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THE MISSING LINKS: WHY HYPERLINKS MUST BE TREATED AS ATTACHMENTS IN ELECTRONIC DISCOVERY

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INTRODUCTION

New technology can be exciting for some but scary for others. What is one person's thrilling new toy may be another person's worst nightmare. Take social media, for example. When Mark Zuckerberg launched "The Facebook" website in 2004,[1] students at Harvard University and eventually colleges across the nation (and ultimately the world), heralded the new "social networking" platform as an innovative, revolutionary way to connect with current friends and make new ones. No one foresaw any harm with social media, and social media ultimately became the world's new and most attended public square.[2]

Fast-forward nearly twenty years, and Facebook (now Meta Platforms), TikTok, Snapchat, and other social media giants are accused in numerous private and government-enforcement civil lawsuits of destroying the lives of America's youth to an epidemic level, as soaring rates of mental health disorders, including depression, self-harm, and suicidal ideation are directly attributable to social media.[3] Technology was fun for a while, until it became what many consider a plague on society.

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1. *This Day in History: Facebook Launches*, HIST. (Feb. 2, 2024), https://www.history.com/this-day-in-history/facebook-launches-mark-zuckerberg.

2. Packingham v. North Carolina, 582 U.S. 98, 107 (2017) (explaining that, social media websites like Facebook and Twitter are, for many, "the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge").

3. *See, e.g.*, Plaintiffs' Master Complaint (Personal Injury), *In re* Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig., No. 4:22-md-03047-YGR (N.D. Cal. Mar. 10, 2023) ECF No. 180-1.

I. A BRIEF HISTORY OF ELECTRONICALLY STORED INFORMATION IN CIVIL LITIGATION DISCOVERY

The history of electronically stored information ("ESI") in civil litigation in America took a different path regarding technology. When letters became emails, typewriters became word-processing software, and chalkboards became Microsoft PowerPoint presentations, many stakeholders in the American justice system were not excited about the new technologies. Instead, they were anxious about how the discovery process would undergo a sea change and about the myriad "unknowns" attendant to collecting and producing vast troves of ESI from complex computer systems.[4] No longer could an attorney say to their client, "just point me to the banker's boxes in your office containing the relevant correspondence and documents, and I will take care of photocopying it all and producing it to the other side." Understanding a client's entire organization, from computer networks and cloud-storage usage to smart phones and USB flash drives, became both necessary and, in most cases, mandatory.[5] Indeed, a party's failure to manage ESI can result in court-

4. *See* Lee H. Rosenthal, *Metadata and Issues Relating to the Form of Production*, 116 YALE L.J. Pocket Part 167 (2006) ("[E]lectronic discovery, with the complexities it can entail, demonstrates the need for lawyers to attend to production issues at a level of detail that was simply not required with paper. When the lawyers are unable to agree, conscientious judges must exercise management and supervision that is also more detailed and often more difficult than was true for conventional discovery."); Shannon M. Curreri, II, *Defining "Document" in the Digital Landscape of Electronic Discovery*, 38 LOY. L.A. L. REV. 1541, 1541 (2005) ("In this era of modern technology, information is increasingly created in, conveyed in, stored in, and exchanged through digital or electronic media. As a result, there has been a drastic growth in the amount of information to review and produce during the discovery phase of civil litigation. In addition to challenges raised by volume, varying levels of sophistication with respect to technological expertise, system configurations, and data management add to the complexity of exchanging information in a coherent and comprehensive manner between adverse parties. Central to addressing the unique obstacles posed by electronic discovery is the need to define what constitutes discoverable electronically stored information. What that definition will encompass and in what form such information will be produced carries significant implications for the scope and cost of discovery, authentication, and overall litigation strategy."); *see also* Burke T. Ward et al., *Electronic Discovery: Rules for a Digital Age*, 18 B.U. J. SCI. & TECH. L. 150, 154 (2012) ("Prior to the digital age, non-testimonial evidence primarily consisted of paper documents, photographs and other physical evidence. With the growth of the digital age, the format of discovery has changed significantly to include electronically stored information."); Adjoa Linzy, *The Attorney-Client Privilege and Discovery of Electronically-Stored Information*, 2011 DUKE L. & TECH. REV. 1, 1 ("The rapid computerization of the 1990s has altered the litigation landscape. Most businesses have moved away from storing documents in file cabinets and warehouses as documents are increasingly stored electronically."); Mia Mazza et. al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, ¶ 3 (2007) ("The explosive growth of ESI has changed the very nature of discovery, with new electronic complexities making the preservation and production of evidence far more challenging.").

5. *See* FED. R. CIV. P. 37(e) advisory committee's notes ("It is important that counsel become familiar with their clients' information systems and digital data—including social media—to address [preservation] issue[s]."); W.D. Pa. LCvR. 26.2.A.1 (stating that prior to conference under FED. R. CIV. P. 26(f), counsel "shall . . . [i]nvestigate the client's [ESI] . . . in order to understand how such ESI is

imposed sanctions if the party has, even unwittingly, spoliated evidence.[6]

Courts around the country, often with input from legal practitioners and experts in computer systems, gradually gained an understanding of the issues surrounding electronic discovery and created best-practices guides, strategies, and model ESI protocols to assist attorneys and their clients in navigating these new issues.[7] The Sedona Conference®[8] was founded in 1998[9] and its first Working Group ("WG1") "met on October 17-18, 2002, and was dedicated to the development of guidelines for electronic document retention and production."[10] In 2006, the United States Supreme Court approved amendments to Rules 26[11] and 34[12] of the

stored [, and] how it has been or can be preserved, accessed, retrieved, and produced"); *see also* Waskul v. Washtenaw Cnty. Cmty. Mental Health, 569 F. Supp. 3d 626, 635 (E.D. Mich. 2021) ("Attorneys are dutybound to meaningfully interview relevant custodians 'to learn the relevant facts regarding ESI and to identify, preserve, collect, and produce the relevant ESI.'" (quoting DR Distribs., LLC v. 21 Century Smoking, Inc., 513 F. Supp. 3d 839, 927 (N.D. Ill. 2021))); Qualcomm Inc. v. Broadcom Corp., No. 05CV1958-B-BLM, 2010 WL 1336937, at *2-3 (S.D. Cal. Apr. 2, 2010) (explaining that an attorney must learn their client's organizational structure and computer data structure in order to adequately advise the client of the duty and best method for preserving evidence).

6. *See, e.g.*, *In re* Google Play Store Antitrust Litig., 664 F. Supp. 3d 981, 993-94 (N.D. Cal. 2023) (stating that sanctions were warranted where "Google did not take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation."); Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 439 (S.D.N.Y. 2004) (granting motion for sanctions after finding that UBS had failed to take all necessary steps to guarantee that relevant data was both preserved and produced).

7. *See, e.g.*, *E-Discovery (ESI) Guidelines*, U.S. N. DIST. OF CAL., https://cand.uscourts.gov/forms/e-discovery-esi-guidelines/ (last visited Aug. 12, 2023); *Suggested Protocol for Discovery of Electronically Stored Information*, USCOURTS.GOV, https://www.mdd.uscourts.gov/sites/mdd/files/ESIProtocol.pdf (last visited Aug. 12, 2023).

8. The Sedona Conference "is a nonpartisan, nonprofit charitable 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, intellectual property rights, and data security and privacy law." *Frequently Asked Questions*, THE SEDONA CONF., https://thesedona conference.org/frequently_asked_questions (last visited Apr. 23, 2024).

