IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANDRA GROUP, LP, Plaintiff, V. JDA SOFTWARE GROUP, INC., Defendant.	§	No. 3:15-mc-11-K-BN
PROJEKT202, LLC, Movant.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This discovery dispute has been referred under 28 U.S.C. § 636(b) to the undersigned United States magistrate judge by United States District Judge Ed Kinkeade. *See* Dkt. No. 17. Defendant JDA Software Group, Inc. ("JDA" or "Defendant") has filed a Motion for Contempt and Sanctions, *see* Dkt. No. 27 (the "Contempt Motion"), in which it contends that projekt202, LLC ("p202") has failed to comply with this Court's orders to produce documents [Dkt. Nos. 21, 24]. p202 filed a response, *see* Dkt. No. 33, and JDA filed a reply, *see* Dkt. No. 37.

After the deposition of a p202 corporate representative designated under Federal Rule of Civil Procedure 30(b)(6), and as allowed by the Court's order, *see* Dkt. No. 51, JDA filed a supplemental brief in support of its Contempt Motion, *see* Dkt. No. 57, p202 filed a supplemental response, *see* Dkt. No. 60, and JDA filed a supplemental reply, *see*

Dkt. No. 64.

The undersigned now issues the following findings of fact, conclusions of law, and recommendation on the Contempt Motion and, pursuant to 28 U.S.C. § 636(e)(6), certifies facts that, in the undersigned's opinion, show that certain conduct by p202 constitutes a violation of this Court's order for which p202 should be cited to appear before Judge Kinkeade and show cause why it should not be held in civil contempt under Federal Rule of Civil Procedure 45(g).

Background

JDA served p202 with a third-party document subpoena under Federal Rule of Civil Procedure 45 in the matter styled and numbered *Andra Group, LP v. JDA Software Group, Inc.*, Case No. 2:13-cv-02528-SRB, in the United States District Court for the District of Arizona. *See* Dkt. No. 1-2. The subpoena commanded p202 to produce documents in Dallas, Texas, and p202 sought relief from the subpoena in this Court by filing a Motion to Quash Subpoena to Produce Documents, *see* Dkt. No. 1, after which JDA filed a Cross-Motion to Compel, *see* Dkt. No. 11.

The Court held oral argument on these motions on April 1, 2015, *see* Dkt. No. 20, and, on April 13, 2015, the Court granted each motion in part and denied each motion in part in its Memorandum Opinion and Order on Motion to Quash Subpoena to Produce Documents and Cross-Motion to Compel, *see* Dkt. No. 21.

The Court ordered p202 "to search for and produce only documents, including [electronically stored information ("ESI")], that are not privileged and that are responsive to the following modified requests, excluding communications between

p202, on the one hand, and [Plaintiff Andra Group, LP ("Andra")] or JDA, on the other, as well as any documents prepared or generated by Andra":

> 1. Each document discussing or describing the nature or scope of p202's contractual obligations to Andra and/or Andra's contractual obligations to p202 in connection with or otherwise relating in any manner whatsoever to the Project.
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> 2. Each document discussing or describing any disagreement or dispute between p202 and Andra regarding the nature, scope, and/or performance of p202's contractual obligations to Andra or of Andra's contractual obligations to p202 in connection with or otherwise relating in any manner whatsoever to the Project.
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> 3. Each document discussing or describing p202's candidacy for the role or position of Project Manager (as that term is described in the SOWs) for the Project, experience, qualifications, and/ or capacity to serve in that role or position, and/or selection for that role or position, including but not limited to each document discussing or describing:
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> a. p202's efforts, if any, to be selected by Andra to serve as Project Manager for the Project, including but not limited to any curricula vitae, resumes, marketing materials, recorded presentations, presentation materials, meeting minutes, notes, or communications referring or relating to any such efforts;
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> b. Andra's efforts, if any, to engage p202 to serve as Project Manager for the Project, including but not limited to any recorded presentations, presentation materials, meeting minutes, notes, or communications referring or relating to any such efforts;
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> c. p202's prior experience, if any, providing services of the types that were or would be required of the Project Manager in the SOWs and/or in any agreement between p202 and Andra wherein it undertook to serve as Project Manager, including but not limited to any curricula vitae, resumes, marketing or presentation materials referring or relating to any such prior experience and/or any contemporaneous self-assessment by p202 of whether it had sufficient experience to undertake the role or position of Project Manager for the Project, and any communications with Andra regarding same;
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> d. p202's capacity (in terms of time, personnel, and/ or other resources) to fully, faithfully, efficiently, and/or timely perform the services that were or would be required of the Project Manager in the SOWs and/or in any agreement between p202 and Andra wherein it undertook to serve as Project Manager for the Project, including but not limited to any communications with Andra regarding its capacity to serve in that role or position and/ or any contemporaneous self-assessment by

p202 of whether it had sufficient capacity to undertake that role or position for the Project; and/ or

e. Andra's deliberation and/or decision to select p202 to serve as Project Manager for the Project, including but not limited to any communications referring or relating to same.

4. Each including but not limited to each document referring or relating to (a) any of p202's billed or billable fees for such services, (b) any payment, non-payment, adjustment, or refund of any such fees and/ or expenses, (c) any disagreement or dispute between p202 and Andra regarding any such fees or expenses, and (d) any proposed or actual resolution of any such disagreement or dispute.

5. Each document discussing or describing any evaluation, assessment, investigation, analysis, test, report, research, or other diligence conducted, performed, prepared, or composed by Andra and/or by p202 or any third party on Andra's behalf on or before March 30, 2012, or any advice, recommendation, comment, or explanation that p202 or any third party gave to Andra on or before March 30, 2012, regarding (a) either or both of the Licensed Products, including their suitability for Andra' s business purposes, (b) any potential risks, benefits, advantages, or disadvantages of entering into either or both of the SLSAs, (c) any of provisions of either or both of the SLSAs, including those duties allocated to Andra therein, such as Andra's duty to "assign a representative who shall have principal responsibility for overseeing and managing the performance by such party under this Agreement and who shall be the primary point of contact for and person authorized to issue to and receive communications from the other party in relation to the implementation process," and to "mutually develop ... one or more Statements of Work," and/ or (d) RedPrairie's expertise, qualifications, capabilities, reputation, and/or suitability to implement the Licensed Products for Andra and/or the selection of RedPrairie to serve in that capacity.

6. Each document discussing or describing any evaluation, assessment, investigation, analysis, report, research, or other diligence conducted, performed, prepared, or composed by Andra and/or by p202 or any third party on Andra's behalf, or any advice, recommendation, comment, or explanation that p202 gave to Andra, regarding:

a. any potential risks, benefits, advantages, or disadvantages of entering into either or both of the SOWs;

b. any of the provisions of either or both of the SOWs, including, without limitation, each duty allocated therein to Andra and/or its Project Manager and/or each of the explicit assumptions set forth within the SOWs and upon with the SOWs were predicated;

c. the quantum of personnel, time, and/or other resources that Andra and/or p202 would need to devote to the Project in order to

satisfactorily perform all or any of the duties allocated to either or both of them in the SLSAs, in the SOWs, and/or in any agreement between them referring or relating to the Project; and/or

d. The hiring or potential hiring of additional personnel at Andra and/or p202 to satisfactorily perform all or any of the duties allocated to either or both of them in the SLSAs, in the SOWs and/or in any agreement between them referring or relating to the Project.

