether sanctions were appropriate against the plaintiff after its vendor, Electronic Evidence Discovery, Inc. was unable to produce documents from its own electronic media, which defendant's vendor was later able to recover. The Appellate Court instructed the District Court to determine whether defendant was entitled to sanctions including a new trial and an adverse inference on a material claim at retrial, holding that a responding party's gross negligence (evidenced by its repeated failure to produce available documents) may be sufficient to establish the bad faith necessary for an inference that other destroyed evidence would have been material to a claim at issue.<sup>25</sup>

Another case demonstrating the need for thorough, competent assistance in pursuing electronic discovery is Gates Rubber Company v. Bando Chemical Industry.<sup>26</sup> The plaintiff lost the opportunity to discover potentially useful data from defendant's computer systems after plaintiff's expert erred by trying to copy defendant's hard drive file by file rather than imaging the entire hard drive.<sup>27</sup> The court found that because the error was the plaintiff's expert's, the plaintiff lost any ability to make an argument that subsequently lost data might have contained any useful evidence.<sup>28</sup>

The selection of an insufficiently capable document services company can subject a party to damaging adverse inferences, deprive a party of critical evidence, and provide opposing parties with unnecessary advantages. Electronic discovery presents access to

otherwise unavailable electronic information, but the quality and quantity of that access can be limited by a party's (and the party's expert's) technology limitations or mistakes. Similarly, as a responding party, such limitations or mistakes can have disastrous consequences, impacting a party's pocketbook or even the outcome of the case.

## Costs of Electronic Discovery

The cost of electronic discovery can vary, but can be especially great when backup systems are designed to collect all of a network's electronic information (including files from a variety of applications) within a structure that is designed to be accessed only through the process of entirely restoring the network – systems that are typically used only in the case of significant network failure. Courts have varied in their treatment of the issue of which party should pay for the discovery of electronic information, sometimes requiring the producing party to cover the cost (especially when its own arcane storage system is responsible for the extreme cost),<sup>29</sup> sometimes ordering that the cost be shared between the discovering and producing parties,<sup>30</sup> and sometimes requiring the discovering party to pay the cost.<sup>31</sup> In a recent case, Rowe Entertainment Inc., v. The William Morris Agency,<sup>32</sup> the court employed an 8-factor balancing test for determining which party should bear the cost – the court considered:

(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.<sup>33</sup>

The court found that the factors in that case weighed in favor of shifting the production costs to the requesting party.<sup>34</sup>

While this 8-factor test may,<sup>35</sup> or may not be employed elsewhere, because courts have wide discretion to determine appropriate sanctions, each sanction determination is heavily fact-based and involves a weighing of the equities, whether or not the court specifically enumerates the particular factors that it weighs.

As discussed above with respect to sanctions, besides the costs of culling and recovering responsive electronic information from its storage media, a responding company potentially faces the cost of temporarily shutting down its computer system or altering its backup procedures during the discovery phase of litigation. Because accessing an electronic document, and in some cases the mere act of turning a computer on or off, alters potentially important metadata, a party may need to cease any use of its computers until responsive hard drives are “imaged,” thereby preserving a copy of stored data. Similarly, as noted earlier, the procedures for cycling or erasing outdated backup tapes and archives may need to be altered or suspended while discovery is pending.

### **Privilege and Confidentiality Review**

Any document production carries the risk of waiving the attorney-client privilege or betraying trade secrets through inadvertent production of otherwise protected documents, but electronic document productions heighten that risk.<sup>36</sup> When producing a mountain of e-mails with myriad attachments, the danger that an otherwise protected attorney-client communication or trade secret may be missed and mistakenly produced rises dramatically.

