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ON INFORMATION MATTERS

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Company Sanctioned for Hands-Off Approach With eDiscovery Vendor

Litigants continue to be plagued by the duty to produce relevant information under their "control" pursuant to Federal Rule of Civil Procedure 34. In *Peerless Industries, Inc. v. Crimson AV, LLC,*[i] a recent case out of the United States District Court for the Northern District of Illinois, the court sanctioned Defendant Crimson AV, LLC ("Crimson") for its failure to produce documents within its control. In this patent infringement case, Crimson was sanctioned for its repeated failure to produce relevant documents in the possession of a sister corporation, Sycamore Manufacturing Co., Ltd. ("Sycamore").[ii]

Peerless initially filed a "Request to Deem Sycamore Documents Within the Control of Crimson," in September 2012.[iii] The court found that because Crimson shared an executive with Sycamore who "exercised a considerable amount of financial and managerial control over both corporations,"[iv] Crimson was in control of information in Sycamore's possession.[v] In response, the court ordered Crimson to produce relevant documents possessed by Sycamore.[vi] Nonetheless, at the time of Crimson's 30(b)(6), plaintiffs discovered that the designated deponent was unable "to answer questions about Sycamore's computer and backup systems, what searches were performed, which employees would have relevant information, whether a document hold had been implemented, or whether employees at Sycamore were even contacted regarding plaintiff's document requests."[vii]

As it turned out, Crimson admitted it had delegated nearly all the collection oversight regarding Sycamore to its vendor. The *Peerless* Court emphasized that in so doing, Crimson failed to meet its obligations because it "took a back seat approach."[viii] Based on the testimony of a Crimson executive who said that he "guessed" the vendor provided the instruction to Sycamore on how to collect documents, the *Peerless* Court granted economic sanctions in favor of the plaintiff and ordered Crimson to "show that they in fact searched for the requested documents and, if those documents no longer exist or cannot be located, they must specifically verify what it is they cannot produce."[ix]

Pursuant to Federal Rule of Civil Procedure 34, "a responding party has a duty to provide all documents within its possession, custody, or control." This requirement is disjunctive, and the standard of production for documents within a party's control is not qualified in any way. The sanctions order in *Peerless* emphasizes the fact that a litigant cannot turn a blind eye or disregard information that is outside its possession but within its control. While the *Peerless* Court did not acknowledge any nuance in the preservation and collection activities that may exist when documents are not in a litigant's possession, some differences in procedures will invariably arise. Once litigation is reasonably anticipated, best practices mandate a party assess its relationship with any related organizations in order to preserve and potentially collect relevant information within its control.

Contact Us: For further information or if you have any questions regarding this Alert, please contact your Redgrave LLP attorney or Managing Partner Victoria Redgrave at (202) 681-2599 or vredgrave@redgravellp.com.

[i] No. 1:11-cv-1768, 2013 WL 85378 (N.D. Ill. Jan. 8, 2013).
[ii] *Id.* at *4.
[iii] Minute Order, No. 1:11-cv-1768, dkt. 82 (N.D. Ill. Oct. 29, 2012).
[iv] *Id.*
[v] *See* Minute Order, finding that "a non-party affiliate need not have actual managerial power over the corporate party, however, courts will consider the ability of control exercised by the non-party affiliate over the corporate party's directors, officers and employees" (internal citation omitted).
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[vi] *Peerless,* 2013 WL 85378 at *3.
[vii] *Id.*
[viii] *Id.*
[ix] *Id.* at *4.