7. Each document discussing or describing the amount of time expended by p202 in the performance of each or all of p202's duties as Project Manager for the Project and/or the performance of each or all of Andra's duties as delineated in the SOWs, including but not limited to any logs, time sheets, or other time records prepared by or on behalf of any p202 personnel, representatives, or agents that refer or relate to his, her, or their performance of such duties.

8. Each document prepared by p202 discussing or describing the scheduling of and/or progress in the performance of those duties allocated to Andra and/or p202 in the SLSAs and/or in the SOWs.

9. Each document discussing or describing (a) the dates on which p202 was scheduled or obligated to deliver and/or the dates on which p202 actually delivered website content including creative elements, product and lifestyle imagery, HTML, and CSS deliverables to RedPrairie/JDA, (b) precisely what website content, i.e., wireframes, was delivered to RedPrairie/JDA on each of the dates on which a delivery occurred, and (c) any delay in p202's creation and/or delivery of any website content to RedPrairie/JDA and/or the reason(s) for any such delay.

11. Each document discussing or describing p202"s and/or Andra's control over, maintenance of, and/or ability to modify Andra's then existing technology platform, including Andra's then existing websites, throughout the course of the Project.

12. Each document discussing or describing Andra's decision to cease paying and/or doing business with JDA.

13. Each document discussing or describing the implementation after March 2013, if any, of any new front office and/or back office software applications for Andra's online retail clothing businesses.

14. Each document discussing or describing Andra's abandonment of its plan to incorporate Accellos warehousing/warehouse management software, or a component of such software, into its new technology platform in favor of RedPrairie' s warehousing/warehouse management software application after entering into the SOWs, including but not limited to any document referring or relating to any assessment, review, report, description, or explanation of the impact of that decision on the costs and/or duration of the Project and/or the need to enter into a change

> order to memorialize any such alteration to the cost and/or duration of the Project."

Id. at 27-30. The Court further ordered "p202, at its own expense, to reproduce the ESI that p202 has previously produced in a form and manner that complies with the subpoena's instructions for producing ESI" because that data was originally produced "in non-readable [Portable Document Format ("PDF")] format without the metadata specified by the subpoena's instructions." *Id.* at 31-32. "But this required reproduction excludes the ESI previously produced in the Bates ranges specified in JDA's January 28, 2015 proposal." *Id.* at 32.

Pursuant to a supplemental to the Court's April 13, 2015 order, *see* Dkt. No. 22, the parties submitted a Joint Status Report in which they "waive[d] any right they might have to file objections to or otherwise challenge or appeal the [Memorandum Opinion and Order on Motion to Quash Subpoena to Produce Documents and Cross-Motion to Compel], including any of the rulings subsumed therein," Dkt. No. 23 at 2. p202 and JDA also agreed on a June 12, 2015 deadline for p202's compliance with the Court's Memorandum Opinion and Order on Motion to Quash Subpoena to Produce Documents and Cross-Motion to Compel. *See id.* In an April 17, 2015 Electronic Order, the Court then ordered p202 to complete its compliance with the subpoena, as modified by the Court, by June 12, 2015. *See* Dkt. No. 24 (together, with Dkt. No. 21, the "Discovery Order").

JDA contends that p202 has failed to comply with the Court's Discovery Order. On August 1, 2015, JDA filed a motion seeking to hold p202 in civil contempt and for

sanctions against p202 under Federal Rule of Civil Procedure 45(g). *See* Dkt. Nos. 27 & 27-1. JDA argues that p202's production of documents in response to the Court's Discovery Order was untimely and incomplete. *See id.*

According to JDA, p202 followed its initial production of documents with three supplemental productions in response to inquiries by JDA's counsel. *See* Dkt. No. 27-2 at 35-36, 42, 50. On June 10, 2015, p202's counsel informed JDA's counsel that "[a] batch of documents comprising projekt202's response to Judge Horan's discovery order is ready to be produced to you," Dkt. No. 27-2 at 8, and JDA received the documents electronically on June 11, 2015, which was one day before the court-ordered deadline. JDA's initial review of the documents raised concerns about completeness, which JDA conveyed to p202. *See id.* at 17-18. p202 had been ordered to re-produce what the parties refer to as the ShareFile documents in a specific format that included metadata, but those documents were missing. It also appeared to JDA that p202 had searched only its Microsoft Outlook Data File and had failed to search its Microsoft Office 365 Server or elsewhere for responsive documents. JDA also observed that the production did not include any responsive documents originating from John Mefford, Sanjay Menon, Bill Grunnah, Amy Hitt, Jeff McLean, Benji Smith, Andrew Stalick, or Brian Welnack, all of whom were involved in p202's project for Andra.

In response, on June 15, 2015, p202 informed JDA that a "fresh copy" of the ShareFile account would be provided in the next few days and that it was looking into the alleged discrepancies raised in JDA's inquiry. *Id.* at 20. On June 18, 2015, p202's counsel informed JDA that the ShareFile documents were being "processed to ensure,

to the extent possible, that the documents contain no corruptions or problems that are not native to or inherent in the file." p202's counsel also stated that the client had specifically assured him that the documents produced included all responsive material residing on p202's Microsoft Office 365 Server, including data stored in Microsoft Outlook, as well as on any other electronic or non-electronic storage device in the company's possession, custody or control (such as laptops or hard drives). *See id.* at 27. As to documents related to the named individuals that JDA raised, p202 responded that no responsive documents, other than those that p202 had agreed to re-produce in the ShareFiles, were found relating to active personnel Sanjay Menon, Brian Welnack, and Bill Grunnah; that John Mefford and Benji Smith were no longer with p202 and that their Microsoft Outlook accounts were not archived; and that Amy Hitt, Jeff McLean, and Andrew Stalick were no longer with p202 and that their Microsoft Outlook accounts were archived outside of p202's network. *See id.* And p202 stated that it had provided the metadata but that JDA just missed it. p202 then told JDA where the metadata could be found and stated that it had asked its information technology ("IT") support personnel to create a document to help JDA find the metadata. *See id.* at 28.

On June 29, 2015, JDA informed p202 that JDA had "finally been successful in our efforts to remedy the corruption issues with p202's production from January 2015," and it provided the link to the site where the materials had been uploaded. *Id.* at 42. On June 30, p202's counsel added that the additional documents represented a reproduction of documents previously produced, "with any fixable glitches in that

production having been fixed to the best of our ability." *Id.* at 50.

JDA contends that p202's document production is still incomplete. JDA argues that not only has p202 failed to search for and produce all responsive documents but also that p202 may have destroyed evidence after being informed of its duty to preserve it. Despite the untimely supplemental document productions, JDA argues that p202 refuses to search for and is withholding entire categories of documents responsive to the subpoena as modified by the Discovery Order. More specifically:

- JDA asserts that p202 has failed to again produce its ShareFile Account in the format ordered by the Court.

- JDA also contends that p202 has not produced documents from a Dropbox account maintained by Jose Luis Garcia, the p202 manager assigned to Andra's project. JDA believes that the Dropbox account contains recordings of project-related telephone conversations between p202 personnel and Andra's founder and CEO. JDA asserts that, instead of producing the telephone recordings, p202 has produced more than 11,000 barely legible pages of wireframe images from the account.

- JDA also contends that p202 has failed to produce documents from its Microsoft Office 365 Account Server, except for the incomplete production of emails and attachments, and specifically has not produced project-related calendars, contacts, notes, tasks, or cloud-based storage from its Microsoft Office 365 Server or responsive documents from the hard drives of the computers that p202's personnel used.