To minimize the risk of inadvertent production, sound review practices for electronic information include use of computer software designed specifically to analyze e-mails and other electronic information and convert them, including all their metadata and otherwise hidden documents or information, into a more easily reviewable and field-searchable form. Using such software not only protects against inadvertent production, it also helps to lay the foundation for arguing in court that any waiver of privilege or confidentiality that might be implied by inadvertent production be excused. In determining whether such waiver ought to be excused (and whether inadvertently produced documents ought then to be returned), courts consider various factors, but require at a minimum that the producing party had exercised reasonable efforts to avoid inadvertent production.<sup>37</sup>

## **Timely Production**

After electronic information has been collected and reviewed, a producing party must produce responsive documents that are not protected as either privileged communications or confidential trade secrets. A party that fails to produce requested electronic information in a timely manner might be subject to court-imposed sanctions. This issue has particular application in the context of electronic discovery because of the complicated task of identifying, recovering, reviewing, and processing the quantity of available electronic information from the myriad sources and in the varied formats discussed above. A responding party cannot afford to delay the electronic information collection and review processes; sometimes an early start and consistent efforts (with adequate help) are required to meet production obligations in a timely manner.

Sanctions for failure to produce responsive electronic information in a timely manner are generally not as severe as the sanctions for spoliation discussed above.<sup>38</sup> However, in certain circumstances, a party that fails to produce responsive electronic information may be precluded from presenting evidence on the issue related to the unproduced data.<sup>39</sup> More typically, a party that fails to produce or accurately disclose its ability to access responsive electronic information will be sanctioned by requiring the payment of costs, attorney fees, or fines.<sup>40</sup> A capable document services company could be instrumental in enabling a producing party to locate, collect, review, and prepare electronic information for production in a timely manner; the procurement of such services would certainly bolster a producing party's claim that it was taking reasonable efforts to produce requested documents expeditiously.

## **In Conclusion**

The availability of electronic discovery presents many issues concerning both document production and the related concern of document retention. Awareness of, and consideration given to, these issues would help any company to respond effectively to electronic document requests and take advantage of electronic discovery opportunities. If a party focuses early on the central production and discovery issues for electronic information (careful construction or evaluation of document requests, preservation relevant electronic information, location and collection of electronic information, seeking

or opposing expense sharing where appropriate, review for privilege and confidentiality, and timely production), as litigation progresses the party will be in a significantly better position to focus on the substantive issues at hand.

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<sup>2</sup> See U.S. v. Bowers, 920 F.2d 220 (4<sup>th</sup> Cir. 1990); Anti-Monopoly, Inc. v. Hasbro, Inc., 1995 U.S. Dist. LEXIS 16355 (S.D.N.Y. Nov. 3, 1995).

<sup>3</sup> See Milwaukee Police Assoc. v. Jones, 615 N.W.2d 190 (Wis. Ct. App. 2000) (discovering party entitled to, if it seeks, electronic versions of documents even if paper documents have already been provided); National Union Elec. Corp. v. Matsushita Elec. Ind. Co., 494 F. Supp. 1257 (E.D. Pa. 1980) (same)

<sup>4</sup> See Kleiner v. Burns, 2000 U.S. Dist. LEXIS 21850, at \*11-\*12 (D. Kan. Dec. 22, 2000).

<sup>5</sup> 2002 U.S. Dist. LEXIS 24518 (S.D.N.Y. Dec. 23, 2002).

<sup>6</sup> Id.

<sup>7</sup> 862 F.2d 56 (3<sup>rd</sup> Cir. 1988)

<sup>8</sup> Id. at 61-62.

<sup>9</sup> Amy Harmon, “Corporate Delete Keys Busy as E-Mail Turns up in Court,” New York Times, Nov. 11, 1998, at A1.

<sup>10</sup> See, e.g., Van Westrienen v. Americontinental Collection Corp., 189 F.R.D. 440, 441 (D. Or. 1999) (court refuses to enforce plaintiff’s request for inspection of electronic records of all letters sent to debtors as overbroad)

<sup>11</sup> See generally Simon Property Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 641 (S.D. Ind. 2000) (order designates court-appointed expert to “mirror-image” hard drives containing responsive documents allowing for broad discovery with minimal burden).