9. Richard G. Braman, *Executive Director's Note*, 1 SEDONA CONF. J. i, i (2000).

10. *The Sedona Conference Working Group Series*, THE SEDONA CONF., https://thesedona conference.org/wgs/ (last visited Apr. 23, 2024).

11. *See* FED. R. CIV. P. 26 advisory committee's note to 2006 amendment (amending, *inter alia*, FED. R. CIV. P. 26(a)(1)(ii) (requiring parties to initially disclose "a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment")); FED. R. CIV. P. 26(b)(2)(B) (limiting discovery of "electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost"); and FED. R. CIV. P. 26(f)(3)(C) (requiring the parties to discuss a proposed discovery plan, including discussing "any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced").

12. *See* FED. R. CIV. P. 34 advisory committee's note to 2006 amendment (amending, *inter alia*, FED. R. CIV. P. 34(a)(1)(A) (stating that parties may request production of "any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form"); FED. R. CIV. P. 34(b)(1)(C) (requests for production of documents "may specify the form

Federal Rules of Civil Procedure to directly address electronic discovery. In updating Rule 34 to include ESI, the amendments clarified that requests for documents should be understood to include ESI and that updated Rule 34 is broad enough to cover "information 'stored in any medium' to encompass future developments in computer technology" and is "broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments."[13] Based on the committee notes, it is likely that the drafters of amended Rule 34 understood that the nature of ESI would evolve with the advent of new technology and intended to create rules that embodied basic guiding principles that would be broad enough to endure such changes.[14] Since the 2006 amendments, attorneys, electronic discovery professionals, and courts have used Rules 26 and 34, well-accepted discovery principles, and common sense to develop a reasoned approach to how discovery rules apply to new technology.

II. THE MODERN USE OF HYPERLINKS IN LIEU OF TRADITIONAL ATTACHMENTS IN ELECTRONIC DOCUMENTS

One particular electronic discovery issue, however, continues to confound courts and lawyers, and, as such, the electronic discovery law has yet to catch up with new technology. The court and lawyers alike grapple with what exactly to do about so-called "hyperlinks," "modern attachments," and "cloud attachments" in electronic documents. Are they emails, chats, word-processing documents, or presentations?

While most people with at least some basic computer knowledge understand that a hyperlink is, at a minimum, "a bit of text, an image, or a button in a . . . document that you can click" with a mouse press to bring up (or launch) other documents, webpages, or other parts of the same

or forms in which electronically stored information is to be produced"); FED. R. CIV. P. 34(b)(2)(E)(i)-(ii) (requiring producing party to "produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request," and "[i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms").

13. *See* FED. R. CIV. P. 34 advisory committee's note to 2006 amendment (amending, *inter alia*, 34(a)(1)(A)).

14. *See id.* (noting that "[i]n 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase[,]" and that "[s]ince then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term 'documents' to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology."). Accordingly, the committee made clear that "Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents." *See id.*

document or webpage,[15] the electronic discovery world has not yet embraced the fact that, with the advent of cloud-based storage (e.g., Dropbox, Google Drive, Microsoft OneDrive, and iCloud), companies use hyperlinks, rather than attach files, in emails and documents with increasing frequency.

A. Courts Have Repeatedly Acknowledged That the Federal Rules of Civil Procedure *Provide Important Guiding Principles for Collecting and Producing All Documents Relevant to a Claim or Defense, Including Attachments to Other Documents*

For many decades, the *Federal Rules of Civil Procedure* have made clear that attachments must be produced in civil discovery along with the "parent" document because that is how the document was "kept in the usual course of business" and "ordinarily maintained[.]"[16] In the 1950s, for example, that would have meant that a document stapled to another document, or a document enclosed in an envelope with a letter, must be produced alongside its parent document. Similarly, in the 1980s, the discovery production would have included a fax coversheet indicating the intended recipient and sender followed by the faxed document.

Since the transformation of electronic discovery in the early 2000s, courts have routinely held that emails, for example, must be produced with their attachments, just like any "stapled" or "enclosed" document.[17]

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15. Brian P., *Hyperlink*, TECHTERMS.COM (May 3, 2023), https://techterms.com/definition/hyperlink.

16. *See* FED. R. CIV. P. 34(b)(2)(E)(i)-(ii) (requiring producing party to "produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request" and, "[i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms . . . ."); *see also* Crawford v. Midway Games Inc., No. CV 07-967 FMC(JCX), 2008 WL 11340327, at *1 (C.D. Cal. June 23, 2008) ("A party who chooses to comply with its obligations under Rule 34 by producing documents as kept in the ordinary course of business, bears the burden of demonstrating that the documents produced were in fact produced in that manner."); DE Techs., Inc. v. Dell Inc., 238 F.R.D. 561, 566 (W.D. Va. 2006), *aff'd in part, modified in part*, No. 7:04CV00628, 2007 WL 128966 (W.D. Va. Jan. 12, 2007) (same).

17. *See, e.g.*, Consol. Rail Corp. v. Grand Trunk W. R.R. Co., No. CIV.A.09-CV-10179, 2009 WL 5151745, at *3 (E.D. Mich. Dec. 18, 2009) (finding that producing party's document production complied with Rule 34's "usual course of business" requirement where, *inter alia*, "[e]mail attachments were produced directly following the corresponding email"); U & I Corp. v. Advanced Med. Design, Inc., 251 F.R.D. 667, 675 n.14 (M.D. Fla. 2008) ("The dubious practice of producing e-mails without attachments in federal discovery has not gone unnoticed by other courts."); PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., No. 1:05-cv-657, 2007 WL 2687670, at *12 (N.D.N.Y. Sept. 7, 2007) ("Without question, attachments should have been produced with their corresponding emails as such are kept in the usual course of business."); CP Solutions PTE, Ltd. v. Gen. Elec. Co., No. 3:04cv2150, 2006 WL 1272615, at *4 (D. Conn. Feb. 6, 2006) ("Defendants chose to provide the documents in the manner in which they were kept in the ordinary course of business. Attachments should have been produced with

This is so, even if the attachments themselves may not be relevant to the case at bar.[18] The reason all attachments should nevertheless be produced alongside relevant emails is not only because the document is physically attached to the email, but also because its incorporation into a relevant communication creates an inference of relevance for the attachments and each attachment provides context to the parent email and vice versa.[19] Simple enough, right?

B. Hyperlinked Documents Are Functionally no Different Than Traditional Attachments, but Their Collection Is More Complicated

But what does the law say about a situation in which, for example, rather than attaching a document to an email, a company's employee provides a hyperlink to another document within the body of the email for the recipient to "click on" to review and perhaps even comment or edit? Here, it gets a little thorny. The thicket does *not* seem to answer the question of how the hyperlinked document or parent email was "kept in the ordinary course of business" or "ordinarily maintained or in a reasonably usable form," as the *Federal Rules of Civil Procedure* require,[20] or even whether the hyperlinked document is relevant to the case or responsive to a party's particular discovery request. Instead, because the technological *ability* to collect and organize hyperlinked documents *with* the parent documents is just catching up with the collaborative use of cloud-based documents, the issue is whether a party that uses hyperlinks instead of or in addition to traditional attachments should be required under the *Federal Rules of Civil Procedure* to collect and produce hyperlinked documents with the parent documents because it differs from how collections and productions have traditionally been implemented.

