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Electronic Discovery

Result in Trade Secrets Dispute Aided by Computer Forensics

BY ANDREW HARRIS

MINEOLA — A court-appointed cybersleuth's recovery of thousands of pages of e-mail, mostly thought to have been deleted from a corporate computer system, has led to a civil contempt finding and a nearly \$1 million award.

The outcome caps a long-running battle between competing credit reporting agencies over an executive who defected from one company to the other and the trade secrets that he took with him.

It also underscores the increasing importance of electronic discovery methods in commercial litigation. In the end, it highlighted another critical issue: how to pay for it. The costs of more than \$160,000 became the subject of a separate litigation.

Justice Ira Warshawsky of Nassau County Supreme Court ruled that the exhumed e-mails proved that the defecting executive — and the head of the company he decamped to — had lied to the court and to the corporate plaintiff about whether they held the plaintiff company's customer list when they signed a stipulation meant to end the case three years ago.

The evidence also established that the pair breached the settlement pact outright in that they worked together during an eight-month period when the executive, Samuel Fensterstock, was supposedly barred from doing so by both that stipulation and a previously existing covenant not to compete, the judge ruled. *Creditriskmonitor.com v. Fensterstock*, No. 006211/2001.

The judge awarded the plaintiff, *Creditriskmonitor.com* \$620,000 in compensatory damages and \$200,000

Decisions of Interest

Monday, August 30, 2004

NASSAU

EMPLOYMENT

Forensic Computer Discovery Leads to Contempt Finding, Damages in Trade Secrets Dispute

PLAINTIFF CREDIT reporting agency's lawsuit alleged defendant's violation of a non-compete clause in his employment contract and a stipulation of settlement by taking plaintiff's customer lists and other confidential information with him to his new employer, co-defendant credit reporting firm. The court ruled that thousands of pages of e-mail that a court-appointed analyst forensically retrieved from a computer proved that defendant, and the head of the firm that he joined, had lied to the court and plaintiff about whether they held plaintiff's customer lists when they entered into the stipulation meant to settle the action. In addition to finding the defendants in contempt for breaching the July 11, 2001 order relating to the stipulation of settlement, the court awarded plaintiff \$621,000 in compensatory damages and \$200,000 in punitive damages. The cost of electronic discovery, originally capped at \$10,000 per party, rose to nearly \$160,000.

Creditriskmonitor.com Inc v. Fensterstock, 006211/2001, Supreme Court, Justice Warshawsky. *Long Island Weekly news story*, Aug. 24.

in punitives. Attorney's fees for the 10-week-long hearing have not yet been set.

Promising to appeal, defense attorney John E. Ryan of Floral Park said in a telephone interview that the settlement terms were "far from clear," and that the evidence did not establish a willful violation of the parties' agreement.

The judge's 115-page decision was rendered after a contest that he found difficulty characterizing as a "hearing."

He called that term "quite deceptive considering the length and complexity of the proceeding."

More than 4,000 pages of documentary evidence, filling seven-plus banker boxes, came into evidence, Justice Warshawsky said.

According to the plaintiff's lead counsel, more than 98 percent of that evidence was derived from the efforts of the court's appointed forensic computer experts, Decision Strategies, now

known as Vance International/Decision Strategies.

One of the plaintiff lawyers, Kenneth Novikoff of Uniondale's Rivkin Radler, called it "an arsenal of smoking guns."

Competitors

Mr. Fensterstock was one of the founders of the plaintiff, Creditriskmonitor.com (CRM), a commercial credit reporting agency now based in the Rockland County village of Valley Cottage.

In 2001, two years after selling the business to an outside investor, Mr. Fensterstock entered into an agreement to work for a competitor, the Manhattan-based Global Credit Services Inc.

According to Justice Warshawsky, Mr. Fensterstock's shift from CRM to Global made him the latter company's top salesman and highest-salaried employee. It also apparently violated a written agreement not to compete with CRM.

Within weeks of Mr. Fensterstock's move, CRM's lawyers filed for a temporary restraining order barring him from working for Global or disclosing CRM's customer list to it, and barring Global from using the list or employing Mr. Fensterstock.

