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"Pharma Bro" Avoids the Most Serious Adverse Inference Sanction for Spoliating Evidence Under Rule 37(e)

In an [opinion](#) out of the Southern District of New York addressing alleged spoliation of ESI, Judge Denise Cote found that the plaintiffs – the Federal Trade Commission and a collection of states – only sufficiently established half of their spoliation claims sought against defendant Martin Shkreli.

Shkreli, aka "Pharma Bro," and his business partner, Kevin Mulleady, launched Vyera in 2014. The plaintiffs alleged that in November 2017 Vyera entered into several anti-competitive agreements, including exclusive supply agreements, with a company preparing to seek FDA approval for the manufacture of the active ingredient in one of Vyera's branded drug products.

The plaintiffs sought sanctions under Rule 37(e) against Shkreli, alleging he failed to preserve messages on two cellphones despite receiving a litigation hold in late 2015. The first phone – a company-issued phone – was allegedly used by Shkreli to communicate about issues relevant to the case. When Shkreli's attorney sent the company phone to be forensically imaged in April 2020, it was discovered that it had been factory reset (*i.e.*, wiped) sometime in 2016 or 2017. While neither Shkreli nor Vyera produced communications from this phone, Vyera represented that company-issued phones were backed up to iCloud.

The second was a contraband phone Shkreli appeared to have possessed while in prison. A Vyera executive testified he communicated with Shkreli through this phone via WhatsApp from the end of 2018 through February 2019. Mulleady also produced two texts from Shkreli dated during his incarceration. Vyera said it did not possess, and likely could not access, the WhatsApp messages. When asked at his deposition if he possessed a phone in prison, Shkreli invoked his Fifth Amendment right against self-incrimination.

To address Shkreli's spoliation, the plaintiffs asked the court to impose a mandatory adverse inference under Rule 37(e)(2) instructing the jury to accept the presumption that this missing ESI would support that Shkreli was continuously involved in Vyera's business from 2015 to 2021, including while incarcerated, and that he engaged in the challenged anti-competitive conduct. Alternatively, under Rule 37(e)(1), the plaintiffs sought curative measures to disallow Shkreli from arguing or introducing evidence to disprove these presumptions. Shkreli, on the other hand, argued that the plaintiffs failed to prove the communications existed and, to the extent they had, that there was no intent to deprive the plaintiffs of the communications. Therefore, Shkreli requested the more modest curative measure that he be precluded from arguing that he did not communicate with two Vyera employees about the company during his incarceration.

The court found the plaintiffs failed to show that the company phone's data had not been preserved, and ordered Vyera to search its iCloud backup data and produce any messages from Shkreli. The court, however, did find that Shkreli failed to preserve the data on his contraband phone, but adopted Shkreli's more narrowly drawn sanctions. Interestingly, in exercising its discretion to impose these lesser sanctions, the court did not specifically address whether Shkreli intended to deprive the plaintiffs of spoliated communications that would have given rise to the more serious sanctions of Rule 37(e)(2).

This opinion illustrates the high threshold litigants must satisfy to secure sanctions under Rule 37(e)(2). Even where the adverse party's conduct represents a "close call," courts generally are reluctant to impose the more serious sanctions under Rule 37(e)(2) and, instead, will opt to impose remedial measures under Rule 37(e)(1).

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