A hyperlinked document may be physically stored in a different

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their corresponding e-mails.").

18. *See, e.g.*, Symettrica Ent., Ltd. v. UMG Recordings, Inc., No. CV 19-1192-CJC (KS), 2020 WL 13311682, at *5 (C.D. Cal. July 17, 2020) ("[W]ell settled authorities from this Circuit and beyond require that . . . [a party] must also produce any linked attachments, notwithstanding its contentions that those attachments maybe irrelevant.").

19. *See, e.g.*, Families for Freedom v. U.S. Customs & Border Prot., No. 10 CIV. 2705(SAS), 2011 WL 4599592, at *5 (S.D.N.Y. Sept. 30, 2011) ("Context matters. The attachments can only be fully understood and evaluated when read in the context of the emails to which they are attached. That is the way they were sent and the way they were received. It is also the way in which they should be produced.").

20. *See supra* notes 12, 16-17; Judge Rotenberg Educ. Ctr., Inc. v. U.S. Food & Drug Admin., 376 F. Supp. 3d 47, 61-62 (D.D.C. 2019) (reviewing case law finding that even if emails and their attachments are not per se a single record that the email and attachment are part and parcel when the email references or includes discussion of the attachment and that, in the ordinary course, the attachment relates to the body of the email).

location than its parent email, but if one were to produce documents as they are "kept in the usual course of business" or "ordinarily maintained," the receiving party would be able to click on the hyperlink and be taken straight to the referenced document. This may not be something that is practical to replicate in the production set. However, under the procedural rules, the documents are still required to be produced in a "reasonably usable form."[21] This is commonly understood to require that, if "the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature,"[22] and does not allow a responding party to "convert [ESI] from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information in litigation."[23] Applying these principles to hyperlinked documents would mean that the format of production for emails and their hyperlinked documents could take the same form of production as traditional emails and attachments by producing the document directly following the parent email along with a unique identifier showing a family relationship. Or, although more cumbersome but still arguably "reasonably usable," by including a field in the ESI "load file"[24] that contains a unique identifier for the produced hyperlink file but without an actual family relationship. However, not providing the receiving party any way to identify the hyperlinked document in the production, or not requiring the production of the hyperlinked document at all, seems to be inconsistent with Rule 34 of the *Federal Rules of Civil Procedure*.[25]

Few courts have wrestled with this issue and those that have either reached opposite conclusions or left the legal issue of the correlation between the *Federal Rules of Civil Procedure*'s mandates and hyperlinked documents for another day by attempting a compromise. By analyzing the reasoning (but not necessarily the conclusions) in recent case law, as well as the technology available to address perceived problems attendant to producing hyperlinked documents, some fairly straightforward guidelines become clear. These guidelines are, as they

21. FED. R. CIV. P. 34(b)(2)(E)(ii) ("If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.").

22. FED. R. CIV. P. 34(b) advisory committee's note to 2006 amendment.

23. *Id.*

24. A "load file" is "a file that helps load and organize information within electronic discovery software so that the documents may be viewed, searched and filtered." *What is a Load File?*, PERCIPIENT (Sept. 29, 2014), https://percipient.co/load-file/. The load file generally contains, for each document, an image file (usually produced in .tiff format), the document's metadata, and the document's text contents. *Id.* "The load file then ties all the information together within the software by connecting the image files to the right text and metadata files." *Id.*

25. FED. R. CIV. P. 34(b)(2)(E)(i)-(ii).

should be, grounded in the same common sense used for the last two decades in interpreting discovery rules as applied to ESI.

C. Not All Hyperlinks Are Created Equal

In short, not all hyperlinks are created equal. For example, when hyperlinks are used to link to an internal user-created document housed on an enterprise system, such as Microsoft 365 or Google Workspace, hyperlinked documents should be treated, collected, and produced as attachments on a wholesale basis. However, other hyperlinks should be treated as attachments, but proportionality concerns embedded in Rule 26(b)(1),[26] based on *current* technological feasibility, may require a more targeted, ad hoc approach because they are housed on varied third-party sites and are not part of an integrated system that may require more effort to collect and produce together with the parent document (i.e., with the family relationship). Some hyperlinks, such as links to publicly available documents or hyperlinks to non-user created information, such as phone numbers or email addresses, do not need to be produced as attachments because they are not integral to the document or are equally available to the receiving party without production.

D. The Court's Flawed Conclusion About Hyperlinks in Nichols v. Noom, Inc.

The opinion in *Nichols v. Noom, Inc*.[27] broadly pronounced that hyperlink documents were not attachments, and refused to order the defendants to collect and produce hyperlinked documents along with their emails.[28] The court's approach in *Nichols* has been erroneously followed in some cases, ignoring decades of discovery law and throwing out common sense merely because of simple technological evolution. The court's opinion, however, is helpful to understand so that one can correctly recognize when its conclusion should apply.

In *Nichols*, the court acknowledged that "hyperlinked internal documents could be akin to attachments, [but] this is not necessarily so."[29]

26. FED. R. CIV. P. 26(b)(1) ("*Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.").

27. No. 20-CV-3677 (LGS) (KHP), 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021).

28. *Id.* at *5.

29. *Id.* at *4.

The court reasoned that when a person creates a document or email with attachments, that the attachment is a necessary part of the communications, but that when a person creates an email with a hyperlink, the hyperlinked document may not be necessary to the communication.[30] As support for this distinction between attachments and hyperlinks, the court listed various examples of hyperlinks that would not be akin to attachments, such as hyperlinks to cases cited in legal memos, hyperlinks to other portions of the same document, hyperlinks to a phone number, hyperlinks to a tracking site for shipments, hyperlinks to a Facebook page, and hyperlinks to terms of use or legal disclaimers.[31] Although the court was correct that not all hyperlinks are akin to attachments (i.e., not all hyperlinks are created equal), the plaintiffs in this case asked the defendants to use existing forensic collection methods designed to collect the company's Google-based emails and their hyperlinked internal documents stored on the company's Google Workspace, rather than the types of hyperlinks the court imagined.[32] The court's reasoning, therefore, was flawed.

Other rationales the *Nichols* court used to conclude that hyperlinked documents need not be produced are arguments that are equally applicable to routine email attachments—rationales that have been rejected by courts for decades. For instance, the court stated that the collection of hyperlinked documents "would certainly increase the review population."[33] This statement is perplexing since it would be equally true with respect to traditional attachments, which no court would countenance. The court also noted that the hyperlinked documents may be duplicative of the collection of documents pulled from a search of documents stored in Google Drive or pulled from a hyperlink in another email.[34] Taken to its logical conclusion, however, the court would have also determined that a document attached to an email would be duplicative of the document stored on an employee's computer or attached to a later-in-time email because they, too, may also be separately produced—a position rejected by courts time and again.[35] Industry standard deduplication is done on a "family level," meaning that stand-alone documents or documents that are attached to unique emails are not deduplicated even if the attached document is an exact duplicate.[36] The

30. *Id.*

31. *Id.*

32. *See* Declaration of Douglas E. Forrest at 5-6, Nichols v. Noom, Inc., No. 1:20-CV-3677-LGS (S.D.N.Y. Mar. 8, 2021), ECF No. 236.

33. *Nichols*, 2021 WL 948646, at *4.

34. *Id.* at *3.

