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*Straight Talk about Electronic Evidence Discovery in Civil Cases- November 2006*

## Spoliation That Didn't Work

Magistrate Recommends Adverse Inference Instruction Based in Part on Former Employee's Cancellation of Personal Yahoo Email Account

Easton Sports, Inc. v. Warrior LaCrosse, Inc., 2006 WL 2811261 (E.D. Mich. Sept. 28, 2006)

Plaintiff was in the business of manufacturing and selling a variety of hockey equipment; the defendants were related sporting goods companies that, at the time of the events giving rise to the complaint, were entering into the hockey equipment business through the acquisition of a hockey equipment manufacturer. Plaintiff alleged that defendants sought to enter the hockey equipment business through a "campaign of industrial espionage, stealing Easton's trade secrets and raiding its employees." Plaintiff alleged

that defendants had used secret inducements to entice Hamoyun Ghassemi to steal its proprietary information and go to work for defendants. Before leaving plaintiff's employ, Ghassemi downloaded numerous files and used his personal Yahoo account to forward files to himself and to defendants. The day after the complaint was filed, in which it was alleged that Ghassemi misappropriated plaintiff's documents and used his personal Yahoo account to communicate with defendants, Ghassemi cancelled his Yahoo account. (Ghassemi was not named as a defendant in the complaint.)

The court found that Ghassemi's cancellation of his account "resulted in the destruction of Yahoo records concerning his computer use." The magistrate judge further found:

I am persuaded that Homayoun Ghassemi inappropriately accessed numerous confidential electronic

documents in Easton's computer record system. I am satisfied that Ghassemi transferred at least a portion of those records to his personal Yahoo computer service account. I find that Ghassemi corruptly terminated his Yahoo computer service contract with the intent to bring about the destruction of any information or data compiled or stored through that service. I further find that Ghassemi inappropriately copied confidential Easton business information to a compact disc ("CD"); that he retained control of the disc following the termination of his employment with the Plaintiff; and that he thereafter accessed the contents of the disc through the computer assigned to him by Warrior.

That information, however, was deleted (apparently by Ghassemi) after the filing of this lawsuit, but prior to the court ordered examination of the computer hard drive.

(Emphasis added.) Additional findings with respect to the former employee's Yahoo email account include:

"A substantial amount of confidential Easton information was transferred to Ghassemi's personal Yahoo account . . ."

"The evidence further discloses that Ghassemi terminated his Yahoo contract for computer services immediately after Warrior received notice of Plaintiff's lawsuit. The inevitable and fully foreseeable result of that contract termination was the loss of relevant evidence which would otherwise have been recoverable. Ghassemi's destruction of that evidence . . . occurred during his agency relationship with Warrior, long after Easton's suspicions were communicated to him by Warrior, and immediately after the filing of this action."

"No innocent explanation for Ghassemi's destruction of his Yahoo account has been presented."

"It is impossible for Plaintiff to identify communications from Ghassemi's Yahoo account

which have been lost, and it would be unfair to insist upon a clear and definite showing of prejudice in light of the fact that Ghassemi, who clearly rendered assistance to Warrior long before his resignation was submitted to Easton, destroyed the most likely sources of corroborative proof."

The magistrate concluded that the appropriate sanction for "defendants' failure to prevent the spoliation of evidence by its agent, Ghassemi," would be: (a) an order allowing plaintiff to present evidence of the defendants' failure to preserve the electronic data; (b) an instruction to the jury that it may presume, based upon the spoliation, that the evidence destroyed would have been favorable to plaintiff; and (c) an order permitting counsel for Easton to argue in favor of the negative inference. The magistrate judge noted, however, that the ultimate decision in such matters "should be reserved to the trial judge."

As this recent case illustrates, more and more defendants are being caught

off guard when it comes to implementing full control over the preservation of electronic data that pertains to litigation matter. This case also emphasizes the importance of focusing an intense scrutiny over the technical details on the possible methods of data misappropriation and subsequent spoliation options that can be used to cover one's tracks.

At CyberControls, our experience in the field of commercial evidence forensics is a significant advantage that we offer to you and your clients. The courts are slowly beginning to understand the ins and outs of the digital evidence world. More and more bad actors are attempting to cover their tracks with data wiping software. Trial attorneys are expected to 'know what to do' each and every time. Our firm works to provide strategic, pretrial advice about the multi-faceted arena of electronic discovery with an objective perspective so that our attorney clients have enough information to make informed decisions on a timely basis.

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This document is neither designed nor intended to provide legal or other professional advice but is intended merely to be a starting point for research and information on the subject of electronic evidence discovery. While every attempt has been made to ensure accuracy of this information, no responsibility can be accepted for errors or omissions.

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