- JDA also contends that p202 has failed to produce documents from a p202 website that contained Andra project-related documents. JDA states that, after oral argument but prior to entry of the Discovery Order, JDA discovered that several hyperlinks contained in various production documents would direct the browser to a p202-maintained server from which it obtained documents that were responsive to the Discovery Order but that have not been produced by p202.

- JDA also contends that p202 has failed to produce documents responsive to several of the requests in the subpoena, such as those discussing or describing any prior experience, qualifications, and/or capacity on p202's part to serve in

the role of project manager or p202's project-related billings, payments, non-payments, adjustments, or disagreements with Andra and any resolutions of those disagreements.

- JDA also contends that p202 has failed to produce responsive documents, including emails, maintained by key p202 personnel John Mefford, Benji Smith, Sanjay Menon, Bill Grunnah, and Brian Welnack and that p202 provided incomplete production concerning other key personnel.

- JDA accuses p202 of irreparably corrupting responsive ShareFile Account documents by converting the materials into an unreadable PDF format and stripping them of metadata and of failing to preserve documents relating to both current and former employees.

- And JDA suggests that p202's counsel neglected their legal duty to manage the client's identification, preservation, review, and production efforts after entry of this Court's orders.

JDA seeks an order holding p202 in civil contempt, ordering p202 to comply with the Court's Discovery Order, imposing appropriate judicial sanctions in form of civil coercive and remedial relief, and awarding JDA its attorneys' fees and costs incurred in enforcing the Court's Discovery Order. *See* Dkt. No. 27 at 4; Dkt. No. 27-1 at 18-19, 28-30; Dkt. No. 64 at 17-18.

p202 filed a response to the Contempt Motion, stating that it has produced "every responsive piece of information that p202 has." Dkt. No. 33 at 2 (emphasis removed). p202 states that it did not produce telephone recordings because those recordings no longer exist, did not exist at the time that JDA served its subpoena, and have not existed since that time. And p202 takes the position that the recordings were deleted before p202 had a duty to preserve them. p202 states that it has now produced the ShareFile three times: originally on January 20, 2015 and subsequently on June 29, 2015 and August 5, 2015 to address JDA's concerns about certain metadata for a

portion of those documents. p202 also explains that the source of the issues with the metadata was movement of the documents using different storage methods and locations during the course of their usage for p202's Andra work, which occurred before p202 was served with JDA's subpoena. p202 asserts that, as a non-party, it "has no interest in withholding any documents or metadata from JDA, and, in fact, it has not done so. What data p202 has, it has produced to JDA. .... But it cannot produce what it does not have." *Id.* at 10. p202 also states that it has searched every place in its records where data responsive to the Court's Discovery Order might have been found and produced to JDA all responsive data that it found.

As support for its response, p202 submitted the Affidavit of Jose Luis Garcia, p202's Director of Operations who took the lead role in helping outside counsel respond to JDA's subpoena. *See* Dkt. No. 33-1 at 2-5. Mr. Garcia testifies that, during the course of p202's work with Andra, "the files were stored in a number of different filesharing programs and storage repositories, including a Dropbox account, Microsoft Office SharePoint, and Citrix ShareFile, and the documents in those files were regularly accessed from, modified in, and moved back and forth between those programs and repositories in the course of projekt202's performance of services. Some of those documents were also stored, created, and modified at various times in programs that are a part of the Microsoft Office 365 program used by project202. At the time I searched for and gathered the data as described ..., the complete set of projekt202's files related to it's Andra Group project was stored in SharePoint and in ShareFile, and that set of files is what I pulled and produced to projekt202's attorneys."

Id. Mr. Garcia further testified that the metadata in the documents may have been altered by the migration of the files between the Dropbox, SharePoint, and ShareFile programs but that it was not altered intentionally. *See id.* at 3. Mr. Garcia testified that he also searched the Microsoft Outlook accounts for specific current and former p202 employees and contractors, which were hosted on p202's Microsoft Office 365 cloud. *See id.* at 3-4. As to the telephone recordings that he made, Mr. Garcia testified that he did not keep or archive those recordings but instead erased each of them soon after they were made, and that, at the time that p202 received JDA's subpoena, the recordings no longer existed and had not existed for over a year. *See id.* at 4-5.

p202 also contends that JDA failed to confer with it before filing the Contempt Motion and opines that, had JDA done so, especially concerning the discarded telephone recordings and the corruption of the metadata in p202's original production, it is unlikely the Contempt Motion would have been filed.

In its Contempt Motion, JDA also requested the deposition of p202's corporate representative designated under Rule 30(b)(6) to testify concerning p202's efforts to comply with JDA's subpoena. *See* Dkt. No. 27 at 4. That request for relief is now moot because the deposition of p202's corporate representative, Jose Luis Garcia, took place on September 30, 2015. *See* Dkt. Nos. 49 & 57-3.

In the Rule 30(b)(6) deposition, Mr. Garcia testified that he was the person at p202 in charge of locating documents in response to the Court's Discovery Order. *See* Dkt. No. 57-3 at 11 [Garcia Depo. at 39:1-9]. He also testified that Kent Livingston and John Nichols were p202's IT department and provided tech support for p202 and that

they were the persons to whom Garcia assigned the task of locating responsive documents in p202's project-related Microsoft Outlook files. *See id.* at 49 [Garcia Depo. at 189:15-192:15].

Mr. Garcia testified that "there were two sessions of giving data" to p202's attorneys: one in response to the subpoena, and the other in response to the Court's Discovery Order. *See id.* at 46-47 [Garcia Depo. at 180:23]. In the first, prior to the January 20, 2015 production, p202 downloaded both the Microsoft Outlook files on its Microsoft Office 365 Server, which included calendars and emails, and the project file residing in the ShareFile Account to Dropbox and then gave its lawyers login credentials to access that data. *See id.* at 48 [Garcia Depo. at 185:6-187:20]. In the second, prior to the August 5, 2015 production, p202 provided documents to its counsel on a USB or thumb drive. *See id.* at 58 [Garcia Depo. at 227:1-23].

Mr. Garcia testified that he was surprised to learn that the first time that JDA received any production of emails was on June 11, 2015 because those documents had been provided to p202's counsel prior to the January 20, 2015 production. *See id.* at 52 [Garcia Depo. at 202:15-203:15]. Mr. Garcia also testified that p202 "gave many time sheet documents to our attorneys," either in this case or another case, but that he did not remember if p202 searched through its archives of time entry and time management documents for responsive documents in response to the subpoena, or if, after entry of the Court's Discovery Order, p202 searched its archived data to find responsive documents related to time entry or time devoted by any personnel at the company to the Andra project. *See id.* at 18 [Garcia Depo. at 65:14-67:21], 29 [Garcia

Depo. at 111:18-112:25]. To the best of his recollection, after entry of the Court's Discovery Order, p202 did not undertake any effort to search its archive of Quick Books to identify any documents responsive to JDA's request for accounting data pertaining to p202's Andra implementation project, *see id.* at 20 [Garcia Depo. at 73:2-7], and p202 did not provide its attorneys with invoices, payment information, or information pertaining to disputes over invoices, *see id.* at 30 [Garcia Depo. at 113:7-18]. Mr. Garcia also testified that, after entry of the Court's Discovery Order, p202 did not go back to determine if any responsive documents were located on its website or Microsoft Outlook e-mail account but that p202 did review its ShareFile account again and reproduced it to p202's counsel on a USB drive. *See id.* at 54 [Garcia Depo. at 211:6-212:3].