35. *See supra* notes 17-20.

36. *Using Near-Duplication to Dedupe Document Collections Can Be Dangerous*, SPECIAL COUNSEL (May 19, 2016), https://blog.specialcounsel.com/ediscovery/using-near-duplication-to-dedupe-

Nichols court offered no relevant distinction between hyperlinks and traditional attachments to support its diversion from industry standards. Even if the duplicative nature of the hyperlinked documents was a legitimate concern unique to hyperlinks, the technology had already evolved to accommodate this concern—the collection tool the *Nichols* plaintiffs asked the defendants to use already allowed for duplicate documents to be excluded.[37]

In support of the conclusion that hyperlinked documents should not be treated as attachments, the *Nichols* court also noted that not all of the hyperlinked documents would be material to the case.[38] Discovery law and standard industry practice demand that all attachments be produced if even one of the documents in the document family is relevant.[39] The court already recognized this standard by acknowledging that an attachment is a "necessary part of the communication" and should therefore be produced with the communication.[40] The court, however, offered no relevant distinction, beyond inapplicable examples,[41] to demonstrate why hyperlinked documents would not also be a necessary part of the communication, and therefore material to the communication.

The *Nichols* court's refusal to find the value in a party's ability to show

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document-collections-can-be-dangerous [https://web.archive.org/web/20190407220822/http://blog.specialcounsel.com/ediscovery/using-near-duplication-to-dedupe-document-collections-can-be-dangerous/] ("[I]n eDiscovery, deduplication is performed on a family level rather than a document level. This means that the same Word document attached to two unique emails will not be deduped because they are parts of unique families."); *Production Deduplication*, DISCO, https://support.csdisco.com/hc/en-us/articles/205830890-Production-deduplication (showing that DISCO only offers two types of deduplication—global or custodian level deduplication *by family*); Patrick Oot et al., *Ethics and Ediscovery Review*, 28 ACC DOCKET 46 (Jan./Feb. 2010) ("[L]awyers typically want to make review decisions at the message attachment group level, i.e., looking at emails and their attachments as one logical unit, meaning that the email and attachments will all be treated alike, whether relevant or privileged. For documents that are attached to multiple emails, that may mean that the review platform might contain a copy for *each message attachment group* to which the document belongs . . . ." (emphasis added)).

37. *See Acquiring Google Drive Attachments of Emails*, METASPIKE (June 26, 2023), https://docs.metaspike.com/article/46-acquiring-google-drive-attachments-of-emails. Metaspike's Forensic Email Collector ("FEC") is available with an annual $1,099 license and widely used in the electronic discovery industry to collect documents from Google's cloud-based systems. *Forensic Email Collector*, METASPIKE, https://www.metaspike.com/shop/forensic-email-collector/ (last visited Apr. 23, 2024). This tool allows for the collection of the email and the hyperlinked document (the version of the document that existed closest to the time the email was sent and the current version of the document) and can create a family relationship between the documents, but only during the collection process. *Acquiring Google Drive Attachments of Emails*, *supra*.

38. *Nichols*, 2021 WL 948646, at *1.

39. *See* Symettrica Ent., Ltd., 2020 WL 13311682, at *5 ("[W]ell settled authorities from this Circuit and beyond require that . . . [a party] must also produce any linked attachments, notwithstanding its contentions that those attachments maybe irrelevant.").

40. *Nichols*, 2021 WL 948646, at *4.

41. *Id.* (listing examples such as where a document contains a hyperlink to another portion of the same document, to a phone number, to a shipment tracking number, to a term of use, or to a legal disclaimer).

a link between the parent communication and the hyperlinked document is not explained by the rationale provided and is also inconsistent with basic discovery principles.[42] But the conclusion seems to squarely rest on the level of burden asserted by the producing party. The defendants in *Nichols* had already collected the documents and using the plaintiffs' desired collection method for hyperlinked documents would have required recollection.[43] Courts tend to disfavor repetition.[44] The burdens of collection and review, though overstated, were convincingly articulated to the court. The court even suggests that there is hope on horizon when "future ESI software will be able to provide greater efficiencies and reduced costs to address the concerns of both parties."[45] However, the tool the plaintiffs asked the defendants to use in *Nichols* was far more efficient, if used during the initial collection, than the more manual ad hoc process that the court endorsed. Not to mention, the burden placed on the receiving party to guess which document was connected to which email and which documents may have been entirely missing from production.

Importantly, the *Nichols* court also mentioned that the ESI protocol the parties negotiated, and the court entered, did not specify that hyperlinks would be treated the same as attachments.[46] Since the *Nichols* decision, parties now more frequently address the issue of hyperlinks when negotiating ESI protocols. Courts have often enforced parties' agreed-to protocols that treat hyperlinks as attachments.[47]

Although there may have been reasons for the court to deny the plaintiffs' request for hyperlinked documents in *Nichols*, based upon the case's specific circumstance, the court's broad proclamation that hyperlinked documents are not attachments was unnecessary and overbroad. Electronic discovery professionals and scholars have raised serious concerns about the *Nichols* decision and its potential fallout for good reason.[48] Treating hyperlinked documents as distinct from

42. *See supra* notes 17-20.

43. *Nichols*, 2021 WL 948646, at *2.

44. *See, e.g.*, McSparran v. Pennsylvania, No. 1:13-CV-1932, 2016 WL 687992, at *4 (M.D. Pa. Feb. 18, 2016) (holding "it would be unduly burdensome to require Plaintiff to effectively redo document production in response to Defendants' belated request for metadata"); Romero v. Allstate Ins. Co., 271 F.R.D. 96, 106 (E.D. Pa. 2010) (noting "prevailing case law supports the notion that it is unduly burdensome for a party to effectively 'redo' a production of documents as a result of a belated request for metadata" (citing Ford Motor Co. v. Edgewood Props., Inc., 257 F.R.D. 418, 425-26 (D.N.J. 2009))).

45. *Nichols*, 2021 WL 948646, at *5 n.5.

46. *Id.* at *3.

47. *See, e.g., In re* Stubhub Refund Litig., No. 4:20-md-02951-HSG, 2023 WL 3092972 (N.D. Cal. Apr. 25, 2023).

48. *See* Letter Amicus Brief from Profs. W. Hamilton & A. Pardieck to Hon. Lorna G. Schofield, *Nichols*, 2021 WL 948646, ECF No. 297 [hereinafter Profs. W. Hamilton & A. Pardieck] (expressing disagreement with Magistrate Judge Parker's conclusion that hyperlinks are not attachments); Tom

traditional attachments to emails in all cases plainly ignores the natural relationship between the email and the hyperlinked document where, in the usual course of business, an employee receiving an email with a hyperlink clicks on the link to retrieve the document, just as they would have had to click on the attachment to the email. This relationship cannot and should not be destroyed once the documents are produced in litigation. Doing so would not only contravene the *Federal Rules of Civil Procedure*'s command to produce documents "as they are kept in the usual course of business" and "in a form or forms in which [they are] . . . ordinarily maintained or in a reasonably usable form,"[49] as going from a click of a hyperlink to not being able to identify the hyperlinked document at all would clearly "remove[] or significantly degrade[]"[50] the recipient's ability to search for the hyperlinked document and make it "more difficult or burdensome for the requesting party to use the information efficiently in the litigation."[51] Failure to include documents hyperlinked to an email, just like the failure to include traditional attachments, fails the basic tenets of Rule 34 and is not reasonable.

