Lions, Tigers & Bears: Failing to Preserve ESI, Search Terms and Forensically Imaging Computers

By Joshua Gilliland, Esq., Professional Development Manager, D4 LLC

In *Treppel v. Biovail Corp.,* 2008 U.S. Dist. LEXIS 25867 (S.D.N.Y. 2008) the Plaintiff brought an action alleging a smear campaign against him. The Defendants in turn claimed the Plaintiff defamed their CEO and caused their stock to drop in value. No matter what the truth is, these parties are no longer sending each other Christmas cards.

After a dismissal battle, the Plaintiff brought a motion to compel ESI responses and sanctions for the loss of electronically stored information.

Litigation Hold History

The facts of the lawsuit occurred between 2000 to April 2002 after the Plaintiff published two reports that were unfavorable to the Defendant. *Treppel,* 7.

The Plaintiff brought the lawsuit in April 2003 and served a second amended complaint in August 2003. *Treppel,* 7.

Sometime in May 2003, Defendant's Corporate Counsel learned of Plaintiff's lawsuit. Corporate Counsel orally instructed two Defense key players to enact a litigation hold to preserve ESI. No written litigation hold was issued and Corporate Counsel did not follow-up. *Treppel,* 7.

The facts become protracted as preservation instruction trickled down to different key players. Some individuals did not recall ever hearing the instruction from Corporate Counsel to preserve ESI. *Treppel,* 7.

No instructions were ever issued to the IT department before December 2003 to enact a litigation hold. *Treppel,* 8.

Plaintiff Preservation Letter & Defendants' Actions

The Plaintiff sent a preservation letter on December 3, 2003. *Treppel,* 8.

Corporate Counsel again gave litigation hold instructions to key players, however he was not "involved in issuing at that stage any notice to anybody personally." *Treppel,* 9.

Preservation Blues

Despite being on notice of litigation, the Defendants first preserved back-up tapes from their three locations in December 2003. *Treppel,* 9. The Defendants' email and file servers were not preserved until March 2005. *Treppel,* 9.

One key player's laptop was not preserved until August 2005. *Treppel,* 11. The email messages on this one laptop were downloaded directly and not preserved on any of the other email servers. *Id.*

Why Work Together on Search Terms & Discovery?

After the rejection of a proposed comprehensive e-discovery plan, the Defendants proposed the parties agree on employee files to be searched with key words. *Treppel,* 11.

Plaintiff counsel stated "it is defendants' obligation to simply search its [sic] records and respond to those demands. Plaintiff has no obligation to assist defendants in the process by providing search terms or any other guidance." *Treppel,* 11-12.

The seeds of war now sown, the bombing began with the Plaintiff's motion to compel discovery responses and preservation of ESI. *Treppel,* 12.

The First Wave of Searches

The Court ordered the Defendants to conduct several searches after the first motion to compel. *Treppel,* 12. Six search terms were used on fourteen presumably key players. *Treppel,* 13. The Defendants performed the search on the December 2003 and March 2005 back-up tapes. *Treppel,* 13.

Second Wave: Search Terms and Preservation

The Plaintiff requested the Defendant expand their search with 30 additional key words and custodians. *Treppel,* 13.

The Defendants claimed the request was untimely and overly broad and only produced discovery pursuant to the original search terms. *Treppel,* 13.

The Motion to Compel Restoration and Search of All Back Up Tapes

The Plaintiff brought a second motion to compel for the Defendants to restore and search their back-up tapes, plus the lone laptop. *Treppel,* 14.

Timing is everything when it comes to back-up tapes. In this case, the litigation was filed in May 2003 and the facts took place in 2002. Moreover, the chance that back-up tapes from 2005 would have anything relevant for 2002 would be remote. *Treppel,* 14-15. The Court applied Fed. R. Civ. P. 26(b)(2)(C)(iii) and found that searching the back-up tapes would impose a burden that would outweigh any benefit of conducting a search. *Id.*

Or so it seemed…

Victory from the Jaws of Fed. R. Civ. P. 26(b)(2)(C)(iii)

The Court acknowledged two big exceptions to the above analysis: Email messages were likely created after the litigation started, even if other ESI files were not. *Treppel,* 16-17. As such, the Defendants were ordered to restore and search the back-up tapes for one email server for three separate date ranges. *Treppel,* 17.

The second exception was a back-up tape that was not searched at all. This unexplored ESI needed to be restored and search as well. *Treppel,* 17.

The Duty to Preserve

The Defendant failed to enact a litigation hold to fully preserve electronically stored information. The Defendant knew of pending litigation, which would have triggered the duty to preserve in May 2003. However, the Defendants did not enact a litigation hold until December 2003, seven months later. *Treppel,* 20-21.

The Defendant's document retention policy was to preserve the tapes for one year. The Court noted that the failure to enact a hold in May 2003 would have caused ESI to be lost as far back as May 2002, when the facts giving rise to the litigation took place. *Treppel,* 21.

The lone laptop that was "off the grid" of the email system was not imaged until 2005, two years after the lawsuit was filed. *Treppel,* 22-23. As such, ESI pertaining to the litigation was most likely lost.

A Time for Sanctions

The Court held the Defendant failed to preserve electronically stored information. The question was what sort of sanction was warranted. *Treppel,* 39-40.

The Plaintiff (understandably) went for an adverse inference instruction. This failed because the Plaintiff could not prove "the likelihood that any evidence that was destroyed would have supported his claims." *Treppel,* 39.

The Court's analysis on the Defendant's culpable state of mind was fascinating. The Court in effect bifurcated whether there was negligence vs gross negligence with the timing of *Zubulake IV* and their legal protégée as the benchmark, along with the Plaintiff's preservation letter. *Treppel,* 28-30.

The Court found there was only negligence to not preserve back-up tapes by December 2003, because of the state of the law and

technology. This was not gross negligence, since the Defendants attempted to place some form of a litigation hold in place. *Treppel,* 28-30.

However, post December 2003 there was gross negligence or recklessness. *Zubulake IV* and related cases had been published and the Defendants were discussing preservation of evidence with the opposing party. Despite these events, the Defendants only preserved one back-up of the December 2003 file and email servers, which allowed ESI going back to December 2002 to be lost. *Treppel,* 28-30.

The Court ordered a forensic search of the Defendant's laptop at the Defendant's expense. *Treppel,* 39. The results were to be reviewed for privilege and then produced to the Plaintiff was a privilege log. *Treppel,* 40.

The Court further ordered the restoration and search of email servers and back-up tapes for specific date ranges. *Treppel,* 40.

Bow Tie Thoughts

The summer of 2009 will be remembered for litigation hold cases coming out almost on a weekly basis. Attorneys must prepare their clients for litigation readiness on how a litigation hold is deployed, communicated and procedures for preserving electronically stored information.