Mr. Garcia testified that, before p202 was served with JDA's subpoena, p202 had no document or email retention policy and that p202 did not have one as of the date of his Rule 30(b)(6) deposition. *See id.* at 15-17 [Garcia Depo. at 55:16-61:4], 20 [Garcia Depo. at 75:3-11]. Neither did p202 have a practice or custom for the storage of digital, video, tape, or audio recordings, and, "[s]ince there's no policy, each person does that in their own whim." *Id.* at 20 [Garcia Depo. at 74:7-20, 75:1-22].

Mr. Garcia testified that, during p202's work on the Andra project and shortly thereafter, p202 stored all Andra project-related documents on a Dropbox storage account owned by Mr. Garcia. The Dropbox account was used as a group repository for all Andra project documents, and it provided a central location for p202's Andra project team to have access to files in one location. After the Andra project ended, but before

p202 was served with JDA's subpoena, the Andra project-related data was moved in the normal course of business from Mr. Garcia's Dropbox account to p202's ShareFile storage account. To move the documents, Mr. Garcia synced the Andra project-related documents in his Dropbox account to his laptop and then uploaded them from his laptop into an Andra folder in p202's ShareFile account. The documents were transferred in their native format. They were not converted to PDF, *see id.* at 51-52 [Garcia Depo. at 200:12-202:5], and he was very surprised to learn that most of the documents produced to JDA were in PDF format, *see id.* at 52 [Garcia Depo. at 201:3-202:5]. After Mr. Garcia moved the Andra project-related documents from his Dropbox account to ShareFile, he deleted them from his personal Dropbox. *See id.* p202 did not contact Dropbox to inquire whether any of the data that had been deleted from Mr. Garcia's Dropbox account still existed in its systems. Instead, p202 asked each current employee if he or she still had relevant information in their respective Dropbox accounts. *See id.* at 26 [Garcia Depo. at 98:3-25].

Mr. Garcia opined that the multiple transfers of the Andra project-related documents altered the metadata. He explained that p202 made no special effort to retain or protect the metadata because p202 does not need metadata in its line of work and that any corruption of the metadata was completely accidental and not intentional. *See id.* at 48 [Garcia Depo. at 188:6-189:6]. But p202 did not hire a forensic ESI specialist to confirm that the metadata was altered by the migration of files between Dropbox, SharePoint, and ShareFile. *See id.* at 70 [Garcia Depo. at 275:7-13]. Mr. Garcia also testified that p202's attorneys did not instruct p202 to preserve the

integrity of the metadata in the documents that p202 was providing in response to the subpoena, *see id.* at 48-49 [Garcia Depo. at 188:22-189:6], and p202 made no attempt to comply with the subpoena's directives in Instruction No. 3 concerning the production of ESI, *see id.* at 47 [Garcia Depo. at 183:19-184:15].

Mr. Garcia also testified that, prior to receiving JDA's subpoena, p202's individual employees were entrusted with managing their own data on any given project and could retain or delete data as they saw fit. Some of p202's employees on the Andra project did not use p202's email or storage systems and instead used their own personal email or storage accounts. And, when employees who had worked on the Andra project left the company, p202 would delete their email accounts to free up valuable storage space for current employees and projects. To comply with the Court's Discovery Order, Mr. Garcia asked employees who used their own email systems if they had any Andra project-related emails but did not seek permission to image their email accounts to search for responsive documents. *See id.* at 40-41 [Garcia Depo. at 154:22-159:11]. But he did not ask at least one key employee on the Andra project, Bill Grunnah, who used his own outside email system, because, "[i]f you knew Bill, then you'd know why." *Id.* at 40 [Garcia Depo. at 154:22-155:17].

p202 also did not image the laptops of current employees who worked on the Andra project to seek responsive documents. *See id.* at 44 [Garcia Depo. at 170:2-7]. When employees left p202, their laptops were reassigned. p202 made no attempt to locate the laptops used by former employees who worked on the Andra project or to determine if those laptops had been wiped. *See id.* [Garcia Depo. at 170:12-172:2].

Mr. Garcia testified that, after the Court's Discovery Order, p202 did not go back to determine if responsive documents were located on p202's website. Originally, Mr. Garcia asked Kent Livingston to determine if any data from the Andra project was on the website "because he can go look really quick to see if there's an Andra folder," and Mr. Garcia testified that he was told by Mr. Livingston that there was nothing Andra-related on the review site. *See id.* at 52-53 [Garcia Depo. at 204:11-206:23]. JDA then introduced exhibits that it obtained from the website, including email communications that contained live links to Andra project-related documents located on p202's website and 64 pages related to the Andra project. *See id.* at 53 [Garcia Depo. at 207:1-208:11]. Mr. Garcia testified that p202 did not search its website after the Court's Discovery Order to determine if any responsive documents were located there because they thought they had already looked extensively. Mr. Garcia also opined that Mr. Livingston simply missed 65 documents on the website and that, as a result, the documents were not provided to p202. *See id.* at 53-54 [Garcia Depo. at 210:4-211:12].

Mr. Garcia testified that, in August 2012, p202 considered Andra a high risk client. Mr. Garcia and his team began recording most of their phone calls with Tomima Endmark, Andra's CEO and founder, *see id.* at 65-66 [Garcia Depo. at 256:10-258:5], and Mr. Garcia continued to record those conversations until p202 was told to stop the Andra project, *see id.* at 67-68 [Garcia Depo. at 264:22-265:8]. Mr. Garcia and his team kept the recordings in Dropbox, *see id.* at 68 [Garcia Depo. at 22-266:1, 266:22-267:2], and Mr. Garcia deleted the recordings sometime in early 2013 after Andra paid all of its invoices, *see id.* at 69 [Garcia Depo. at 18-24]. Mr. Garcia also testified that Ms.

Endmark told him during a telephone conversation after the February 28, 2013 meeting between Andra, JDA, and p202 that she was considering litigation against JDA. *See id.* at [Garcia Depo. at 122:13-123:18], 33 [Garcia Depo. at 125:3-16]. And Mr. Garcia testified, despite Ms. Endmark's comments and Andra's subsequently filed lawsuit against JDA in Arizona, there was no litigation hold in place at p202 until p202 was served with JDA's subpoena at issue in this matter. *See id.* at 30 [Garcia Depo. at 113:19-120:16], 34 [Garcia Depo. at 133:11-17].

After the Rule 30(b)(6) deposition was taken, JDA filed a supplemental brief in support of its Contempt Motion. *See* Dkt. No. 57. p202 filed a supplemental response, *see* Dkt. No. 60, and JDA filed a supplemental reply, *see* Dkt. No. 64. In its supplemental brief, JDA argues that Mr. Garcia's deposition testimony demonstrates that p202's counsel had and refused to produce responsive documents, even though p202 had provided those documents to its counsel before the motion to quash the subpoena was filed. JDA also contends that the supplemental production failed to comply with the Court's Discovery Order's requirement that p202 re-produce the documents in the ShareFile Account in legible form and with metadata and find and produce all responsive documents located in storage devices in p202's control. And JDA contends that p202 destroyed evidence after it had a duty to preserve that evidence. In addition to the relief sought in the original motion, JDA also complains in its supplemental brief about the Rule 30(b)(6) deposition and seeks sanctions for p202's alleged failure to properly prepare its corporate representative to testify on all of the specified topics. *See id.*

Throughout the filings in this proceeding, both JDA and p202 take issue with the tone and alleged lack of civility in the other's communications and court filings, and much of the Contempt Motion, response, reply, and supplemental filings are devoted to parsing those communications. *See, e.g.*, Dkt. Nos. 27, 27-1, 33, 37, 57, 60, & 64.