E. An Ad Hoc Approach to Hyperlinks Ignores How Businesses Today Store Documents and Information and Twenty-first Century Technological Advancements

The ad hoc approach to the production of hyperlinked documents with the parent communication that the court settled on in *Nichols*, one that has been echoed in other cases,[52] ignores the way that businesses have changed how they share information. Today, businesses routinely use cloud-based document storage, including Microsoft OneDrive and Google Drive. These systems do not rely on attachments because the document is available in the cloud with a mouse click. In fact, there are

O'Connor, *Are Hyperlinks the Same as Attachments? Judge Parker Opinion in* Nichols v. Noom, DIGIT. WAR ROOM (May 21, 2021), https://www.digitalwarroom.com/blog/are-hyperlinks-the-same-as-attachments-judge-parker-opinion-nichols-v.-noom ("The problem of linking is not major, does not require an enormous expenditure of time or money and is, in fact, already accomplished by other vendors."); Hanzo, *Case Law Summary: Are Hyperlinked Documents the Same as Attachments?*, JD SUPRA (Apr. 16, 2021), https://www.jdsupra.com/legalnews/case-law-summary-are-hyperlinked-7412961/ ("While this is an evolving area of the law, I anticipate that future courts and future opinions will reach a different conclusion."); Michael Berman, *What Is a "Document?"*, E-DISCOVERY LLC (Aug. 17, 2021), https://www.ediscoveryllc.com/what-is-a-document/ ("Noom's production of documents without links does not appear to conform to Rule 34(b)(2)(E)(ii)'s procedural mandate.").

49. FED. R. CIV. P. 34(b)(2)(E)(i)-(ii).

50. FED. R. CIV. P. 34(b) advisory committee's note to 2006 amendment.

51. *Id.*

52. *See, e.g.*, Porter v. Equinox Holdings, Inc., No. RG19009052, 2022 WL 887242, at *2 (Cal. Super. Ct. Mar. 17, 2022).

times that a user is *required* to use a hyperlink instead of an attachment in order to control the volume of their email (i.e., the attachment's size is too large to send as a traditional email attachment).[53] Unquestionably, this new practice has changed the way the collection and production of ESI must proceed. However, technological advancements cannot and should not be used to circumvent or obstruct discovery. Nor should parties be permitted to simply throw their hands up at the technical impositions of producing discovery from cloud-based systems. As law professors stated in an amicus letter to the *Nichols* court in an effort to provide the court with context to the broader issue regarding hyperlinks, "the separation of email and linked files is not a problem without a solution" and warned that the ruling would delay "technological progress and encourage gamesmanship."[54]

The ability to use forensic software to collect and produce hyperlinked documents, including the version of the document that existed at the time the email was sent, and to create the correct family relationship with the parent email, exists and is continuing to improve. Indeed, some software manufacturers' cloud-based systems, such as Microsoft OneDrive,[55] also use hyperlinks, but have created ways to collect hyperlinked documents, including a recent change to allow the collection of the version of the document that existed at the time the email was sent so long as certain criteria is met.[56]

Other cloud-based systems, such as Google Drive, have been reluctant to evolve. In fact, Google has used its capabilities, or lack thereof, as a reason to resist linking emails with their hyperlinked attachments. Although companies cannot be forced to change their systems, it is hornbook law that parties in civil litigation also "cannot seek to preclude [one party] . . . from pursuing discovery based on a record-keeping system that is plainly inadequate."[57] Nevertheless, for those cloud-based systems

53. *Send Attachments with Your Gmail Message*, GOOGLE, https://support.google.com/mail/answer/6584?hl=en&co=GENIE.Platform%3DDesktop#zippy=%2Cattachment-size-limit (last visited Apr. 23, 2024) ("If your file is greater than 25 MB, Gmail automatically adds a Google Drive link in the email instead of including it as an attachment.").

54. *See* Profs. W. Hamilton & A. Pardieck, *supra* note 48, at 3.

55. *See Collect Cloud Attachments in Microsoft Purview eDiscovery (Premium)*, MICROSOFT (Oct. 1, 2023), https://learn.microsoft.com/en-us/purview/ediscovery-cloud-attachments?view=o365-worldwide&source=recommendations.

56. Unexplainably, some courts still entertain arguments that they should not have to use a tool that is literally built into their system because it would "disrupt [the producing party's] . . . standardized workflow for ESI-related discovery processing," despite the fact that new technology is inherently disruptive and necessarily requires evolution. *In re* Meta Pixel Healthcare Litig., No. 22-cv-03580-WHO (VKD), 2023 WL 4361131, at *1 (N.D. Cal. June 2, 2023).

57. *See, e.g.*, Pom Wonderful LLC v. Coca-Cola Co., No. CV 086-237 SJO (FMOx), 2009 WL 10655335, at *3 (C.D. Cal. Nov. 30, 2009) (stating that a company may not shield itself from discovery due to its own record keeping and ordering defendant to re-link emails with attachments); *see also In re* Myford Touch Consumer Litig., No. 13-CV-03072-EMC, 2016 WL 7734558, at *8 (N.D. Cal. Sept. 14,

that have not made linking of emails and their hyperlinked documents available, third-party tools have been developed to fill that gap.[58]

For instance, Metaspike's FEC hyperlink capabilities are designed to work for the Google Workspace. Like with any tool, there are limitations. For instance, FEC currently only connects emails, calendar items, and chats with hyperlinked documents and not documents hyperlinked within other documents and does not collect information only available from Google Vault's "legal hold" environment.[59] Even when best efforts are used, there are circumstances under which not every relevant hyperlinked document will be collected in this manner, but it does more than Google's system presently permits. While parties in civil litigation may dismiss the idea of using a third-party tool to assist with ESI collection, most parties already pay third-party vendors for electronic discovery assistance, collection, processing, and storage during the (sometimes lengthy) life of a lawsuit. Surely, parties cannot be absolved from discovery obligations because they require the assistance of a vendor or an affordable discovery tool.

F. In Some Instances, Courts Have Ordered Parties to Collect and Produce Hyperlinked Documents Similar to Attachments

Nichols was not the first nor the last decision regarding hyperlinks. Courts have ordered parties to collect and produce hyperlinked documents along with their parent emails.[60] For example, in *IQVIA, Inc.*

2016), *on reconsideration in part*, No. 13-CV-03072-EMC, 2016 WL 6873453 (N.D. Cal. Nov. 22, 2016) (finding that "[i]f [defendant] failed to maintain proper records, this should not be held against Plaintiffs"); Mizner Grand Condo. Ass'n, Inc. v. Travelers Prop. Cas. Co. of Am., 270 F.R.D. 698, 700 (S.D. Fla. 2010) ("[W]hen a party produces documents as they are kept in the ordinary course of business, if the business record-keeping system used by the producing party 'is so deficient as to undermine the usefulness of production,' that party may not have met its obligations under Rule 34." (citation omitted) (quoting Pass & Seymour, Inc. v. Hubbell Inc., 255 F.R.D. 331, 336 n.2 (N.D.N.Y. 2008))).

58. *See supra* note 37. Similarly, Slack, a messaging application for businesses, allows enterprise third-party Discovery APIs (an acronym for application programming interfaces) to export files shared on the platform through approved discovery partners. *See A Guide to Slack's Discovery APIs*, SLACK HELP CTR., https://slack.com/help/articles/360002079527-A-guide-to-Slacks-Discovery-APIs (last visited Aug. 26, 2023).

