

Failure to Issue Litigation Hold Does Not Prevent Defendant from Seeking Protective Order Under FRCP 26(b)(2)(B): Court Rejects “Bright Line Rule”

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Should a party be precluded from seeking a protective order under Federal Rule Civil Procedure 26(b)(2)(B) on the ground that the requested electronically stored information is inaccessible where the cause of the inaccessibility was the party's failure to issue a timely litigation hold? This was the issue before the court in *Major Tours, Inc. v. Colorel et al.* 2010 WL 255727250 (D.N.J. June 22, 2010). Rejecting the “bright line rule” urged by the plaintiff, the *Major Tours* court refused to hold as a matter of law that a protective order cannot be granted under Rule 26(b)(2)(B) “when the evidence is inaccessible because of that party's failure to institute a litigation hold.” According to the court, “nothing in the plain language of Rule 26(b)(2)(B) requires such a threshold determination of who is at fault for the data having become inaccessible.” Accordingly, the court held, similar to a request for sanctions based on spo-

and is assessed on a case-by-case basis,” the *Major Tours* court held that “this need for case-by-case discretionary balancing of factors also applies to the analysis under Rule 26(b)(2)(B),” quoting *Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F. 3d 423, 436 (2nd Cir. 2001) and *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit*, 242 F.R.D. 139 (D.D.C. 2007). The factors, as provided for in the Advisory Committee Notes to Rule 26(b)(2)(B), include the specificity of the discovery request, the likelihood of finding relevant information, the importance of the issues at stake in the litigation and the parties' resources.

In affirming the Magistrate's the court agreed that since the defendant had “produced tens of thousands of email” during the course of the litigation, “[this] meant that the

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liation of evidence, a case-by-case review under Rule 26(b)(2)(B) is required. The court additionally held that the Magistrate did not abuse his discretion when he refused to order the State of New Jersey “to perform over a million dollars worth of discovery on the off chance that it might add to the five year's worth of discovery already obtained, just because there is some risk that relevant emails were not preserved.”

In its analysis, the court pointed out that the *Zubulake* decisions and Judge Scheindlin's recent opinion in *Pension Committee of University of Montreal Pension Plan v. Banc of America*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), although conceptually related on the question of spoliation sanctions, did not address the bright line rule sought by the plaintiffs. Noting that the consideration of spoliation sanctions is “confined to the sound discretion of the trial court

backup tapes were likely to produce evidence of only marginal, cumulative benefit, and at great expense.”

To review the court's decision, please [click here](#).

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qubit \ˈkyū -bit\ n. a quantum bit, the counterpart in quantum computing to the binary digit or bit of classical computing. Just as a bit is the basic unit of information in a classical computer, a qubit is the basic unit of information in a quantum computer. *whatis.com*

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