On July 11, 2001, the parties believed they had settled the suit. Three key components of that deal were that Mr. Fensterstock not work for Global before Dec. 4, 2001, that he would not solicit CRM clients for Global and that Global would not accept CRM's confidential information or use it in any way.

Almost immediately the deal began to unravel.

Mr. Novikoff's partner, Michael Masri, said that industry buzz indicated that Mr. Fensterstock was working for Global during the time he was banned from doing so.

In November, he and Mr. Novikoff filed for a finding of contempt.

The case was set down for discovery, but as it wound through that process, the Rivkin Radler lawyers say they began to believe they were not seeing everything.

"We were seeking e-mails, correspondence, any documentation in the possession of Global that would bear on the time frame," Mr. Novikoff said. "We

learned quickly through common sense that there was a whole host of e-mails that had to be out there."

Mr. Novikoff and his partner petitioned the court for a forensic examination of Global's computers.

Granting that relief, Justice Warshawsky wrote in a May 2003 order, "In the modern world ... business is often transacted with the client through electronic mail thus causing both litigants and the court to plumb the depths of computer technology to understand what 'e-mails' are deleted and which are preserved in the time honored search for the 'paper trail.'"

Acknowledging CRM's argument that the defendants were acting in bad faith, he appointed the Oakton, Va.-based Decision Strategies.

Giving the company a list of dates, names and subject matters, the judge first authorized the search of the computers of four Global executives and then, later, the "cloning" of the company's server.

"Cloning" is a process of creating an exact bit-for-bit replica of a computer's memory, explained Glenn Maravetz, managing director of Decision Strategies' computer forensics labs in Oakton.

When e-mail is deleted, Mr. Maravetz said, what is really erased is the computer's address for that file. The file itself remains on the computer's hard drive. While over time it may be over-written, given the size of most computer hard drives, it could also remain for some time, he added.

Cloning enables the forensic examiner to look not only at the files that are still discernable, but even those whose addresses have been erased.

"In forensic analysis, we want to see everything, including those things that aren't visible ... the shrapnel of activity," said Mr. Maravetz.

In CRM's case, the results of Decision Strategies' work was "pretty damning," Mr. Novikoff said.

"Without all of those documents, our case would not have been as comprehensive," he said. "They couldn't run away."

Global's lawyer, Mr. Ryan, a partner in Floral Park's Ryan Brennan & Donnelly,

conceded the importance of the forensics work, while maintaining that he will challenge the conclusions drawn from the evidence at trial.

Calling the process "a learning experience," Mr. Ryan expressed concern with the parameters of the Decision Strategies' search and the volume of extraneous documentation that he said it produced. "You're dealing with competitors here, looking into each others' souls," he said.

"Some things are so generic," Mr. Ryan said. "The better you can tailor it, the more focused the things that come out."

Mr. Maravetz offered his own caveat, warning that in cases like CRM's, time is of the essence. "The more time that goes by, the more evidence that is destroyed," he said.

Cost Issue

Despite its potential benefits, forensic work is expensive. Justice Warshawsky directed that the costs be split between the parties, lawyers for each side said.

Mr. Ryan said that the bill was to be capped at \$10,000 per party, a fact confirmed by Mr. Novikoff. Without warning, they both assert, it topped \$160,000. The question of who is responsible for payment of that overage has itself become the subject of separate litigation. Mr. Maravetz maintained, however, that the dispute had been resolved.

Decision Strategies charges rates ranging from \$150 to \$300 per hour, or roughly \$2,000 to \$5,000 per hard drive, Mr. Maravetz said.

In the six years that Decision Strategies has been involved in forensic computer examination, it has seen its e-discovery business roughly double each year. The company, which also has offices in New York City, Miami, London and Mexico City, also handles private investigations, intelligence and security work.

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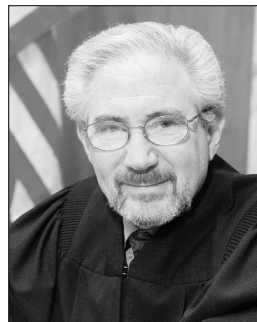


PHOTO BY RICK KOPSTEIN

Justice Warshawsky