<sup>12</sup> See Tulip Computers Int’l v. Dell Computer Corp., 2002 U.S. Dist. LEXIS 7792, at \*18-\*19 (D. Del. Apr. 30, 2002) (court adopts plaintiff’s e-discovery proposal of keyword search by plaintiff’s expert for relevant set of e-documents followed by defendant’s subsequent production of non-privileged, non-confidential subset of e-documents within keyword-identified set).

<sup>13</sup> See Symantec Corp. v. McAfee Assocs., 1998 U.S. Dist. LEXIS 22591 (N.D. Cal. Aug. 14, 1998) (plaintiff prevented from obtaining discovery after it delayed reviewing Jaz disk produced earlier by defendant and therefore failed to seek additional discovery based on leads from Jaz disk until period for discovery expired).

<sup>14</sup> See ABC Home Health Servs. v. IBM Corp., 158 F.R.D. 180 (S.D. Ga. 1994) (court finds that jury instruction that could give rise to an adverse inference would be appropriate where defendant erased computer’s hard drive before complaint filed or discovery request served but where defendant actually anticipated litigation).

<sup>15</sup> See Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2<sup>nd</sup> Cir. 2002).

<sup>16</sup> Cabnetware, Inc. v. Sullivan, 1991 U.S. Dist. LEXIS 20329, at \*3-\*6 (E.D. Cal. July 15, 1991) (Court granted default judgment against defendant for spoliation: “Though fully aware of the request for production of the source codes and of their significance in copyright infringement actions, defendant purposefully destroyed the initial source codes in order to avoid having that code made available for comparison in this litigation. [Defendant’s] explanation that he destroyed the evidence by writing over the floppy disks because he needed more disks and did not want to bother to go out and buy additional disks simply cannot be credited.”); Computer Assocs. Int’l, Inc. v. American Fundware, Inc., 133 F.R.D. 166 (D. Colo. 1990) (court issued default judgment against defendant because although general industry practice is to delete older versions of source code upon creation of newer versions, defendant should have retained older versions once plaintiff served document request).

<sup>17</sup> 169 F.R.D. 598 (D.N.J. 1997). See also Danis v. USN Communications, 2000 U.S. Dist. LEXIS 16900 (N.D. Ill. 2000) (district court adopts magistrate courts recommendation that company’s CEO who failed to implement a reasonable document preservation program be fined \$10,000 and that jury be advised that any missing documents are the fault of that company);

<sup>18</sup> 1999 Mass. Super. LEXIS 240 (June 16, 1999).

<sup>19</sup> Id. at \*29-\*33.

<sup>20</sup> 177 F. Supp. 2d 859 (N.D. Ill. 2001).

<sup>21</sup> Id. See also Trigon Ins. Co. v. United States, 204 F.R.D. 277 (E.D. Va. 2001) (adverse inferences and attorney's fees deemed appropriate after defendant intentionally destroyed responsive documents).

<sup>22</sup> See, e.g., Proctor & Gamble Co. v. Haugen, 179 F.R.D. 622, 631-32 (D. Utah 1998) (producing party fined for negligent failure to preserve e-mails, more severe sanctions not available because discovering party did not obtain a court order delineating producing party's obligations), rev'd on other grounds, 222 F.3d 1262 (10<sup>th</sup> Cir. 2000).

<sup>23</sup> See generally Armstrong v. Executive Office of the President, 1 F.3d 1274, 1284-85 (D.C. Cir. 1993).

<sup>24</sup> 306 F.3d 99 (2<sup>nd</sup> Cir. 2002).

<sup>25</sup> Id. at 106-13.

<sup>26</sup> 167 F.R.D. 90, 112-13 (D. Colo. 1996).

<sup>27</sup> Id. at 112-13.

<sup>28</sup> Id.