The undersigned now concludes that clear and convincing evidence shows that p202 has not complied with the Court's Discovery Order and that p202 should be cited to appear before Judge Kinkeade and show cause why it should not be held in civil contempt and be subject to appropriate judicial sanctions.

Legal Standards

Federal Rule of Civil Procedure 45 "explicitly contemplates the use of subpoenas in relation to non-parties" and governs subpoenas served on a third party, such as p202. *Isenberg v. Chase Bank USA, N.A.*, 661 F. Supp. 2d 627, 629 (N.D. Tex. 2009). Rule 45(g) allows a court to hold in contempt a person who, having been served, "fails without adequate excuse to obey the subpoena or an order related to it." FED. R. CIV. P. 45(g).

In a case in which, as here, the matter is referred to a magistrate judge under 28 U.S.C. § 636(b), 28 U.S.C. § 636(e)(6) provides that, "[u]pon the commission of any [act of contempt] – ... (B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where – ... (iii) the act constitutes a civil contempt, the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon

a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge."

"A party may be held in contempt if he violates a definite and specific court order requiring him to perform or refrain from performing a particular act or acts with knowledge of that order." *Whitfield v. Pennington*, 832 F.2d 909, 913 (5th Cir. 1987). "The judicial contempt power is a potent weapon" that should not be used unless a specific aspect of the court's order has been "clearly violated." *Piggly Wiggly Clarksville, Inc. v. Mrs. Baird's Bakeries*, 177 F.3d 380, 383 (5th Cir. 1999).

"Contempt is characterized as either civil or criminal depending on its 'primary purpose.'" *In re Collier*, 582 F. App'x 419, 522 (5th Cir. 2014). "A contempt order is civil in nature if the purpose of the order is (1) to coerce compliance with a court order or (2) to compensate a party for losses sustained as a result of the contemnor's actions." *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 290-91 (5th Cir. 2002).

To show that civil contempt is warranted, a moving party must establish "1) that a court order was in effect, 2) that the order required certain conduct by the respondent, and 3) that the respondent failed to comply with the court's order." *Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 47 (5th Cir. 1992). Intent is not an element of civil contempt; the issue is whether the alleged contemnor has complied with the court's order. *See Whitfield*, 832 F.2d at 913. The standard of proof for civil contempt is clear

and convincing evidence, which is "that weight of proof which produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, of the truth of the precise facts of the case." *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995) (internal quotation marks omitted).

"After the movant has shown a *prima facie* case, the respondent can defend against it by showing a present inability to comply with the subpoena or order." *Petroleos Mexicanos v. Crawford Enters.*, 826 F.2d 392, 401 (5th Cir. 1987). "Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising this defense, the defendant has a burden of production." *United States v. Rylander*, 460 U.S. 752, 757 (1983). Additionally, "[t]he respondent may avoid a contempt finding by establishing that is has substantially complied with the order or has made reasonable efforts to comply." *In re Brown*, 511 B.R. 843, 849 (S.D. Tex. 2014) (citing *U.S. Steel Corp. v. United Mine Workers of Am., Dist. 20*, 598 F.2d 363, 368 (5th Cir. 1979)). And, "[e]ven if liability is established, the respondent may demonstrate mitigating circumstances that might persuade the Court to withhold the exercise of its contempt power." *Id.* (citing *Whitfield*, 832 F.2d at 914).

"Upon a finding of civil contempt, the Court has broad discretion to impose judicial sanctions that would coerce compliance with its orders and compensate the moving party for any losses sustained. The Court may impose a conditional fine, provided the amount is reasonably designed to force compliance without being punitive, and/or a fixed term of imprisonment, with the condition that the contemnor

be released if he or she complies with the court order. The Court also may require that the contemnors pay reasonable attorney's fees incurred by the moving party in obtaining the contempt finding." *Mary Kay Inc. v. Designs by Deanna, Inc.*, No. 3:00-cv-1058-D, 2013 WL 6246484, at *4 (N.D. Tex. Dec. 3, 2013) (citations omitted).

Analysis

JDA contends that p202 should be held in civil contempt because it has failed to obey this Court's Discovery Order modifying and requiring p202 to comply with JDA's subpoena. JDA contends that p202 violated the Discovery Order because p202 failed to reproduce the documents from its ShareFile Account, which the Court order p202 to produce in legible form and with metadata; because p202 failed to find and produce all non-privileged, responsive documents in its possession, custody, or control from whatever storage device or place; because p202 failed to conduct itself transparently and cooperatively; and because p202 failed to complete its compliance with the subpoena as modified by the agreed-upon and court-ordered June 12, 2015 deadline.

I. The Rule 30(b)(6) deposition

Before turning to the merits of the Contempt Motion, the Court must first address to what extent it will consider, and address JDA's arguments or complaints concerning, Jose Luis Garcia's deposition testimony as p202's Rule 30(b)(6) corporate representative.

A. p202's alleged failure to properly prepare the witness

In its Contempt Motion, JDA sought a Rule 30(b)(6) deposition of a corporate

representative designated by p202 to testify about the nature and extent of p202's compliance with the subpoena, as modified by the Court's Discovery Order. JDA subsequently noticed the deposition, and, after the Court denied p202's Motion for Protective Order and to Quash Defendant's Rule 30(b)(6) Deposition Notice [Dkt. No.43], *see* Dkt. No. 50, p202 designated Jose Luis Garcia as its corporate representative. p202 had previously submitted Mr. Garcia's affidavit in support of its response in opposition JDA's Contempt Motion. *See* Dkt. No. 33-1.

Mr. Garcia was deposed on September 30, 2015. *See* Dkt. No. 57-3. In its supplemental briefs, JDA asserts that p202 failed to prepare Mr. Garcia to testify to each of the eight topics listed in the Rule 30(b)(6) deposition notice, and JDA seeks sanctions against p202 for its alleged failure to comply with its legal duty to designate one or more witnesses to testify about the information known or reasonably available to p202 on each of the designated matters. *See* FED. R. CIV. P. 30(b)(6). JDA contends that Mr. Garcia was not prepared to testify to any of the designated topics other than what documents were given to p202's attorneys. *See* Dkt. No. 57 at 2; Dkt. No. 57-3 at 10 [Garcia Depo. at 35].

But a request for sanctions for p202's alleged noncompliance with the Rule 30(b)(6) deposition notice is outside the scope of the Contempt Motion. Although the deposition was taken to obtain evidence concerning p202's compliance with the Court's Discovery Order, JDA must file a separate motion if it seeks sanctions or other relief based on p202's alleged failure to comply with the Rule 30(b)(6) deposition notice.

B. Proposed changes to the deposition testimony

On October 30, 2015, two weeks after JDA filed its supplemental brief, Mr. Garcia submitted an errata sheet making substantive corrections to his deposition testimony. *See* Dkt. No. 60-1 at 1-2. Because of the timing, p202 has not been afforded an opportunity to address JDA's arguments concerning the proposed changes to Mr. Garcia's deposition, nor has it sought leave to do so. Likewise, JDA has not sought to reopen Mr. Garcia's deposition to cross-examine him on the proposed changes. Instead, JDA asks the Court to disregard the errata sheet as a sham affidavit in which p202's counsel attempts to materially alter or contradict Mr. Garcia's deposition testimony.

Mr. Garcia's errata sheet proposed changes to his testimony as to five areas of inquiry at his deposition.