59. *See In re* Uber Techs., Inc. Passenger Sexual Assault Litig., No. 23-md-03084-CRB (LJC), WL 1772832, at *2 (N.D. Cal. Apr. 23, 2024) ("Metaspike's Forensic Email Collector (FEC) program can retrieve active Google Email and contemporaneous versions of linked Google Drive documents, but it does not have the ability to do the same with Google Email and Drive documents archived using Google Vault."). Google Vault "is an information governance and eDiscovery tool for Google Workspace" that gives organizations the ability to "retain, hold, search, and export users' Google Workspace data[,]" including Gmail messages, Google Drive files, Google Calendar events, and Google Chat messages. *About Google Vault*, GOOGLE, https://support.google.com/vault/answer/2462365?hl=en (last visited Apr. 23, 2024).

60. *In re* StubHub Refund Litigation, 2023 WL 3092972, at *2 (ordering defendant to produce

v. Veeva Systems, Inc.,[61] a special master rejected the defendant's argument that the law did not require the defendant to produce documents linked to produced emails because the Google Drive documents were not stored with emails in the ordinary course of business. The special master held that the producing party was in the best position to link the documents and was "not convinced that relinking these 2,200 documents [was] unduly burdensome in light of the issues at stake in this matter, the resources of the parties, and the amount in controversy."[62]

Some courts have recognized the receiving party's need for the linked documents but also the need to balance the burdens placed upon the producing party. For instance, in *Shenwick v. Twitter, Inc.*, the court was "mindful of the burdens to Defendants," but also "note[d] that Plaintiffs have a right to determine if an electronic message refers to a document[.]"[63] As such, the court concluded that "Plaintiffs should be able to access that document" and ordered the defendants to produce documents referenced in hyperlinks for 200 documents of the plaintiffs' choosing.[64] Importantly, the forensic collection software the plaintiffs in *Nichols* implored defendants to use to collect hyperlinked documents along with emails was not available when *Shenwick* was decided in 2018..

Some courts have recognized the advances in technology and required a more rigorous inquiry into whether the current technological capabilities allow for a comprehensive collection of hyperlinked documents. In *In re Uber Technologies, Inc., Passenger Sexual Assault Litigation*, the court required the defendant to conduct a detailed investigation[65] as to whether there was a viable option for collecting the

hyperlinked documents because "[p]laintiffs have a bunch of emails and a bunch of documents, but they can't tell what document was linked to what email"); Civil Minutes Order at 1, Klein v. Meta Platforms, Inc., No. 320-cv-08570-JD (N.D. Cal. Aug. 11, 2022), ECF No. 334 (ordering defendant to produce hyperlinked documents requested by plaintiffs); Shenwick v. Twitter, Inc., No. 16-cv-05314-JST (SK), 2018 WL 5735176, at *1 (N.D. Cal. Sept. 17, 2018) ("Defendants must produce documents referenced in a hyperlink for 200 documents that Plaintiffs choose."); Steel Supplements, Inc. v. Blitz NV, LLC, No. 8:22-CV-444-WJF-CPT, 2022 WL 3646137, at *2 (M.D. Fla. Mar. 23, 2022) (ordering third party to "search its SharePoint, emails, repositories, and Outlook Exchange server, and any other place such as drives or drop-box type locations, and produce any responsive documents that the US-based employees could or did access, such as hyperlinks, email attachments, or any responsive documents that were in their custody or control or viewable to them as Ignite US employees, wherever the ultimate server is sited"); Stitch Editing Ltd. v. TikTok, Inc., No. CV 21-06636-SB (SKx), 2022 WL 17363054, at *1 (C.D. Cal. Aug. 31, 2022) ("Documents referenced in hyperlinks from all productions—existing and future—must be produced together with the source document containing the hyperlinks so that the association between parent document and hyperlinked document is maintained.").

61. IQVIA, Inc. v. Veeva Sys., Inc., No. 2:17-CV-00177-CCC-MF, 2019 WL 3069203 (D.N.J. July 11, 2019).

62. *Id.* at *5.

63. *Shenwick*, 2018 WL 5735176, at *1.

64. *Id.*

65. Contrast this with other courts who have more eagerly accepted the producing party's overbroad representations regarding the technological infeasibility of collecting and producing

version of the hyperlinked document that existed at the time the email was sent, rather than only collecting the version that existed at the time of collection.[66] Based on the evidence presented from this "exhaustive investigation,"[67] the court ultimately ordered Uber to "produce, to the extent feasible on an automated, scalable basis with existing technology, the contemporaneous document version i.e., the document version likely present at the time an email or message was sent,"[68] which would likely require the use of FEC for the emails and documents available on Uber's active systems. For documents that were archived and only available on Google Vault, the court required defendants to produce the emails and cloud-based documents with metadata (including, if necessary, as custom fields) showing the relationship between email messages with links and the document hyperlinked within the message or email, essentially allowing the receiving party to match up the communication with the hyperlinked document.[69] For the documents only available on Google Vault, the court stopped short of requiring the production of the version of the document that existed at the time the email was sent due to Uber's sufficient showing of the technical infeasibility of doing so.[70] However, the court allowed plaintiffs to identify up to 200 hyperlinks for Google Vault documents when they sought the version of the document that existed at the time the email was sent, with an option for plaintiffs to request more.[71] The court also required Uber to identify which hyperlinked documents were missing from the production and which documents produced were the non-contemporaneous versions.[72] Finally, the court adopted plaintiffs' definition of an "attachment," which included "modern attachments, pointers, internal or non-public documents linked, hyperlinked, stubbed or otherwise pointed to within or as part of other ESI" as a default but did not obligate the production of contemporaneous versions of documents "if no existing technology makes it feasible to do

hyperlinked documents over evidence presented by requesting parties, which can significantly impact the resulting order. *See, e.g.*, *In re* Soc. Media Adolescent Addiction/Personal Injury Prods. Liab. Litig., No. 22-md-03047-YGR (PHK), 2024 WL 1786293, at *8 (N.D. Cal. Feb. 20, 2014) ("Plaintiffs' proposal assumes all or most of the Defendants use Google or Microsoft tools, and further assumes that there exist various capabilities of Google and Microsoft tools which, at the DMC, were admitted to be based on certain reading of documentation about those tools and not based on actual knowledge as to their capabilities.").

66. *In re* Uber Techs., Inc. Passenger Sexual Assault Litig., No. 23-md-03084-CRB (LJC), WL 1772832, at *3 (N.D. Cal. Apr. 23, 2024).

67. *Id.*

68. *Id.* at *4.

69. *Id.*

70. *Id.*; *see also infra* Section III.

71. *In re Uber Techs., Inc. Passenger Sexual Assault Litig.*, 2024 WL 1772832, at *4.

72. *Id.* at *6.

so."[73] This type of exacting approach by the court, which required a thorough investigation by the producing party, is what is necessary in order to make fair decisions that balance the receiving party's right to relevant information and the technological feasibility to provide such information.

G. Google's Inconsistent Approach to Hyperlinks

What is troubling is the trend of recent decisions where courts blindly follow *Nichols* by still accepting the producing parties' burden arguments without reassessing the validity of those assertions or how they align with current technology and common practice. For instance, in a consumer privacy case against Google, Google advanced the argument that the plaintiffs' request for hyperlinked documents, or the Bates numbers for those documents,[74] would create an "impossible burden" and that Google had "no automated means to collect a linked document" because such a hyperlinked document "is not maintained within the file and could be stored anywhere."[75] In making this argument, Google ignored the existence and potential use of the FEC tool advocated for by plaintiffs in the *Nichols* case, which clearly has this capability. Google also ignored the method of linking parent emails with hyperlinked documents that it itself had used in other cases.

Indeed, nine months before Google made this argument in *In re Google RTB Consumer Privacy Litigation*, Google represented to the federal government in an antitrust case that:

> Google will conduct an automated search to identify all links within emails that are linked to shared G Suite documents (Google Docs, Google Sheets, and Google Slides). . . . For each link identified, Google will conduct an automated search for the document corresponding with the link. . . . Google will process and produce the documents corresponding with the email links as though they were separate documents. . . . [B]oth the parent document and linked-to document would be produced with sufficient metadata to tie the documents together.[76]

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73. *Id.*

74. A Bates number is a "unique numeric or alphanumeric identifier attached to individual documents and pages to make each document and page easily identifiable and retrievable." *Bates Number*, PRACTICAL LAW GLOSSARY, Westlaw 8-509-9148. For example, if ACME Corp. produces 25,000 pages to an opposing party in discovery, it may apply the Bates number "AMCE _000001 - AMCE_025000" to the production.

75. Joint Discovery Dispute Letter at 7, *In re Google RTB Consumer Privacy Litig*., (N.D. Cal. Oct. 19, 2021) (No. 4:21-cv-02155), ECF No. 95.

76. Joint Status Report at 8 n.4, United States v. Google LLC, No. 1:20-cv-03010-APM (D.D.C. June 16, 2022), ECF No. 361; *see also* Order Regarding Discovery Procedure at 23-24, *In re* Google

Based on Google's representations in *United States v. Google LLC*, the plaintiffs' request for Bates numbers for Google Workspace documents hyperlinked in Google emails in *In re Google RTB Consumer Privacy Litigation* was certainly not an "impossible burden," nor was it accurate that Google had "no automated means" to do so.[77] However, the court in *In re Google RTB Consumer Privacy Litigation* did "not require any party to include a metadata field for 'linked items' that contains [sic] information identifying, by Bates number, the documents associated with hyperlinks within a produced document. Google represents that it is not technically feasible to provide this information on a production-wide basis[;]" further the court only suggested that "parties should consider reasonable requests for production of hyperlinked documents on a case-by-case basis."[78]

If one were to just look at the representations by the producing party in this case and at the prior case law, this would seem to be a reasoned and measured approach. However, this would be based on faulty assumptions advanced by the producing party.[79] Specifically, Google could have made good faith efforts to achieve what the plaintiffs were requesting simply by using third-party forensic collection tools or by following the same exact method it had used previously in *United States v. Google LLC*.

The approach Google took in *United States v. Google LLC* to "conduct an automated search for the document corresponding with the link" and produce "both the parent document and linked-to document . . . with sufficient metadata to tie the documents together,"[80] is an option for those parties who are unwilling or unable to use FEC.[81] However, this approach

Digit. Advert. Antitrust Litig., No. 1:21-md-03010-PKC (S.D.N.Y. Mar. 17, 2023), ECF No. 508 ("[T]he producing party shall conduct an automated search across all emails to be produced. . . . [T]o identify any emails that contain links to another document and will conduct a reasonable search for the document corresponding with each identified link. . . . For documents produced pursuant to this Appendix J, the producing party shall produce DOC LINK metadata[.]").

77. Joint Discovery Dispute Letter, *supra* note 75, at 7.

78. Order Re Discovery Dispute Re ESI Protocol at 5, *In re* Google RTB Consumer Privacy Litig., No. 4:21-cv-02155 (N.D. Cal. Nov. 4, 2021), ECF No. 116.

79. This case also demonstrates the problems with allowing only limited requests for hyperlinked documents. Later in the same case, the requesting party made a request for hyperlinks referenced in fifty-one documents that were all deposition exhibits. Joint Discovery Letter Brief at 1, *In re* Google RTB Consumer Privacy Litig., No. 4:21-cv-02155-YGR (N.D. Cal. Mar. 27, 2023), ECF No. 464. Google opposed this request and the requesting party had to seek relief from the court. *See* Order Re March 27, 2023 Discovery Dispute Re Hyperlinked Documents at 2, *In re* Google RTB Consumer Privacy Litig., No. 4:21-cv-02155-YGR (N.D. Cal. Apr. 21, 2023), ECF No. 490 (Google's objections to minimal requests for hyperlinked documents overruled, and Google ordered to produce documents corresponding to the hyperlinks found within fifty-one documents).

80. *See* Joint Status Report, *supra* note 76, at 8 n.4.

81. Currently, FEC is only able to collect hyperlinked documents referenced in emails within the Google Workspace, and not within other documents, and cannot collect hyperlinks in emails that were deleted by the user and only available within the Google Vault "legal hold" environment. Approaches similar to Google's hybrid approach could potentially be used for non-Google specific documents as well,

is not without its drawbacks. In *United States v. Google LLC* and *In re Google Digital Advertising Antitrust Litigation*, Google limited the universe of its automated approach to only those emails that hit on search terms and that are found to be responsive, independent, and without the context of the hyperlinked document.[82] This is not in line with the traditional approach to attachments imposed by the *Federal Rules of Civil Procedure*, in which the entire family of documents is reviewed comprehensively, and if any document in the family is relevant, the whole family is produced.[83]

Using Google's hybrid approach means that if the substance of an email itself is rather innocuous without the context of the document (e.g., an email simply says, "take a look at this document" or has no text in the body at all), then neither the email nor the hyperlinked document would be produced. This would mean that, even if the hyperlinked document was independently produced, the receiving party would never know to when that document was emailed or by whom, nor would the receiving party have the context of any potential commentary in the email, which can be of great importance in deposition and at trial. Ideally, the linking of emails and their hyperlinked documents should be done prior to running search terms or conducting a review in order to provide the appropriate context for relevance determinations and should include the version of the document that existed at the time the email with the hyperlink was sent. Also, the hyperlinked document would likely be the document as it exists at the time of collection, and not the document as it existed the time the email was sent. Google's approach, although far superior to not receiving any hyperlinked documents, does not seem appropriate when a reliable tool that would avoid these issues currently exists—and works in a Google-created system.

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so long as there is a unique identifier available. Electronic discovery vendors are often capable of developing scripts to meet client needs. *See, e.g.*, *Epiq Chat Connector*, EPIQ, https://www.epiqglobal.com/en-us/technologies/legal-solutions/chat-connector (last visited Sept. 1, 2023); *In re* Uber Techs., Inc., Passenger Sexual Assault Litig., No. 23-md-03084-CRB (LJC), WL 1772832, at *2 (N.D. Cal. Apr. 23, 2024) ("Uber's e-discovery vendor, Lighthouse, has developed a tool, Google Parser, that extracts specific links to Google Drive documents from email and chat messages and certain metadata. Google Parser facilitates the grouping together of a message and a document stored in Google Drive for purposes of review and production, and it contains certain metadata fields relevant to search, review, and production of messages. However, there is no evidence that this technology, which is an extraction tool, has been refined and deployed to collect contemporaneous versions of hyperlinked documents archived with Google Vault.").

82. Joint Status Report, *supra* note 76, at 8 n.4; Order Regarding Discovery Procedure, *supra* note 76, at 23-24.

83. *See supra* note 17.

III. GOOGLE'S RELUCTANT EVOLUTION

In December 2023, Google Vault finally added the ability for administrators to export hyperlinked documents stored in Google Drive when they export email messages.[84] However, this feature does come with limitations. For instance, legal holds over email do not extend to hyperlinked documents and, if search terms are used for export purposes, the search does not extend to a search of the hyperlinked documents.[85] In addition, although not explicitly stated, the hyperlinked document that is exported is the document that exists at the time of collection rather than the specific version that existed at the time the email was sent.[86] However, it is possible to identify the version of the hyperlinked document that existed at the time the email was sent, albeit through a more manual process.[87] Due to this limitation, the FEC tool is likely a better collection tool than Google's until Google Vault's functionality further evolves.

IV. EVIDENTIARY HURDLES PRESENTED BY LIVE DOCUMENTS

Similarly to Google Vault's, Microsoft 365's Purview eDiscovery (Premium) hyperlinked cloud attachment collection features, which collects Microsoft 365 emails along with their hyperlinked attachments from OneDrive and other Microsoft repositories, still rely heavily on collecting the hyperlinked attachment as it exists at the time of collection versus the document as it existed at the time the email was sent.[88] Relying solely on this version may present evidentiary hurdles if one seeks to use

84. Doug Austin, *Admins in Google Vault Can Now Export Hyperlinked Google Drive Content from Gmails: eDiscovery Trends*, EDISCOVERY TODAY (Dec. 13, 2023), https://ediscoverytoday.com/2023/12/13/admins-in-google-vault-can-now-export-hyperlinked-google-drive-content-from-gmails-ediscovery-trends/; *Google Workspace Updates*, GOOGLEBLOG (Dec. 5, 2023), https://workspaceupdates.googleblog.com/2023/12/google-vault-export-hyperlinked-drive-content-from-gmail-messages.html ("Starting December 8, 2023, admins can export Drive files hyperlinked in Gmail messages directly in Google Vault. . . . If Drive hyperlinks are found, a separate export of Drive files will also be created. . . . Vault admins can find the association between the Gmail export and Drive link export in the export file names and metadata.").

85. This creates the same issue with search terms as discussed in the prior paragraph.

86. *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, 2024 WL 1772832, at *1 ("[W]hen a hyperlinked Google Drive document is exported from Google Vault, the current version of that document is exported. If a Google Drive document archived using Google Vault was edited after the email with the hyperlink to the document was sent, then the Google Vault export will not reflect the version of the document that existed at the time of the email.").

87. *Id.* ("For data archived using Google Vault, and no longer in the active Google Workspace, there is a manual process in place to identify a historic version of a hyperlinked Google Drive document contemporaneous with the email communication.").

88. Craig Ball, *Cloud Attachments: Versions and Purview*, CRAIGBALL.NET (Apr. 8, 2024), https://craigball.net/2024/04/08/cloud-attachments-versions-and-purview/ (last visited May 5, 2024) ("Microsoft Purview collects cloud attachments as they exist at the time of collection . . . .").

both the email and the hyperlinked document as a family unit in a deposition. However, producing the version of the document as it exists at the time of the collection provides the context necessary to meaningfully assess the substance of the cloud attachment. This way, the receiving party can determine which "point-in-time" versions are likely important enough to request the producing party investigate whether an earlier version of those cloud attachments exists and should be produced. As the *In re Uber Technologies, Inc. Passenger Sexual Assault Litigation* order recognized,

> [C]ontemporaneous versions of hyperlinked documents can support an inference regarding "who knew what, when." An email message with a hyperlinked document may reflect a logical single communication of information at a specific point in time, even if the hyperlinked document is later edited. Thus, important evidence bearing on claims and defenses may be at stake, but the ESI containing that evidence is not readily available for production in the same manner that traditional email attachments could be produced.[89]

Even if the "point-in-time" or "contemporaneous" version of the document no longer exists, the fact that a document *may* have been edited after an email was sent could be made clear during a deposition or in court briefing, along with the fact that the producing party has represented that the "point-in-time" version no longer exists. Alternatively, a party may still use the document in its own right without the transmittal parent email. Although priority should be placed on collecting and producing the version of the hyperlinked document at the time the email was sent, if that is not possible or reasonably feasible, then perfect should not be the enemy of good.

V. A WORKABLE PATH FORWARD

To the extent that there are automated methods to collect and produce emails and their hyperlinked documents in a manner that allows the receiving party to understand which emails hyperlink to which documents, those methods should be used. Although Microsoft's Purview eDiscovery (Premium) and FEC are reliable methods for collecting hyperlinked documents in order to produce documents in a manner consistent with Rule 34's mandates, there are limitations. The hybrid approach used by Google, or similar approaches developed by electronic discovery vendors, are also viable options. These methods may not be perfect, but producing parties should be expected to make their best good faith efforts. Unfortunately, some parties merely cite to *Nichols* and only

89. *In re Uber Techs., Inc., Passenger Sexual Assault Litig.*, 2024 WL 1772832, at *2.

agree to take an opposing party's request for hyperlinked documents on an ad hoc, case-by-case basis,[90] despite the producing party's ability to use more automated approaches. This is not a workable solution. This ad hoc approach can lead to unnecessary and resource-draining discovery disputes and is highly prejudicial to litigating parties.[91] However, there are circumstances in which creating a more curated list of hyperlinks for production may still make sense. This may be the case when companies do not use a primary enterprise solution such as Google Workspace or Microsoft 365, when companies use hyperlinks sparingly, when employees hyperlink to multitudes of external sites of their personal choosing (each of which require permissions access from various individual users who may or may not still be employed by the company), or when the company truly has no automated approach available for collection and production with a family relationship. And under other circumstances, the principles of proportionality may require that collection, review, and production of hyperlinked documents be done on a case-by-case basis. There will also be documents that will be exceptions to the available technologies and that have not been captured in an automated fashion, despite the producing party's best efforts. These documents may also require the case-by-case approach. If courts require that parties fully investigate their technological options and capabilities, and if the parties actively address issues surrounding the collection and production of hyperlinked documents during a Rule 26(f) conference and continue to work cooperatively throughout the discovery process, many future disputes on this issue can be avoided.

CONCLUSION

By and large, approaching hyperlinked documents differently than traditional attachments is inconsistent with current technology and contravenes the *Federal Rules of Civil Procedure*'s requirements regarding the production of documents in civil discovery. To use hyperlinks in lieu of attachments is no longer a new practice, and the methods of storing and sharing information have evolved and continue to evolve. As the electronic discovery process evolves with it, so, too, should the law.

90. *See, e.g.*, Defendant Shopify Inc.'s Memorandum in Opposition to Plaintiffs' Third Motion to Compel at 7-8, 11, Bedford, Freeman & Worth Publ'g Grp., LLC v. Shopify Inc., No. 1:21-cv-01340-CMH (E.D. Va. May 25, 2022) (citing *Nichols* to oppose production of hyperlinked documents and explaining that, when "Plaintiffs raised their concerns regarding the hyperlinked documents and identified specific links they believed to be relevant, Shopify *agreed* to respond by explaining which of those documents would or would not be produced.") (emphasis in original).

91. *See supra* note 79.