<sup>29</sup> See In re Brand Name Prescription Drugs Antitrust Litig., 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 15, 1995) (high cost due to producing party's record-keeping scheme must be borne by record-keeping party, but requesting party must more narrowly limit description of documents sought); see also Bills v. Kennecott Corp., 108 F.R.D. 459, 462 (D. Utah 1985) (no cost-shifting upon 4-factor analysis, noting especially that "the party responding is usually in the best and most economical position to call up its own computer stored data"); National Union Elec. Corp. v. Matsushita Elec. Indus., 494 F. Supp. 1257, 1260-62 (E.D. Pa. 1980).

<sup>30</sup> See Sattar v. Motorola, Inc., 138 F.3d 1164, 1171 (7<sup>th</sup> Cir. 1998) (where requesting party did not have access to hardware or software to read 4-inch tape, producing party must either (1) download data from 4-inch tape to conventional hard or floppy disc; (2) loan requesting party software to read 4-inch tapes; or (3) offer on-site access to producer's system, or else parties must split cost of printing out e-mails)

<sup>31</sup> Byers v. Illinois State Police, 2002 U.S. Dist. LEXIS 9861, at \*31-\*38 (N.D. Ill. June 3, 2002) (requesting parties required to pay cost of licensing software to retrieve archived e-mail because they failed to make showing of likelihood of existence of relevant information therein); Anti-Monopoly, Inc. v. Hasbro, Inc., 1996 U.S. Dist. LEXIS 563 (S.D.N.Y. Jan. 23, 1996) (requesting party required to pay for cost of special programming to recover responsive electronically restored data); In re Air Crash Disaster at Detroit Metropolitan Airport, 130 F.R.D. 634, 636 (E.D. Mich. 1989) (where producing party already produced paper copies, requesting party required to pay for creation of requested magnetic tapes, which did not exist at time of production request).

<sup>32</sup> 205 F.R.D. 421 (S.D.N.Y. 2002).

<sup>33</sup> Id. at 429.

<sup>34</sup> Id. at 429-432.

<sup>35</sup> See, e.g., Murphy Oil USA, Inc. v. Fluor Daniel, Inc., 2002 U.S. Dist. LEXIS 3196 (E.D. La. Feb. 19, 2002).

<sup>36</sup> See, e.g., United States v. Keystone Sanitation Co., 885 F. Supp. 672 (M.D. Pa. 1994) (attorney-client privilege waived through e-mail production that included attorney e-mails referencing otherwise protected communications with clients).

<sup>37</sup> See, e.g., Ciba-Geigy Corp. v. Sandoz, Ltd., 916 F. Supp. 404 (D.N.J. 1995).

<sup>38</sup> See supra text accompanying notes 13 to 21.

<sup>39</sup> Crown Life Ins. Co. v. Craig, 995 F.2d 1376, 1381-84 (7<sup>th</sup> Cir. 1993) (sanction precluding producing party from presenting evidence on certain key issues appropriate where producing party failed to produce electronic database containing raw data relevant to those issues); see also DeLoach v. Philip Morris, 206 F.R.D. 568, 573-74 (M.D.N.C. 2002) (where respondent failed to produce responsive databases until after requesting party's expert report was filed, requesting party allowed to review responsive databases and file supplemental expert report without any opportunity for producing party to respond).

<sup>40</sup> See, e.g., GTFM, Inc. v. Wal-Mart Stores, 2000 U.S. Dist. LEXIS 16244 (S.D.N.Y. Nov. 9, 2000) (defendant required to pay plaintiff's fees and costs incurred as a result of "defendant's failure to make an accurate disclosure of its computer capabilities"); National Assn. of Radiation Survivors v. Turnage, 115 F.R.D. 543, 554-60 (N.D. Cal. 1987) (sanction of costs, fine, and oversight of continuing discovery by special master where "various discovery omissions are directly attributable to the failure of defendant and its counsel to establish a coherent and effective system to faithfully and effectively respond to discovery

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requests” and “most egregious discovery omission[s] were electronic records”); Fautek v. Montgomery Ward & Co., 96 F.R.D. 141, 144-46 (N.D. Ill. 1982) (plaintiff awarded costs incurred and invited to move for attorney’s fees where defendant failed to cooperate in providing requested computer data).