When asked during the deposition about software that p202 uses for purposes of time entry and time management, Mr. Garcia testified that p202 used OpenAir until the end of 2013 and then it used Harvest. *See* Dkt. No. 57-3 at 18 [Garcia Depo. at 66:5-21]. His errata sheet seeks to replace those responses with "projekt202 used QuickBooks through the end of 2011, then used Harvest from the beginning of 2012 through the end of September 2012 through the present." Mr. Garcia explained that, "[d]uring my deposition, I forgot we had previously used QuickBooks for this purpose. I make this change to correct that testimony." Dkt. No. 60-1 at 1.

When asked during the deposition about the steps that p202 took to preserve and produce documents in accordance with Instruction No. 3 in JDA's subpoena, including the requirement that all documents be produced with metadata, *see* Dkt. No.

1-2 at 9-10, Mr. Garcia testified that p202's attorneys did not give p202 directions about the specific manner in which documents must be produced, that p202 did not follow the directives in Instruction No. 3, *see* Dkt. No. 57-3 at 47 [Garcia Depo. at 183:19-194:20], and that p202's counsel did not instruct p202 about the importance of preserving the integrity of the metadata for the documents to be produced in response to the subpoena, *see id.* at 48-49 [Garcia Depo. at 188:6-189:3]. In his errata sheet, Mr. Garcia seeks to replace those responses with an explanation that "projekt202 was instructed by its counsel about the importance of preserving the metadata of the documents requested from us. During my deposition, I neglected to mention conversations projekt202's counsel Kevin Duddlesten and Joe Miquez had with Stephen Andrews after p202 received JDA's subpoena, and subsequent conversations with me around the time Judge Horan issued his discovery order and afterward about the need to ensure that we produced all relevant metadata for all documents we produced. That includes discussion we had about the ShareFile and SharePoint documents we sent to our attorneys, which we understand have all been turned over to JDA's attorneys." Dkt. No. 60-1 at 1. Mr. Garcia explained that "I make this change to correct that testimony." *Id.*

During the deposition, Mr. Garcia testified about Kent Livingston and John Nichols, who he described as "tech support for our company" "based in Austin" who did his "heavy lifting." Dkt. No. 57-3 at 49 [Garcia Depo. at 189:15-190:3]. In his errata sheet, Mr. Garcia seeks to supplement those responses with an explanation that "Kent Livingston and John Nichols are not employees of projekt202, and weren't employees

of projekt202 during the time we were working on the Andra project. Kent and John are contractors based in Austin, Texas who provide part-time tech support help to projekt202 through their company, Strategic Help." Dkt. No. 60-1 at 1. Mr. Garcia stated that this correction also applies to his other references to Kent Livingston and John Nichols. *See id.*; Dkt. No. 57-3 at 41 [Garcia Depo. at 160:11-18], 51 [Garcia Depo. at 197:5-21] (describing Kent Livingston and John Nichols as p202's IT department), 53 (Garcia Depo. at 206:5-12). Mr. Garcia explained that "I realized upon reviewing my deposition that I'd failed to specify that Kent and John are not employees of projekt202, so I am making this clarification." Dkt. No. 60-1 at 1.

When asked during the deposition about the timing of p202's production of emails to JDA, Mr. Garcia testified that it came to him as a surprise that JDA did not receive emails from p202 until June 11, 2015 because p202 had provided those documents to its counsel in January 2015. *See* Dkt. No. 57-3 at 52 [Garcia Depo. at 202:6-204:3]. In his errata sheet, Mr. Garcia states that, "[d]uring my deposition, I mistakenly testified that I had gathered Outlook information and produced it to my attorneys in January 2015, at the same time as I produced the Andra file and documents I discussed in my testimony. This was a mistake, because I did not gather and produce Outlook information (other than any Outlook documents that were a part of the Andra files from ShareFile and SharePoint) until after we learned of Judge Horan's order and received instruction from our attorney on what to produce. At that time, I did gather and produce all responsive Outlook information during the same time frame as I was in the process of re-pulling and sending to our attorneys the

SharePoint/ShareFile documents. I make this change to correct that testimony." Dkt. No. 60-1 at 1-2.

When asked during the deposition about the search terms that p202 used to find responsive documents in the ShareFile account, the only word that Mr. Garcia identified was the word "Andra." Dkt. No. 57-3 at 62 [Garcia Depo. at 243:11-20]. In his errata sheet, Mr. Garcia states that, "[t]o clarify, we did not run any search terms on the Andra documents in the ShareFile account. Instead, we produced every piece of documents and data in the Andra files in that account, and did not use any search terms to filter them. We did use the search term in our Outlook search, as I testified about elsewhere in my deposition. Looking back through my deposition, I realized that this fact did not come across clearly, so I am making this clarification." Dkt. No. 60-1 at 2.

Federal Rule of Civil Procedure 30(e)(1) allows a deponent to review the transcript of his deposition within 30 days of being notified by the officer that is available and to make changes in "form or substance" to the deposition by submitting a signed statement listing the changes and the reasons for making them. FED. R. CIV. P. 30(e)(1). JDA does not dispute that the proposed changes were submitted timely.

Courts take three different approaches when a party challenges proposed substantive changes to deposition testimony pursuant to Rule 30(e). *See Mata v. Caring For You Home Health, Inc.*, 94 F. Supp. 3d 867, 871 (S.D. Tex. 2015) (citing *Devon Energy Corp. v. Westacott*, Civ. A. No. H-09-1689, 2011 WL 1157334, at *4 (S.D. Tex. Mar. 24, 2011) (collecting cases)). "The traditional view is that Rule 30(e) permits

a deponent to change deposition testimony by timely corrections, even if they contradict the original answers, giving reasons." *Devon*, 2011 WL 1157334, at *4. This "least restrictive approach allows substantive changes, but the prior testimony remains a part of the record and can be used for impeachment." *Mata,* 94 F. Supp. 3d at 871 (citing *Eicken v. USAA Fed. Savings Bank*, 498 F. Supp. 2d 954, 961-62 (S.D. Tex. 2007)); *see also Devon*, 2011 WL 1157334, at *5 ("Under this approach, the fact and extent of the change are treated as subjects for impeachment that may affect a witness's credibility. The changed version does not replace the original testimony, which remains part of the record on which the witness may be examined and impeached." (citation omitted)).

Conversely, "[t]he most restrictive approach allows deponents to correct only typographic and transcription errors." *Mata,* 94 F. Supp. 3d at 871-72 (citing *Trout v. FirstEnergy Generation Corp.*, 339 F. App'x 560, 566 (6th Cir. 2009)).

Other courts apply an analysis similar to the "sham affidavit" rule applicable to an affidavit that contradicts the affiant's prior deposition testimony. *See id.* at 872 (citing *Hambleton Bros. Lumber Co. v. Balkin Entrs.*, 397 F.3d 1217, 1225 (9th Cir. 2005)); *Devon*, 2011 WL 1157334, at *5. Under "a more flexible, case-specific approach to the sham-affidavit analysis," courts allow "'contrary errata if sufficiently persuasive reasons are given, if the proposed amendments truly reflect the deponent's original testimony, or if other circumstances satisfy the court that amendment should be permitted.'" *Devon*, 2011 WL 1157334, at *6 (quoting *EBC, Inc. v. Clark Building Sys., Inc.*, 618 F.3d 253, 270 (3rd Cir. 2010)).

