



**FEDERAL COURT ORDERS CORPORATION TO PAY FOR  
PLAINTIFF'S FORENSIC SEARCH OF CEO'S LAPTOP AND PROVIDES  
REMINDER OF THE NEED FOR CAREFUL MANAGEMENT OF  
ELECTRONICALLY STORED INFORMATION**

A recent opinion from the U.S. District Court for the Southern District of New York highlights the paramount importance of corporate counsel's taking a proactive and hands-on approach to managing electronic discovery at the earliest suggestion of a litigated dispute. In *Treppel v. Biovail Corporation*,<sup>1</sup> the court authorized the plaintiff to conduct, at the defendants' expense, a "thorough forensic examination" of a laptop computer used by Biovail's Chairman and CEO based on what the court found to be "clearly deficient" efforts on the company's part to preserve electronically stored information ("ESI").

The lawsuit arose from plaintiff Treppel's claims that Biovail and Eugene Melnyk, Chairman/CEO, had destroyed his reputation and career as a securities analyst by making a number of defamatory statements concerning Treppel's professionalism and ethics. Soon after learning of Treppel's lawsuit in May 2003, Kenneth Cancellara, Biovail's General Counsel, "orally instructed" both Melnyk and Kenneth Howling, Vice President of Finance, "to preserve relevant information." Cancellara *did not*, however, issue any written instructions to this effect, nor did he follow up with Melnyk or Howling and provide guidance regarding their preservation efforts or confirm their compliance with his oral instructions. For their own part, Melnyk's and Howling's recollections of Cancellara's oral instructions ultimately proved hazy. Melnyk disclosed at his deposition that he had no memory of the instructions at all. Howling stated that, although he recalled receiving such an oral instruction from Cancellara, he did not recall when he received it. Finally, no preservation instructions were given to Biovail's Information Technology Department until some time in December 2003, nearly seven months after the defendants had learned of the lawsuit.

<sup>1</sup> 2008 WL 866594, No. 03 Civ. 3002 (S.D.N.Y. April , 2008)

In addressing Treppel's motion to compel additional discovery and for an order granting discovery-based sanctions, the court faulted Biovail on several levels, noting the company's delinquency in implementing a "comprehensive preservation program." Among the court's foremost concerns was the failure to create timely back-ups of Biovail's servers following notice of the litigation. The court also noted the company's inability to demonstrate exactly when Melnyk and Howling began preserving electronic evidence and what specific steps they took in so doing. Importantly, the court noted Cancellara's failure as General Counsel to follow up on his oral preservation instructions to Melnyk and Howling.

Of particular interest was the court's reasoning and ruling that, owing to the "unique procedure by which Melnyk's e-mail was downloaded to his personal laptop and then deleted from Biovail's servers," the resulting absence of such e-mails from Biovail's backup tapes, and the uncertainty as to when Melnyk first began taking steps to preserve relevant information, there was a distinct possibility that relevant e-mails had been deleted after the defendants had become aware of the lawsuit. In view of what the court found to be a negligent failure to discharge their duty to preserve relevant ESI, the court penalized the defendants by directing them to pay for the plaintiff's forensic examination of Melnyk's laptop, by which the plaintiff was principally seeking to recover any relevant e-mails that were deleted by Melnyk.

The sanctions awarded against the corporate defendants in *Treppel v. Biovail* provide a forceful reminder that, once a company becomes aware of a litigated matter, it must promptly circulate written instructions to its key employees advising them to preserve all ESI (as well as other documents and information) that may be relevant to the disputed matter. Additionally, in searching for relevant ESI, companies must take particular care to account for any information that might be stored on non-networked computers and devices, including laptops, portable electronic devices (such as Blackberries), and cell phones. If the defendants in *Treppel v. Biovail* had been able to demonstrate to the court that the company had timely issued written preservation instructions to its appropriate employees and that such instructions had been faithfully followed, they well could have avoided the costs – as well as the potential prejudice and embarrassment – associated with an order directing that they pay for a forensic search of a laptop used exclusively by the company's CEO.



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### **ADMISSIONS INFORMATION**

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The ultimate lesson, then, is perhaps a familiar one: The inconvenience and costs associated with finding and preserving ESI in the first instance frequently pale in comparison to the burdens and prejudice associated with the penalties that can be imposed for the failure to do so.

If you have any questions regarding the case detailed above or regarding electronic discovery issues that may affect your company, please contact Mitchell J. Banas at 716.843.3803 or [mbanas@jaeckle.com](mailto:mbanas@jaeckle.com) or Dennis K. Schaeffer at 716.843.3872 or [dschaeffer@jaeckle.com](mailto:dschaeffer@jaeckle.com).