The United States Court of Appeals for the Fifth Circuit has not announced its position with respect to the three approaches. *See Mata*, 94 F. Supp. 3d at 872; *Reilly v. TXU Corp.*, 230 F.R.D. 486, 487 (N.D. Tex. 2005); *accord Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 480 (5th Cir. 2012) ("Counsel argues on appeal that Relator was entitled to submit an errata sheet and make substantive changes to her deposition under Federal Rule of Civil Procedure 30(e). We do not necessarily disagree, but the only question for our purposes is whether the district court abused its discretion in concluding that Relator's counsel unreasonably and vexatiously multiplied proceedings.").

The Court should apply the broad, least restrictive interpretation of Rule 30(e) because it is consistent with Rule 30(e)'s plain language, which expressly contemplates "changes in form or substance" accompanied by a signed statement reciting the reasons for the changes. FED. R. CIV. P. 30(e). As written, Rule 30(e) makes provision for changes in substance that are made for legitimate reasons, such as to correct a misstatement or honest mistake. *See Devon*, 2011 WL 1157334, at *6. While the undersigned wholly agrees that a deposition should not be "a take home examination," *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992), the broad approach allows for legitimate corrective changes while implementing adequate safeguards to prevent abuse, including maintaining a record of the changes and the stated reasons for them, *see Devon*, 2011 WL 1157334, at *6; *Reilly*, 230 F.R.D. at 490.

The undersigned also notes that most of the cases following the sham affidavit approach were decided in the context of a court's determination of a summary

judgment motion. *See Reilly*, 230 F.R.D. at 490. Here, allowing Mr. Garcia's testimony, including his errata changes, does not implicate a grant or denial of summary judgment.

The changes proposed in the errata sheet, and specifically the changes concerning preservation of metadata and the timing of when p202 provided responsive documents to its counsel, unquestionably alter Mr. Garcia's deposition testimony in substantive and even contradictory respects. But, because the Court should apply the broad interpretation of Rule 30(e), the Court should decline to strike the changes.

Instead, the Court should consider both the deposition testimony and the changes in the errata sheet in determining whether p202 violated the Court's Discovery Order and should held in civil contempt and be subject to appropriate judicial sanctions.

II. Motion for Contempt and Sanctions

A. Duty of non-party to preserve evidence.

Although p202 is not a party to the underlying Arizona litigation, p202 was integrally involved in the software implementation project underlying that lawsuit and documents relevant to that lawsuit are available only from p202. *See* Dkt. No. 21 at 16-18. The evidence shows that p202 did not preserve certain evidence, and, as a result, relevant documents, including but not limited to telephone recordings, metadata, and documents generated by former p202 employees who worked on the Andra project, may have been irretrievably lost.

"Spoliation of evidence 'is the destruction or the significant and meaningful

alteration of evidence.'" *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) (quoting *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 612 (S.D. Tex. 2010)). Spoliation claims can take two forms: first-party spoliation occurs when a defendant in a lawsuit destroys evidence of value to the plaintiff, and third-party spoliation occurs when a third party destroys evidence that could have been used by a plaintiff against a different defendant in a separate suit. *See Benson v. Penske Truck Leasing Corp.*, No. 03-2088 MA/V, 2006 WL 840419, at *3 (W.D. Tenn. Mar. 30, 2006). "A party's duty to preserve evidence comes into being when the party has notice that the evidence is relevant to the litigation or should have known that the evidence may be relevant." *Guzman*, 804 F.3d at 713.

There is no general duty in the common law for an independent non-party to preserve evidence. *See Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849 (D.C. 1998). "'Absent some special relationship or duty rising by reason of an agreement, contract, statute, or other special circumstance, the general rule is that there is no duty to preserve possible evidence for another party to aid that other party in some future legal action against a third party.'" *Id.* (quoting *Koplin v. Rosel Well Perforators*, 734 P.2d 1177, 1179 (Kan. 1987)); *see also 5636 Alpha Road v. NCNB Tex. Nat'l Bank*, 879 F. Supp. 655, 665 (N.D. Tex. 1995) (observing that Texas does not recognize a claim for negligent spoliation), *Trevino v. Ortega,* 969 S.W.2d 950, 953 (Tex. 1998) (refusing to recognize intentional or negligent spoliation as an independent tort).

Although there is evidence of the close working relationship between p202 and Andra, JDA has not come forward with evidence of any special relationship or

circumstance that would impose a duty on p202 to preserve evidence before it was served with JDA's subpoena and even though it was aware of potential litigation by Andra against JDA and, later, of the Arizona litigation between Andra and JDA.

Accordingly, the undersigned concludes that p202 did not have a duty to preserve evidence for a potential lawsuit between Andra and JDA, and because p202 had no duty to preserve evidence, p202 is not subject to contempt or sanctions for any spoliation of evidence that occurred before p202 was served with the subpoena.

The undersigned notes that Federal Rule of Civil Procedure 37 was amended, effective December 1, 2015, to provide sanctions against a party for the failure to preserve electronically stored information. *See* FED. R. CIV. P. 37(e). Even if p202 had a duty to preserve evidence, Rule 37(e) would not apply because p202 is not a party. *See id.* ("If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.").

B. Certified factual findings

It is undisputed that the first two elements necessary for a civil contempt finding have been established. A court order – the April 13, 2015 Memorandum Opinion and Order on Motion to Quash Subpoena to Produce Documents and Cross-Motion to Compel [Dkt. No. 21] as supplemented by the April 17, 2015 Electronic Order [Dkt. No. 24] (collectively, the "Discovery Order") – is in effect, and the Discovery Order requires certain conduct by p202 – specifically searching for and producing documents, including ESI, and reproducing certain ESI. Neither party argues that the Discovery Order was unclear or that p202 did not understand its obligations under the Discovery Order. Indeed, both p202 and JDA expressly waived any rights to object to or otherwise challenge or appeal the Discovery Order. *See* Dkt. No. 23 at 2.

The remaining issue is whether JDA has established that p202 failed to comply with the Discovery Order. Having considered all of the submissions and evidence before the Court, the undersigned, pursuant to 28 U.S.C. §§ 636(b) and 636(e)(6), now certifies the following facts that, in the undersigned's opinion, show that the following complained-of conduct by p202 constitutes a civil contempt of the Discovery Order.

In this context, JDA makes much of the timing of p202's supplemental document productions, but p202's failure to meet the June 12, 2015 deadline is not, in the undersigned's view, the critical issue at this point. Although p202's failing to complete its compliance with the subpoena by the deadline may bear on the existence and extent of losses that JDA allegedly suffered from p202's noncompliance, as a practical matter, no order finding p202 in civil contempt and imposing appropriate judicial sanctions can

coerce p202 to comply by a date that has long since passed.

Rather, from the undersigned's perspective, the critical issue at this point is whether p202 has complied with the Discovery Order's search, production, and reproduction requirements, including p202's obligation to search for and produce documents and ESI that p202 had an obligation to preserve after it was served with JDA's subpoena.

The Court ordered "p202, at its own expense, to produce the ESI that p202 has previously produced in a form and manner that complies with the subpoena's instructions for producing ESI." Dkt. No. 21 at 31-32. Mr. Garcia testified that p202 never made an attempt to comply with Instruction No. 3 of the subpoena concerning the manner in which ESI was to be produced because "[w]e were trying to save money for this very costly process and we decided to do it ourselves." Dkt. No. 57-3 at 47 [Garcia Depo. at 183:19-184:14]. Yet the Court, in its Discovery Order, rejected p202's arguments that it would be unduly burdensome and expensive to search for ESI, either with in-house personnel or by hiring an outside IT specialist, and ordered p202 to produce ESI in compliance with the subpoena's instructions. *See* Dkt. No. 21 at 26-27, 31-32. The Court's order also required p202 to produce the metadata in those documents, in accordance with the subpoena's instructions, where, in p202's original production, the metadata appeared to be corrupted. *See id.* at 31-32. After the Court's Discovery Order, p202 simply offers a guess as to how the metadata was corrupted (by moving documents from one location to another), and JDA offers a competing surmise (by conversion of documents to PDF format after they were provided in their native

format to p202's attorneys). But p202 made no attempt to determine how or when the metadata was actually corrupted. More importantly, and regardless of the cause of the corruption, p202 made no attempt, either by using in-house personnel or an outside vendor, to determine if the metadata still exists and could be produced, despite the Court's order to reproduce the ESI that p202 had previously produced in a form and manner that complies with the subpoena's instructions for producing ESI.

Further, the Court's Discovery Order required p202 to search for and produce documents, including ESI, that are not privileged and that are responsive to the subpoena's modified requests, excluding communications between p202, on the one hand, and Andra or JDA, on the other, as well as any documents prepared or generated by Andra. *See id.* at 27-30. That clearly required p202 to search for and produce all responsive documents in p202's possession, custody, or control, in the ordered format, wherever they were located. But the evidence shows that p202 acted as if its duty to produce documents was limited to those located in its ShareFile. The Court's order was not so limited.

The evidence further shows that p202 also failed to make all reasonable efforts to search for potentially responsive documents as the Court's Discovery Order required. *See id.* Mr. Garcia acknowledges that accounting data has not been produced to JDA. And, to determine if current employees had responsive emails, Mr. Garcia simply asked most of them whether they did or not – and, even then, he did not ask at least one employee based on, apparently, a difficult personality. Complying with the Discovery Order required more of p202 than simply asking current employees if they

have responsive documents, yet p202 made no effort to search its computers for additional documents that had not already been produced and made no attempt to itself determine if former employees had responsive emails on their personal devices. Likewise, p202 made no attempt to determine if computers used by employees who worked on the Andra project had been wiped before they were reassigned or if any responsive documents existed on those computers. Rather, the evidence shows that p202 simply assumed that any Andra-related documents that had not been moved to Dropbox and then to ShareFile no longer existed and made no attempt to search or forensically image any computers or other devices within its possession, custody, or control in response to the Discovery Order. p202 also failed to determine if documents deleted from Mr. Garcia's Dropbox account, such as the telephone recordings, still existed and could be retrieved and produced.

And the evidence shows that, after the Court entered its Discovery Order, p202 further failed to take reasonable steps to determine whether it had responsive documents that had not been produced despite evidence that JDA had located responsive documents on a website by following a link in documents from p202's original production that have never been produced by p202. *See* Dkt. Nos. 27 at 17, 27-2 at 78-100, 57-3 at 52-54 [Garcia Depo. at 204:11-211:12].

For all of these reasons, the undersigned finds, based on these certified facts, including as more fully described above, that JDA has established by clear and convincing evidence that p202 failed to comply with the Court's Discovery Order and that more can and should be done to comply with that order. Accordingly, pursuant to

Section 636(e), the undersigned recommends that p202 should be cited to appear before Judge Kinkeade and show cause why it should not be held in civil contempt under Rule 45(g) for violating the Discovery Order modifying the subpoena served on p202 and requiring p202 to comply with the subpoena as modified and be subject to appropriate judicial sanctions to coerce compliance with the Discovery Order and/or compensate JDA for any losses sustained as a result of p202's noncompliance.

C. Admonishments

The undersigned concludes with two admonishments to counsel for both parties.

First, both JDA and p202 devote extensive argument to complaints about the other's alleged lack of civility and candor. The undersigned once again reminds counsel of the mandates of *Dondi Properties Corp. v. Commerce Savings & Loan Association*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc), and that "[m]alfeasant counsel can expect ... that their conduct will prompt an appropriate response from the court, including the range of sanctions the Fifth Circuit suggests in the Rule 11 context: a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances." *Id.* at 288 (internal quotation marks omitted). But the *Dondi* Court also admonished counsel that characterizing an opposing party's conduct as acting in bad faith "should be sparingly employed by counsel and should be reserved for only those instances in which there is a sound basis in fact demonstrating a party's deliberate and intentional disregard of an order of the court or of obligations imposed under applicable Federal Rules." *Id.* at 289. After considering counsel's competing accusations, the undersigned

does not recommend sanctions against either based on the alleged violations of *Dondi*'s requirements but warns all counsel against failing to comply with the letter and spirit of *Dondi* in the future.

Second, p202 contends that JDA's Contempt Motion failed to comply with the Court's certificate of conference requirements. Northern District of Texas Local Civil Rule 7.1 provides that, before filing a motion for sanctions, the movant's attorney must confer with the non-movant's attorney to determine whether the motion is opposed, and the motion for sanctions must include a certificate of conference. *See* N.D. TEX. L. CIV. R. 7.1(a), (h). The Contempt Motion included a certificate of conference, which states that "counsel for [p202] was advised that this motion would be filed, and opposed the motion," Dkt. No. 27 at 6, but not that the parties conferred. Simply informing opposing counsel that a motion will be filed does not comply with the Local Civil Rule 7.1's requirements. But a failure to satisfy conference requirements does not necessarily mandate summarily denying the motion because the Court retains discretion to "waive strict compliance with the conference requirements" and to consider a motion on its merits. *Pulsecard, Inc. v. Discover Card Svcs., Inc.*, 168 F.R.D. 295, 302 (D. Kan. 1996). The Court may deem a failure to confer excusable when the conference would merely be "a waste of time," *Vinewood Capital, L.L.C. v. Al Islami*, No. 406-CV-316-Y, 2006 WL 3151535, at *2 (N.D. Tex. Nov. 2, 2006), or when "it is clear that the motion is opposed and that a conference would neither have eliminated nor narrowed the parties' dispute," *Obregon v. Melton*, No. 3:02-cv-1009-D, 2002 WL 1792086, at *1 n.3 (N.D. Tex. Aug. 2, 2002). In this case, the undersigned warns JDA

that any future failure to fully comply with the Court's conference requirements may subject it to sanctions or summary denial of a motion as to which the requirements are not observed in advance of filing.

Recommendation

Movant projekt202, LLC should be cited to appear before United States District Judge Ed Kinkeade on a date that the Court will set and show cause why it should not be held in civil contempt for violating the Court's April 13, 2015 Memorandum Opinion and Order on Motion to Quash Subpoena to Produce Documents and Cross-Motion to Compel [Dkt. No. 21] as supplemented by the April 17, 2015 Electronic Order [Dkt. No. 24] and be subject to appropriate judicial sanctions to coerce compliance with the Court's orders and/or compensate Defendant JDA Software Group, Inc. for any losses sustained as a result of projekt202, LLC's noncompliance. Other than to the extent that the Court finds projekt202, LLC in civil contempt and imposes appropriate judicial sanctions, Defendant JDA Software Group, Inc.'s Motion for Contempt and Sanctions [Dkt. No. 27] should, for the reasons explained above, be denied, including insofar as it also seeks sanctions for alleged spoliation that occurred before projekt202, LLC was served with the subpoena at issue or seeks sanctions for projekt202, LLC's alleged noncompliance with the Federal Rule of Civil Procedure 30(b)(6) deposition notice.

A copy of these findings, conclusions, and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions, and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: December 9, 2015

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE