



**Tuesday, October 26**  
**9:00am-10:30am**

## **505 - Judicial Perspectives on Electronic discovery**

**Patrick Burke**

*Senior Director and Assistant General Counsel*  
Guidance Software

**Hon. Shira A. Scheindlin**

*United States District Judge*  
United States District Court, Southern District of New York

**Hon. Donald E. Shelton**

*Chief Judge*  
Washtenaw County Trial Court

**Hon. David Waxse**

*United States Magistrate Judge*  
United States District Court, District of Kansas

## Faculty Biographies

### **Patrick Burke**

Guidance Software

### **Hon. Shira A. Scheindlin**

Shira A. Scheindlin is a United States District Judge for the Southern District of New York. She was nominated by President Bill Clinton on July 28, 1994.

Before taking her current seat in the Southern District, Judge Scheindlin worked as a prosecutor (Assistant United States Attorney for the Eastern District of New York), commercial lawyer (General Counsel for the New York City Department of Investigation and partner at Herzfeld & Rubin), and Judge (Magistrate Judge in the Eastern District of New York 1982-1986 and Special Master in the Agent Orange mass tort litigation).

She is a member of the American Law Institute, a former Chair of the Commercial and Federal Litigation Section of the NYSBA, a former Board Member of NYCLA, and a member of several committees of the Association of the Bar of the City of New York. She was also a member of the Judicial Conference of the United States Advisory Committee on the Federal Rules of Civil Procedure.

Judge Scheindlin received a Bachelor's degree from the University of Michigan, a Master's degree from Columbia University, and a JD from Cornell Law School.

### **Hon. Donald E. Shelton**

Hon. Donald E. Shelton is the Chief Judge of the 22d Juridical Circuit Court in Ann Arbor, Michigan. He has been a state trial court judge since 1990.

Judge Shelton has a distinguished record of public service including serving as a member of the Eastern Michigan University Board of Regents, serving as mayor of the City of Saline, and chairing the Southeast Michigan Council of Governments (SEMCOG). Prior to becoming a judge, he was a practicing trial attorney.

In 2007, he received the Frank J. Kelley Distinguished Public Servant Award presented by the State Bar of Michigan. Judge Shelton is the author of several legal texts and numerous articles published in professional publications, primarily related to the impact of technology on the judicial system, and has written for and lectured at numerous academic and professional conferences. In his spare time, he is an adjunct faculty member at Eastern Michigan University. Most recently he has completed a new textbook, titled "Forensic Science in Court: Challenges in the 21st Century", which will be released next month.

He is one of only seven judges in the United States to have received a PhD in Judicial Studies from the University of Nevada. Prior to his PhD, Judge Shelton received his BA from Western Michigan University, JD degree from the University of Michigan Law School, and a Masters degree from Eastern Michigan University.

**Hon. David Waxse**

*United States Magistrate Judge*

United States District Court, District of Kansas

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**THE PENSION COMMITTEE OF THE  
UNIVERSITY OF MONTREAL  
PENSION PLAN, et al.,**

**Plaintiffs,**

**- against -**

**BANC OF AMERICA SECURITIES,  
LLC, CITCO FUND SERVICES  
(CURACAO) N.V., THE CITCO GROUP  
LIMITED, INTERNATIONAL FUND  
SERVICES (IRELAND) LIMITED,  
PRICewaterhouseCOOPERS  
(NETHERLAND ANTILLES), JOHN W.  
BENDALL, JR., RICHARD GEIST,  
ANTHONY STOCKS, KIERAN  
CONROY, and DECLAN QUILLIGAN,**

**Defendants.**

**AMENDED  
OPINION AND ORDER**

**05 Civ. 9016 (SAS)**

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***Zubulake Revisited: Six Years Later***

**SHIRA A. SCHEINDLIN, U.S.D.J.:**

**I. INTRODUCTION**

In an era where vast amounts of electronic information is available for review, discovery in certain cases has become increasingly complex and

expensive. Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party. As discussed six years ago in the *Zubulake* opinions, when this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy. Once again, I have been compelled to closely review the discovery efforts of parties in a litigation, and once again have found that those efforts were flawed. As famously noted, “[t]hose who cannot remember the past are condemned to repeat it.”<sup>1</sup> By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence.

In February, 2004, a group of investors brought this action to recover losses of 550 million dollars stemming from the liquidation of two British Virgin Islands based hedge funds in which they held shares: Lancer Offshore, Inc. and

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<sup>1</sup> George Santayana, *Reason in Common Sense*, Vol. 1 of *The Life of Reason* (1905) (Prometheus Books 1998 at 82).

OmniFund Ltd. (the “Funds”).<sup>2</sup> Plaintiffs<sup>3</sup> have asserted claims under the federal securities laws and under New York law against former directors, administrators, the auditor, and the prime broker and custodian of the Funds.<sup>4</sup> The Funds were managed by Lancer Management Group LLC (“Lancer”) and its principal, Michael Lauer.<sup>5</sup> The Funds retained Citco Fund Services (Curacao) N.V. (“Citco

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<sup>2</sup> See Second Amended Complaint (“SAC”) ¶ 1. Familiarity with the facts underlying this action is assumed. For a more detailed discussion of the facts see *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, No. 05 Civ. 9016, 2009 WL 2876262 (S.D.N.Y. Sept. 4, 2009) and *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 592 F. Supp. 2d 608 (S.D.N.Y. Jan. 5, 2009).

<sup>3</sup> Although there are ninety-six plaintiffs in this action, only thirteen are relevant for this motion. They are: the Morton Meyerson Family Foundation and the 1999 Meyerson Charitable Remainder Trust (“2M”); Defined Benefit Plan for Hunnicutt & Co., Inc., IRA F/B/O William Hunnicutt VFTC as Custodian (“Hunnicutt”); the Coronation International Active Fund of Funds and Fortis Global Custody Management and Trustee Services (Ireland) Limited as Trustee for Coronation Universal Fund (“Coronation”); Andre Chagnon, Foundation Lucie Et Andre Chagnon, Sojecci II Ltee, and Claude Chagnon (the “Chagnon Plaintiffs”); Bombardier Trust (Canada), the Bombardier Trust (UK), and the Bombardier Trust (U.S.) Master Trust (“Bombardier Trusts”); Fondation J. Armand Bombardier (“Bombardier Foundation”); the Altar Fund; the Pension Committee of the Pension Plan for The Régime De Retraite De La Corporation De L’Ecole Polytechnique (“L’Ecole Polytechnique”); Okabena Marketable Alternatives Fund, LLC (“Okabena”); the Corbett Family Charitable Foundation, Inc. (“Corbett Foundation”); Commonfund Global Hedged Partners, LLC (“Commonfund”); Kuwait and Middle East Financial Investment Company (“KMEFIC”); and the Pension Committee of the University of Montreal Pension Plan (“UM”).

<sup>4</sup> See SAC ¶¶ 318-460.

<sup>5</sup> See *id.* ¶ 1.

NV”) to perform certain administrative duties, but it eventually resigned as administrator of the Funds.<sup>6</sup> On April 16, 2003, Lancer filed for bankruptcy.<sup>7</sup> On July 8, 2003, the Funds were placed into receivership in the Southern District of Florida.<sup>8</sup>

In October, 2007, during the discovery process, Citco NV, its parent company, the Citco Group Limited, and former Lancer Offshore directors who were Citco officers (collectively with Citco NV, the “Citco Defendants”) claimed that substantial gaps were found in plaintiffs’ document productions. As a result, depositions were held and declarations were submitted. This occurred from October, 2007 through June, 2008. Following the close of this discovery, the Citco Defendants moved for sanctions, alleging that each plaintiff failed to preserve and produce documents – including those stored electronically – and submitted false and misleading declarations regarding their document collection and preservation efforts. The Citco Defendants seek dismissal of the Complaint – or any lesser sanction the Court deems appropriate – based on plaintiffs’ alleged misconduct.

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<sup>6</sup> See *id.* ¶¶ 4, 13.

<sup>7</sup> See *id.* ¶ 313.

<sup>8</sup> See *id.* ¶ 315.

Because this is a long and complicated opinion, it may be helpful to provide a brief summary up front. I begin with a discussion of how to define negligence, gross negligence, and willfulness in the discovery context and what conduct falls in each of these categories. I then review the law governing the imposition of sanctions for a party's failure to produce relevant information during discovery. This is followed by factual summaries regarding the discovery efforts – or lack thereof – undertaken by each of the thirteen plaintiffs against whom sanctions are sought, and then by an application of the law to those facts. Based on my review of the evidence, I conclude that all of these plaintiffs were either negligent or grossly negligent in meeting their discovery obligations. As a result, sanctions are required.

## **II. AN ANALYTICAL FRAMEWORK AND APPLICABLE LAW**

From the outset, it is important to recognize what this case involves and what it does not. This case does not present any egregious examples of litigants purposefully destroying evidence. This is a case where plaintiffs failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose. As a result, there can be little doubt that some documents were lost or destroyed.

The question, then, is whether plaintiffs' conduct requires this Court



to impose a sanction for the spoliation of evidence. To answer this question, there are several concepts that must be carefully reviewed and analyzed. The first is plaintiffs' level of culpability – that is, was their conduct of discovery acceptable or was it negligent, grossly negligent, or willful. The second is the interplay between the duty to preserve evidence and the spoliation of evidence. The third is which party should bear the burden of proving that evidence has been lost or destroyed and the consequences resulting from that loss. And the fourth is the appropriate remedy for the harm caused by the spoliation.

**A. Defining Negligence, Gross Negligence, and Willfulness in the Discovery Context**

While many treatises and cases routinely define negligence, gross negligence, and willfulness in the context of tortious conduct, I have found no clear definition of these terms in the context of discovery misconduct. It is apparent to me that these terms simply describe a continuum.<sup>9</sup> Conduct is either acceptable or unacceptable. Once it is unacceptable the only question is how bad is the conduct. That is a judgment call that must be made by a court reviewing the

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<sup>9</sup> See *Reilly v. Natwest Markets Grp. Inc.*, 181 F.3d 253, 267 (2d Cir. 1999) (stating that the failure to produce evidence occurs ““along a continuum of fault – ranging from innocence through the degrees of negligence to intentionality””) (quoting *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988)).

conduct through the backward lens known as hindsight. It is also a call that cannot be measured with exactitude and might be called differently by a different judge. That said, it is well established that *negligence* involves unreasonable conduct in that it creates a risk of harm to others, but *willfulness* involves intentional or reckless conduct that is so unreasonable that harm is highly likely to occur.

It is useful to begin with standard definitions of each term and then to explore the conduct, in the discovery context, that causes certain conduct to fall in one category or another.

[Negligence] is conduct “which falls below the standard established by law for the protection of others against unreasonable risk of harm.” [Negligence] is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from [its] act. But it may also arise where the negligent party has considered the possible consequences carefully, and has exercised [its] own best judgment.<sup>10</sup>

The standard of acceptable conduct is determined through experience. In the discovery context, the standards have been set by years of judicial decisions analyzing allegations of misconduct and reaching a determination as to what a party must do to meet its obligation to participate meaningfully and fairly in the

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<sup>10</sup> Prosser & Keeton on Torts § 31 at 169 (5th ed. 1984) (quoting Restatement (Second) of Torts § 282) (citations omitted).

discovery phase of a judicial proceeding. A failure to conform to this standard is negligent even if it results from a pure heart and an empty head.

“Gross negligence has been described as a failure to exercise even that care which a careless person would use.”<sup>11</sup> According to a leading treatise – *Prosser & Keeton on Torts* – most courts find that gross negligence is something more than negligence “and differs from ordinary negligence only in degree, and not in kind.”<sup>12</sup>

The same treatise groups willful, wanton, and reckless into one category that requires “that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.”<sup>13</sup>

Applying these terms in the discovery context is the next task. Proceeding chronologically, the first step in any discovery effort is the preservation of relevant information. A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending

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<sup>11</sup> *Id.* § 34 at 211-12.

<sup>12</sup> *Id.* at 212 (citations omitted).

<sup>13</sup> *Id.* at 213 (citing Restatement (Second) of Torts § 500 and collecting cases).

on the circumstances, may be grossly negligent or willful.<sup>14</sup> For example, the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful.<sup>15</sup> Possibly after October, 2003, when *Zubulake IV* was issued,<sup>16</sup> and definitely after July, 2004, when the final relevant *Zubulake* opinion was issued,<sup>17</sup> the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.<sup>18</sup>

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<sup>14</sup> See *Treppel v. Biovail*, 249 F.R.D. 111, 121 (S.D.N.Y. 2008) (collecting cases); *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372, 380 (D. Conn. 2007) (finding gross negligence where there was “no evidence that the defendants did anything to stop the routine destruction of the backup tapes after [their] obligation to preserve arose”); *Pastorello v. City of New York*, No. 95 Civ. 470, 2003 WL 1740606, at \*11-\*12 (S.D.N.Y. Apr. 1, 2003) (concluding that loss of data due to unfamiliarity with record-keeping policy by employee responsible for preserving document was grossly negligent).

<sup>15</sup> See, e.g., *Gutman v. Klein*, No. 03 Civ. 1570, 2008 WL 5084182 (E.D.N.Y. Dec. 2, 2008) (adopting finding of the Magistrate Judge that spoliator acted in bad faith by intentionally deleting computer files).

<sup>16</sup> See *Zubulake v. UBS Warburg LLC* (“*Zubulake IV*”), 220 F.R.D. 212 (S.D.N.Y. 2003).

<sup>17</sup> See *Zubulake v. UBS Warburg LLC* (“*Zubulake V*”), 229 F.R.D. 422 (S.D.N.Y. 2004).

<sup>18</sup> Compare *Adorno v. Port Auth. of N.Y. & N.J.*, 258 F.R.D. 217, 228-29 (S.D.N.Y. 2009) (holding that defendants were only negligent where they instituted some form of a litigation hold – albeit limited in scope – when the duty to preserve arose in 2001); with *Treppel*, 249 F.R.D. at 121 (holding that the failure to preserve backup tapes after December 2003 was sufficient to constitute

The next step in the discovery process is collection and review. Once again, depending on the extent of the failure to collect evidence, or the sloppiness of the review, the resulting loss or destruction of evidence is surely negligent, and, depending on the circumstances may be grossly negligent or willful. For example, the failure to collect records – either paper or electronic – from key players constitutes gross negligence or willfulness as does the destruction of email or certain backup tapes after the duty to preserve has attached. By contrast, the failure to obtain records from *all* employees (some of whom may have had only a passing encounter with the issues in the litigation), as opposed to key players, likely constitutes negligence as opposed to a higher degree of culpability. Similarly, the failure to take all appropriate measures to preserve ESI likely falls in the negligence category.<sup>19</sup> These examples are not meant as a definitive list. Each case will turn on its own facts and the varieties of efforts and failures is infinite. I have drawn the examples above from this case and others. Recent cases have also addressed the failure to collect information from the files of former employees that

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gross negligence or recklessness); *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 198-99 (S.D.N.Y. 2007) (“[T]he Court finds that [the] utter failure to preserve documents and ESI [electronically stored information] relevant to plaintiffs’ allegations in this case . . . to be at least grossly negligent.”) (collecting cases).

<sup>19</sup> See *Treppel*, 249 F.R.D. at 121.

remain in a party's possession, custody, or control after the duty to preserve has attached (gross negligence)<sup>20</sup> or the failure to assess the accuracy and validity of selected search terms (negligence).<sup>21</sup>

## **B. The Duty to Preserve and Spoliation**

Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. The right to impose sanctions for spoliation arises from a court's inherent power to control the judicial process and litigation, but the power is limited to that necessary to redress conduct "which abuses the judicial process." The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth. . . . The courts must protect the integrity of the judicial process because, "[a]s soon as the process falters . . . the people are then justified in abandoning support for the system."<sup>22</sup>

The common law duty to preserve evidence relevant to litigation is well recognized.<sup>23</sup>

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<sup>20</sup> See *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 627-28 (D. Colo. 2007).

<sup>21</sup> See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259-62 (D. Md. 2008).

<sup>22</sup> *Silvestri v. General Motors*, 271 F.3d 583, 589 (4th Cir. 2001) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991), and *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993)) (citations omitted).

<sup>23</sup> See Fed. R. Civ. P. 37(f) Advisory Committee Note ("A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case."). See also *Kronisch v. United States*, 150

The case law makes crystal clear that the breach of the duty to preserve, and the resulting spoliation of evidence, may result in the imposition of sanctions by a court because the court has the obligation to ensure that the judicial process is not abused.<sup>24</sup>

It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation.<sup>25</sup> “[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”<sup>26</sup> A plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.<sup>27</sup>

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F. 3d 112, 126-27 (2d Cir. 1998).

<sup>24</sup> See generally *Chambers*, 501 U.S. 32.

<sup>25</sup> See *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 433, 436 (2d Cir. 2001).

<sup>26</sup> *Treppel*, 249 F.R.D. at 118 (quoting *Zubulake IV*, 220 F.R.D. at 218).

<sup>27</sup> See *Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 340 (D. Conn. 2009) (concluding that a duty to preserve arose when plaintiff retained counsel in connection with potential legal action but had not yet identified responsible parties); *Cyntegra, Inc. v. Idexx Labs., Inc.*, No. 06 Civ. 4170, 2007 WL 5193736, at \*3 (C.D. Cal. Sept. 21, 2007) (stating that because plaintiffs control when litigation begins, they “must necessarily anticipate litigation before the complaint is filed”); *Indemnity Ins. Co. of N. Am. v. Liberty Corp.*, No. 96 Civ. 6675, 1998 WL 363834, at \*4 n.3 (S.D.N.Y. June 29, 1998) (holding that “the following factors demonstrate that plaintiff was on notice that a lawsuit was likely so as to trigger a duty to preserve the evidence: (1) the sheer magnitude of the losses; (2) that plaintiff attempted to document the damage through photographs

### C. Burdens of Proof

The third preliminary matter that must be analyzed is what can be done when documents are no longer available. This is not an easy question. It is often impossible to know what lost documents would have contained. At best, their content can be inferred from existing documents or recalled during depositions.<sup>28</sup> But this is not always possible. Who then should bear the burden of establishing the relevance of evidence that can no longer be found? And, an even more difficult question is who should be required to prove that the absence of the missing material has caused prejudice to the innocent party.

The burden of proof question differs depending on the severity of the sanction. For less severe sanctions – such as fines and cost-shifting – the inquiry

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and reports; and (3) that it immediately brought in counsel as well as experts to assess the damage and attempt to ascertain its likely causes in anticipation of litigation”).

<sup>28</sup> See, e.g., *Connor v. Sun Trust Bank*, 546 F. Supp. 2d 1360, 1376-77 (N.D. Ga. 2008) (holding that the nonproduction of a relevant email that must have been deleted no more than ten days prior to the case being filed tended to indicate that other relevant emails were not produced); *Treppel*, 249 F.R.D. at 123 (noting that the existence of emails produced by other custodians “does suggest that additional relevant discoverable materials may be present on [defendant employee’s] laptop that were neither preserved by him nor backed up in 2005. While almost all of the e-mails were created before the obligation to preserve arose, this does not rule out the possibility that other relevant e-mails may have been deleted from [defendant employee’s] laptop after that date”).



focuses more on the conduct of the spoliating party than on whether documents were lost, and, if so, whether those documents were relevant and resulted in prejudice to the innocent party. As explained more thoroughly below, for more severe sanctions – such as dismissal, preclusion, or the imposition of an adverse inference – the court must consider, in addition to the conduct of the spoliating party, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence.

On the question of what is “relevant,” the Second Circuit has provided the following guidance:

[O]ur cases make clear that “relevant” in this context means something *more than sufficiently probative to satisfy Rule 401* of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that “the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction.”<sup>29</sup>

It is not enough for the innocent party to show that the destroyed evidence would have been responsive to a document request. The innocent party must also show that the evidence would have been helpful in proving its claims or defenses – *i.e.*, that the innocent party is prejudiced without that evidence. Proof of relevance

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<sup>29</sup> *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108-09 (2d Cir. 2002) (quoting *Kronisch*, 150 F.3d at 127) (emphasis added).

does not necessarily equal proof of prejudice.

In short, the innocent party must prove the following three elements: that the spoliating party (1) had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party's claim or defense.<sup>30</sup>

Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner. "Where a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party."<sup>31</sup> Although many courts in this district presume relevance where there is a finding of gross negligence, application of the presumption is not required.<sup>32</sup> However, when the spoliating party was merely

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<sup>30</sup> *See id.* at 107.

<sup>31</sup> *Id.* at 109 (citing *Kronisch*, 150 F.3d at 126).

<sup>32</sup> *See id.* ("[A] showing of gross negligence in the destruction or untimely production of evidence will *in some circumstances* suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party.") (emphasis added); *Treppel*, 249 F.R.D. at 121-22 ("While it is true that under certain circumstances 'a showing of gross negligence in the destruction or untimely production of evidence' will support [a relevance] inference, the circumstances here do not warrant such a finding, as the defendants' conduct 'does not rise to the egregious level seen in cases where relevance is

negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction.<sup>33</sup> The innocent party may do so by “adduc[ing] sufficient evidence from which a reasonable trier of fact could infer that ‘the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.’”<sup>34</sup> “In other words, the [innocent party] must present extrinsic evidence tending to show that the destroyed e-mails

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determined as a matter of law.”) (quoting *Residential Funding*, 306 F.3d at 109 and *Toussie v. County of Suffolk*, No. 01 Civ. 6716, 2007 WL 4565160, at \*8 (E.D.N.Y. Dec. 21, 2007)); *Zubulake IV*, 220 F.R.D. at 221 (“[B]ecause UBS’s spoliation was negligent and possibly reckless, but not willful, Zubulake must demonstrate that a reasonable trier of fact could find that the missing e-mails would support her claims.”). Cf. *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. at 200 (holding that movant was not required to submit extrinsic proof of relevance where movant had established gross negligence).

<sup>33</sup> See *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 108 (2d Cir. 2001) (“[T]he burden falls on the ‘prejudiced party’ to produce ‘some evidence suggesting that a document or documents relevant to substantiating [its] claim would have been included among the destroyed files.’”) (quoting *Kronisch*, 150 F.3d at 127).

<sup>34</sup> *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch*, 150 F.3d at 127). *Accord Scaleria v. Electrograph Sys., Inc.*, No. 08 Civ. 50, 2009 WL 3126637, at \*16 (E.D.N.Y. Sept. 29, 2009) (“[A] party seeking sanctions for spoliation must demonstrate that the evidence destroyed was ‘relevant’ to its claims or defenses. At least where more severe sanctions are at issue, this means that the moving party must show that the lost information would have been favorable to it.”) (quoting *Chan v. Triple 8 Palace, Inc.*, No. 03 Civ. 6048, 2005 WL 1925579, at \*7 (S.D.N.Y. Aug. 11, 2005)).

would have been favorable to [its] case.”<sup>35</sup> “Courts must take care not to ‘hold[ ] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,’ because doing so ‘would . . . allow parties who have . . . destroyed evidence to profit from that destruction.’”<sup>36</sup>

No matter what level of culpability is found, any presumption is rebuttable and the spoliating party should have the opportunity to demonstrate that the innocent party has not been prejudiced by the absence of the missing information.<sup>37</sup> If the spoliating party offers proof that there has been no prejudice, the innocent party, of course, may offer evidence to counter that proof. While requiring the innocent party to demonstrate the relevance of information that it can never review may seem unfair, the party seeking relief has some obligation to make a showing of relevance and eventually prejudice, lest litigation become a “gotcha” game rather than a full and fair opportunity to air the merits of a dispute.

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<sup>35</sup> *Toussie*, 2007 WL 4565160, at \*8.

<sup>36</sup> *Residential Funding*, 306 F.3d at 109 (quoting *Kronisch*, 150 F.3d at 128).

<sup>37</sup> *See, e.g., Stevenson v. Union Pacific R.R. Co.*, 354 F.3d 739, 750 (8th Cir. 2004) (holding that district court properly imposed an adverse instruction but abused its discretion when it did not permit defendant to rebut the presumption that it destroyed documents in bad faith). If the court orders a mandatory presumption, or if the jury chooses to draw a presumption, that the missing evidence is both relevant and prejudicial, the burden of rebutting this presumption will always rest with the spoliating party.

If a presumption of relevance and prejudice were awarded to every party who can show that an adversary failed to produce any document, even if such failure is completely inadvertent, the incentive to find such error and capitalize on it would be overwhelming. This would not be a good thing.

To ensure that no party's task is too onerous or too lenient, I am employing the following burden shifting test: When the spoliating party's conduct is sufficiently egregious to justify a court's *imposition* of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.

#### **D. Remedies**

The remaining question is what remedy should the court impose.

“The determination of an appropriate sanction for spoliation, if any, is confined to

the sound discretion of the trial judge and is assessed on a case-by-case basis.”<sup>38</sup>

Where the breach of a discovery obligation is the non-production of evidence, a court has broad discretion to determine the appropriate sanction.<sup>39</sup> Appropriate sanctions should “(1) deter the parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore ‘the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party.’”<sup>40</sup>

It is well accepted that a court should always impose the least harsh sanction that can provide an adequate remedy. The choices include – from least

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<sup>38</sup> *Fujitsu*, 247 F.3d at 436.

<sup>39</sup> *See Residential Funding*, 306 F.3d at 107. *See also Fujitsu*, 247 F.3d at 436 (reiterating the Second Circuit’s “case-by-case approach to the failure to produce relevant evidence” in determining sanctions); *Reilly*, 181 F.3d at 267 (“Trial judges should have the leeway to tailor sanctions to insure that spoliators do not benefit from their wrongdoing – a remedial purpose that is best adjusted according to the facts and evidentiary posture of each case.”).

<sup>40</sup> *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (quoting *Kronisch*, 150 F.3d at 126).

harsh to most harsh – further discovery,<sup>41</sup> cost-shifting,<sup>42</sup> fines,<sup>43</sup> special jury instructions,<sup>44</sup> preclusion,<sup>45</sup> and the entry of default judgment or dismissal (terminating sanctions).<sup>46</sup> The selection of the appropriate remedy is a delicate matter requiring a great deal of time and attention by a court.

The Citco Defendants request dismissal – the most extreme sanction. However, a terminating sanction is justified in only the most egregious cases,<sup>47</sup> such as where a party has engaged in perjury, tampering with evidence, or

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<sup>41</sup> See, e.g., *Treppel*, 249 F.R.D. at 123-24 (ordering additional discovery, including forensic search of adversary's computer).

<sup>42</sup> See, e.g., *Green (Fine Paintings) v. McClendon*, No. 08 Civ. 8496, 2009 WL 2496275, at \*7 (S.D.N.Y. Aug. 13, 2009) (awarding monetary sanctions to the movant).

<sup>43</sup> See, e.g., *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 25 (D.D.C. 2004) (ordering defendant to pay \$2.75 million in fines).

<sup>44</sup> See, e.g., *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 443-44 (S.D.N.Y. 2009) (ordering an adverse inference instruction as a sanction for defendants' spoliation of evidence).

<sup>45</sup> See, e.g., *Brown v. Coleman*, No. 07 Civ. 1345, 2009 WL 2877602, at \*4 (S.D.N.Y. Sept. 8, 2009) (precluding certain evidence from being introduced at trial).

<sup>46</sup> See, e.g., *Gutman*, 2008 WL 5084182, at \*2 (granting a default judgment for defendants' intentional destruction of evidence).

<sup>47</sup> See *West*, 167 F.3d at 779 (“Because dismissal is a ‘drastic remedy,’ it ‘should be imposed only in extreme circumstances, usually after consideration of alternative, less drastic sanctions.’”) (quoting *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 845 F.2d 1172, 1176 (2d Cir. 1988)).

intentionally destroying evidence by burning, shredding, or wiping out computer hard drives.<sup>48</sup> As described below, there is no evidence of such misconduct in this case.

Instead, the appropriate sanction here is some form of an adverse inference instruction that is intended to alleviate the harm suffered by the Citco Defendants. Like many other sanctions, an adverse inference instruction can take many forms, again ranging in degrees of harshness. The harshness of the instruction should be determined based on the nature of the spoliating party's conduct – the more egregious the conduct, the more harsh the instruction.

In its most harsh form, when a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and

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<sup>48</sup> See, e.g., *Gutman*, 2008 WL 5084182 (granting default judgment where court-appointed digital forensic expert had determined that defendants had tampered with a computer to permanently delete files and conceal the chronology of the deletions); *McMunn v. Memorial Sloan-Kettering Cancer Ctr.*, 191 F. Supp. 2d 440, 446-62 (S.D.N.Y. 2002) (dismissing plaintiff's claims for intentionally and in bad faith lying during depositions, destroying potentially critical evidence which could have harmed her case, repeatedly lying and misleading defendant to prevent the deposition of key witnesses, editing certain tapes before turning them over to defendant so that they would provide stronger evidence in plaintiff's favor, and engaging in a sham transaction to unfairly bolster her claim); *Miller v. Time-Warner Commc'ns*, No. 97 Civ. 7286, 1999 WL 739528, at \*2-\*4 (S.D.N.Y. Sept. 22, 1999) (granting dismissal where plaintiff deliberately erased a harmful handwritten notation and committed perjury in pre-trial proceedings).



must be accepted as true.<sup>49</sup> At the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption.<sup>50</sup> Even a mandatory *presumption*, however, is considered to be rebuttable.<sup>51</sup>

The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party.<sup>52</sup> This sanction still benefits the innocent

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<sup>49</sup> See, e.g., *Smith v. Kmart Corp.*, 177 F.3d 19, 29 n.4 (1st Cir. 1999) (“[I]t is a permissible sanction to instruct a jury to accept certain facts as true.”). See also *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. CA 03-5049, 2005 WL 674885, at \*10 (Fla. Cir. Ct. Mar. 23, 2005) (ordering that portions of plaintiff's amended complaint be read to the jury and then instructing the jury “that those facts are deemed established for all purposes in this action”), *rev'd on other grounds*, 955 So. 2d 1124 (Fla. Dist. Ct. App. 2007).

<sup>50</sup> See, e.g., *West*, 167 F.3d at 780 (“[T]he trial judge could (1) instruct the jury to presume that the exemplar tire was overinflated; (2) instruct the jury to presume that the tire mounting machine and air compressor malfunctioned; and (3) preclude [plaintiff] from offering evidence on these issues.”); *Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177, 1182 (10th Cir. 1999) (“[Y]ou *must presume* that the evidence which Teltrust Phones, Inc. would not provide would have weighed against Teltrust Phones, Inc. and in favor of Knowlton.”) (emphasis added).

<sup>51</sup> See *Knowlton*, 189 F.3d at 1184 (“Because the sanction [of the mandatory presumption] was not a default, however, the presumption was rebuttable.”).

<sup>52</sup> See *Zimmerman v. Associates First Capital Corp.*, 251 F.3d 376, 383 (2d Cir. 2001) (upholding adverse inference instruction that permitted parties to

party in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party.<sup>53</sup> Such a charge should be termed a “spoliation charge” to distinguish it from a charge where the a jury is *directed* to presume, albeit still subject to rebuttal, that the missing evidence would have been favorable to the innocent party, and from a charge where the jury is *directed* to deem certain facts admitted.

Monetary sanctions are also appropriate in this case. “Monetary sanctions are appropriate ‘to punish the offending party for its actions [and] to deter the litigant’s conduct, sending the message that egregious conduct will not be tolerated.’”<sup>54</sup> Awarding monetary sanctions “serves the remedial purpose of compensating [the movant] for the reasonable costs it incurred in bringing [a

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present spoliation evidence to the jury and instructed the jury that it was “permitted, but not required, to infer that [the destroyed] evidence would have been unfavorable to the defendant”); *Reilly*, 181 F.3d at 267; *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Nucor Corp. v. Bell*, 251 F.R.D. 191, 203 (D.S.C. 2008); *Zubulake V*, 229 F.R.D. at 439-40; *see also* Leonard B. Sand, *et al.*, 4 Modern Federal Jury Instructions-Civil ¶ 75.01.

<sup>53</sup> *See Residential Funding*, 306 F.3d at 209 n.4 (“[A] court’s role in evaluating the ‘relevance’ factor in the adverse inference analysis is limited to insuring that the party seeking the inference had adduced enough evidence of the contents of the missing materials such that a reasonable jury *could* find in its favor.”) (emphasis in original).

<sup>54</sup> *Green*, 2009 WL 2496275, at \*6 (quoting *In re WRT Energy Sec. Litig.*, 246 F.R.D. 185, 201 (S.D.N.Y. 2007)).

motion for sanctions].”<sup>55</sup> This sanction is imposed in order to compensate the Citco Defendants for reviewing the declarations, conducting the additional depositions, and bringing this motion.

Three final notes. *First*, I stress that at the end of the day the judgment call of whether to award sanctions is inherently subjective. A court has a “gut reaction” based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply. *Second*, while it would be helpful to develop a list of relevant criteria a court should review in evaluating discovery conduct, these inquiries are inherently fact intensive and must be reviewed case by case. Nonetheless, I offer the following guidance.

After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party’s possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information

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<sup>55</sup> *Id.*

or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Finally, I note the risk that sanctions motions, which are very, very time consuming, distracting, and expensive for the parties and the court,<sup>56</sup> will be increasingly sought by litigants. This, too, is not a good thing. For this reason alone, the most careful consideration should be given before a court finds that a party has violated its duty to comply with discovery obligations and deserves to be sanctioned. Likewise, parties need to anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions.

### III. PROCEDURAL HISTORY<sup>57</sup>

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<sup>56</sup> I, together with two of my law clerks, have spent an inordinate amount of time on this motion. We estimate that collectively we have spent close to three hundred hours resolving this motion. I note, in passing, that our blended hourly rate is approximately thirty dollars per hour (!) well below that of the most inexperienced paralegal, let alone lawyer, appearing in this case. My point is only that sanctions motions, and the behavior that caused them to be made, divert court time from other important duties – namely deciding cases on the merits.

<sup>57</sup> This was not the first Lancer-related suit filed. UM filed a complaint with the Financial Services Commission of the British Virgin Islands on March 23, 2003 seeking redemption of its shares in the Funds. *See* 4/8/04 Affidavit of Johnny Quigley, former director of Chagnon Foundation, Ex. 1 to the 6/26/09 Declaration of Dyanne Feinberg, the Citco Defendants' counsel ("Feinberg Decl.") ("Quigley Aff."), ¶ 10(b). In June 2003, UM engaged White & Case LLP to commence an action against Lauer and Lancer and a complaint was filed (the "First Complaint"). *See* 3/27/08 Declaration of Andree Mayrand, Director,

In the summer of 2003, a group of investors formed an ad hoc “policy consultative committee” to represent the interests of the Funds’ investors, including “monitor[ing] the court proceedings” against Lancer and the Funds and “retain[ing] legal counsel as necessary . . . .”<sup>58</sup> On September 17 and 18, 2003, this group of investors met prospective legal counsel.<sup>59</sup> Although some plaintiffs had previously retained counsel,<sup>60</sup> in October or November, 2003,<sup>61</sup> plaintiffs

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Investment Management of UM, Ex. 2 to the Declaration of Lance Gotko, plaintiffs’ counsel (“Gotko Decl.”) (“Mayrand Decl.”), ¶ 2. In July 2003, the Securities Exchange Commission (“SEC”) brought an action against Lauer and Lancer in connection with the Funds. *See Securities and Exchange Commission v. Lauer*, No. 03 Civ. 80612 (S.D. Fla. 2003) (the “SEC Action”). At the request of the Receiver appointed in the SEC Action, UM withdrew its First Complaint. In September 2003, UM engaged Hoguet Newman Regal & Kenney, LLP to commence an action against Lancer’s service providers and filed a second complaint (the “Second Complaint”). *See Mayrand Decl.* ¶ 3. In January 2004, UM withdrew the Second Complaint and engaged Counsel to commence this action on its behalf. *See id.* ¶ 4. Scott Berman has served as lead counsel for plaintiffs throughout this litigation. He was originally with Brown Rudnick Berlack Israels (“BRBI”), but, on January 10, 2005, his present law firm, Friedman Kaplan Seiler & Adelman LLP (“FKSA”) was substituted as counsel of record for plaintiffs. Reference to Berman his present and former firms is intended by the use of the term “Counsel.”

<sup>58</sup> Quigley Aff. ¶ 15.

<sup>59</sup> *See id.* ¶ 19.

<sup>60</sup> In March 2003, the Chagnon Plaintiffs retained counsel “in connection with matters related to its investment in the Funds.” *Id.* ¶¶ 10-11. Hunnicutt also engaged counsel in March 2003 to file a complaint against Lancer and the Funds “to recover fees owed . . . for marketing services [he] performed . . . .” Declaration of William Hunnicutt, President of Hunnicutt & Co., Inc., Ex. 4

retained BRBI and Berman as lead counsel for this suit.<sup>62</sup> This lawsuit was then instituted on February 12, 2004 in the Southern District of Florida.<sup>63</sup> On October 25, 2005, the case was transferred to this Court as a result of defendants' motion to transfer venue.

#### IV. PLAINTIFFS' EFFORTS AT PRESERVATION AND PRODUCTION

Shortly after its retention in October or November, 2003, Counsel contacted plaintiffs to begin document collection and preservation.<sup>64</sup> Counsel

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to Gotko Decl. ("Hunnicut Decl."), ¶ 2. In mid-2003, Okabena engaged Foley & Lardner LLP to file a claim in the United States Bankruptcy Court for the District of Connecticut against Lancer, Lauer and others. *See* Declaration of Sherry Van Zee, Vice President of Investment Administration and Chief Compliance Officer of Okabena Investment Services, Inc., Ex. 4 to Gotko Decl. ("Van Zee Decl."), ¶¶ 2, 4. All plaintiffs have retained current Counsel in connection with this action.

<sup>61</sup> Although plaintiffs represent that Counsel was retained in November 2003, at least one email indicates that Counsel may have been retained as early as October 17, 2003. *See* 10/17/03 Email to Counsel, Ex. 12 to Gotko Decl., at IC 1. Documents with page numbers "IC \_\_\_\_" are documents submitted to the Court *in camera* and remain subject to the attorney-client privilege. I disclose no more information than necessary to identify the documents on which I rely.

<sup>62</sup> *See* Quigley Aff. ¶ 19.

<sup>63</sup> Plaintiffs note that they have "objected to producing any documents dated after February 12, 2004 (the date this action was commenced)." *See* Plaintiffs' Memorandum of Law in Opposition to the Citco Defendants' Motion for Sanctions ("Pl. Opp.") at 10. Plaintiffs do not disclose whether they raised this objection in response to a motion to compel from the Citco Defendants or whether both parties agreed to the February 12, 2004 discovery cutoff.

<sup>64</sup> *See* 10/17/03 Email to Counsel, Ex. 12 to Gotko Decl., at IC 1.

telephoned and emailed plaintiffs and distributed memoranda instructing plaintiffs to be over, rather than under, inclusive, and noting that emails and electronic documents should be included in the production.<sup>65</sup> Counsel indicated that the documents were necessary to draft the complaint, although they did not expressly direct that the search be limited to those documents.<sup>66</sup>

This instruction does not meet the standard for a litigation hold. It does not direct employees to *preserve* all relevant records – both paper and electronic – nor does it create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee.<sup>67</sup> Rather, the directive places total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel.<sup>68</sup> Throughout the litigation, Counsel sent plaintiffs monthly case status

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<sup>65</sup> See 11/11/03 Memorandum to Investors from Counsel, Ex. 12 to Gotko Decl. (“11/11/03 Memorandum”) at IC 5; 8/5/09 Declaration of Travis A. Corder, plaintiffs’ counsel, in Opposition to Citco Defendants’ Motion for Sanctions (“Corder Decl.”) ¶ 4.

<sup>66</sup> See 11/11/03 Memorandum.

<sup>67</sup> See Shira A. Scheindlin, *et al.*, *Electronic Discovery and Digital Evidence: Cases and Materials* 147-49 (2009) (providing a sample litigation hold, including instruction to “immediately suspend the destruction of any responsive” paper or electronic documents or data).

<sup>68</sup> See, *e.g.*, *Adams v. Dell*, 621 F. Supp. 2d 1173, 1194 (D. Utah 2009) (holding that defendant had violated its duty to preserve information, in part

memoranda, which included additional requests for Lancer-related documents, including electronic documents. But these memoranda never specifically instructed plaintiffs not to destroy records so that Counsel could monitor the collection and production of documents.<sup>69</sup>

In 2004, a stay pursuant to the Private Securities Litigation Reform Act (“PSLRA”) was instituted and remained in place until early 2007.<sup>70</sup> Counsel “did not focus [their] efforts . . . on discovery” while the PSLRA discovery stay

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because the defendant’s preservation practices “place operations-level employees in the position of deciding what information is relevant”); *see also Zubulake V*, 229 F.R.D. at 432 (“[I]t is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information.”) (emphasis in original). I note that not every employee will require hands-on supervision from an attorney. However, attorney oversight of the process, including the ability to review, sample, or spot-check the collection efforts is important. The adequacy of each search must be evaluated on a case by case basis.

<sup>69</sup> See 8/7/09 Declaration of Amy C. Brown, plaintiffs’ counsel, in Opposition to Citco Defendants’ Motion for Sanctions (“Brown Decl.”) ¶¶ 5-14, 16, 20, 21, 22, 26-33, 38 (and documents cited therein).

<sup>70</sup> See Corder Decl. ¶ 10. In June, 2004, defendants moved to dismiss the First Amended Complaint. As a result, discovery was stayed pursuant to the PSLRA. *See* 15 U.S.C. §§ 77z-1(b)(1); 78u-4(b)(3)(B). In September, 2005, the district court in Florida denied defendants’ motion to dismiss, without prejudice, and ordered this matter transferred to this District. Various motions and amendments of pleadings caused the continuation of the discovery stay until February 2007, when this Court resolved defendants’ motions to dismiss the Second Amended Complaint.



was in place and plaintiffs did not issue a written litigation hold until 2007.<sup>71</sup> In May, 2007, the Citco Defendants made their first document requests.<sup>72</sup>

Depositions of plaintiffs commenced on August 30, 2007. Those depositions revealed that there were gaps in plaintiffs' document production.<sup>73</sup> By October, 2007, the Citco Defendants were dissatisfied with plaintiffs' efforts to produce missing documents.<sup>74</sup> In response to a request from the Citco Defendants, the Court ordered plaintiffs to provide declarations regarding their efforts to preserve and produce documents.<sup>75</sup>

Counsel spent a huge amount of time preparing the declarations, including drafting, questioning plaintiffs' employees, and attempting to locate

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<sup>71</sup> Pl. Opp. at 4. Plaintiffs' statement implies that somehow they were absolved of their collection and preservation obligations while the PSLRA stay was in place. But this would directly contravene the PSLRA, which expressly requires parties to preserve all potentially relevant evidence during the pendency of a stay and provides for sanctions for a failure to comply. *See* 15 U.S.C. § 78u-4(b)(3).

<sup>72</sup> *See* Brown Decl. ¶ 24.

<sup>73</sup> *See* 10/1/07 Letter from Feinberg to Berman, Ex. 1 to the 9/15/09 Supplemental Declaration of Dyanne Feinberg ("Supp. Feinberg Decl.") ("10/1/07 Feinberg Letter"); Brown Decl. ¶ 28.

<sup>74</sup> *See* 10/1/07 Feinberg Letter.

<sup>75</sup> *See* 10/30/07 Hearing Transcript, Ex. 1 to Feinberg Decl.

documents that had not yet been produced.<sup>76</sup> Counsel emphasized to each declarant the importance of the declarations' accuracy and that each should be carefully reviewed prior to its execution.<sup>77</sup> In a systematic manner, each declaration identifies the declarant's relationship to the plaintiff and that, upon retaining Counsel in late 2003 or early 2004 – if not earlier – the steps plaintiff took to locate and preserve documents relating to its Lancer investment (the “2003/2004 Search”). Most declarations also discuss receiving, and complying with, a second search request in late 2007 or early 2008 (the “2007/2008 Search”). Each declarant states that he or she believes the company located, preserved, and produced “all” Lancer-related documents in its possession at the time of either the 2003/2004 search, the 2007/2008 search, or both. Each declarant also states that no responsive documents in plaintiff's possession, custody, or control were discarded or destroyed following a specific point in time – either after the “request to preserve them,” a specified date, or after the declarant arrived at the company.

Plaintiffs' declarations were submitted in the first half of 2008. At

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<sup>76</sup> See 8/6/09 Declaration of Lizbeth Parker, plaintiffs' counsel, in Opposition to Citco Defendants' Motion for Sanctions (“Parker Decl.”) ¶ 5 (attesting to a total of 910 hours). FKSA handled all declarations except for the initial declarations of Scott Letier and Ian Trumpower of 2M. These were produced by 2M's additional counsel, Curran Tomko Tarski, LLP. See *id.* ¶ 8.

<sup>77</sup> See Emails from Counsel to plaintiffs, Ex. 14 to Gotko Decl., at IC 18-24.

least four declarants submitted amended declarations,<sup>78</sup> and at least one deponent submitted a declaration containing information not revealed prior to his deposition.<sup>79</sup> The Citco Defendants then sought to depose certain declarants and other relevant individuals. The Court granted that request.<sup>80</sup> The Citco Defendants found additional gaps in plaintiffs' productions. By cross referencing the productions of other plaintiffs, former co-defendants, and the Receiver in the SEC Action, the Citco Defendants were able to identify at least 311 documents from twelve of the thirteen plaintiffs (all but the Bombardier Foundation) that should have been in plaintiffs' productions, but were not included ("311 Documents").<sup>81</sup> In addition, the Citco Defendants discovered that almost all of the

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<sup>78</sup> These declarants include Letier and Trumpower of 2M, Isabelle Poissant of L'Ecole Polytechnique, and Normand Gregoire of the Chagnon Plaintiffs. The circumstances surrounding the amendments made by Letier and Trumpower are discussed *infra* at Part V.D.1.a.

<sup>79</sup> See Hunicutt Decl. ¶ 8 (revealing that he recalled after his deposition that sometime prior to March 13, 2003, Hunnicutt "inadvertently deleted [his] sent e-mail messages from his computer. While some pre-March 2003 e-mail survived, the overwhelming majority were lost . . .").

<sup>80</sup> See 4/22/08 Hearing Transcript, Ex. 1 to Feinberg Decl. Some declarants had been deposed prior to submitting declarations and were not deposed again.

<sup>81</sup> The Citco Defendants have provided a chart for each plaintiff identifying the documents they believe should have been produced by that plaintiff. Each document is identified by date, sender, recipient, Bates number, and deposition exhibit number. The parties employed a system that identified the

declarations were false and misleading and/or executed by a declarant without personal knowledge of its contents.

## V. DISCUSSION

### A. Duty to Preserve and Document Destruction

By April, 2003, Lancer had filed for bankruptcy, UM had filed a complaint with the Financial Services Commission of the British Virgin Islands, Hunnicutt and the Chagnon Plaintiffs had retained counsel, and the Chagnon Plaintiffs had initiated communication with a number of other plaintiffs. It is unreasonable to assume that the remaining plaintiffs – all sophisticated investors – were unaware of the impending Lancer collapse while other investors were filing suit and retaining counsel. Accordingly, each plaintiff was under a duty to preserve at that time. While, as discussed below, the duty to issue a written litigation hold might not have been well established at that time, it was beyond cavil that the duty to preserve evidence included a duty to preserve electronic records.<sup>82</sup>

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party that produced that document as part of the Bates number. For example, the Bates number for a document produced by the Chagnon Plaintiffs begins “CHAG \_\_\_” and the Bates number for a document produced by the Altar Fund begins “ALT \_\_\_.” The Bates number on a document that the Citco Defendants claim a particular plaintiff failed to produce identifies the entity that did produce it.

<sup>82</sup> This duty was well established as early as 1985 and has been repeatedly stated by courts across the country. *See, e.g., Rowe Enter., Inc. v.*

The burden then falls to the Citco Defendants to demonstrate that documents were destroyed after the duty to preserve arose. The Citco Defendants first point to the 311 Documents, most of which post-date the onset of plaintiffs' duty to preserve. Thus, those plaintiffs that failed to produce these documents clearly failed to preserve and produce relevant documents that existed at the time (or shortly after) the duty to preserve arose. This is not true, however, with respect to the Bombardier Foundation, Commonfund, KMEFIC, and UM.<sup>83</sup> While three of these plaintiffs (all but the Bombardier Foundation) failed to produce documents that the Citco Defendants now have, those documents are older records that may not have been in plaintiffs' possession and/or control at the time the duty to preserve arose.

In addition to citing specific documents not produced by each plaintiff, the Citco Defendants next ask this Court to assume that each plaintiff

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*William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002) (stating that “[e]lectronic documents are no less subject to disclosure than paper records” (citing, *inter alia*, *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 461 (D. Utah 1985))).

<sup>83</sup> See Documents Not Produced by Commonfund, Ex. 11 to Feinberg Decl., (emails between 7/12/99 and 4/10/02); Deposition of Abdullateef Al-Tammar, Ex. 11 to Feinberg Decl. (“Al-Tammar Dep.”), at 90-92 (1997 Executive Summary prepared by KMEFIC); five UM documents, 9/30/98 Letter, Ex. 13 to Feinberg Decl., 6/30/99 Letter, Ex. 13 to Feinberg Decl., 4/02 and 7/02 Poulin Notes, Ex. 13 to Feinberg Decl., 1999 Lancer Year End Review Newsletter, Ex. 13 to Feinberg Decl. The Citco Defendants have failed to identify *any* documents or emails not produced by the Bombardier Foundation.

also received or generated documents that have not been produced by anyone and are now presumed to be missing.<sup>84</sup> Plaintiffs call such a request “absurd” and argue that any such inference would be based on no more than “rank speculation.”<sup>85</sup> The Citco Defendants’ argument is by far the more compelling.

All plaintiffs had a fiduciary duty to conduct due diligence before making significant investments in the Funds. Surely records must have existed documenting the due diligence, investments, and subsequent monitoring of these investments. The paucity of records produced by some plaintiffs<sup>86</sup> and the admitted failure to preserve some records or search at all for others by all plaintiffs leads inexorably to the conclusion that relevant records have been lost or destroyed.<sup>87</sup>

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<sup>84</sup> See Citco Defendants’ Motion for Sanctions (“Citco Mem.”) at 4.

<sup>85</sup> Pl. Opp. at 3.

<sup>86</sup> Coronation produced *no* documents from 1999 to 2000, and very few documents from 2001 to 2002. The Chagnon Plaintiffs produced only four documents from 1998 through 2002. Okabena produced only ten emails for the entire relevant period.

<sup>87</sup> For example, in August, 2009, 2M produced nearly seven hundred additional emails, over one hundred of which were copied to, but never produced by, Coronation, the Chagnon Plaintiffs, Okabena, Bombardier Trusts, L’Ecole Polytechnique, and the Altar Fund. See Citco Defendants’ Reply Memorandum in Support of Their Motion for Sanctions (“Citco Reply”) at 7 n.10.

## B. Culpability<sup>88</sup>

The age of this case requires a dual analysis of culpability – plaintiffs’ conduct before and after 2005. The Citco Defendants contend that plaintiffs acted willfully or with reckless disregard, such that the sanction of dismissal is warranted.<sup>89</sup> Plaintiffs admit that they failed to institute written litigation holds until 2007 when they returned their attention to discovery after a four year hiatus. Plaintiffs should have done so no later than 2005, when the action was transferred to this District. This requirement was clearly established in this District by mid-2004, after the last relevant *Zubulake* opinion was issued.<sup>90</sup> Thus, the failure to do so as of that date was, at a minimum, grossly negligent. The severity of this misconduct would have justified severe sanctions had the Citco Defendants

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<sup>88</sup> The culpability, relevance of lost documents, prejudice, and appropriate sanctions are evaluated for each plaintiff *infra* Part V.D.

<sup>89</sup> See Citco Mem. at 1.

<sup>90</sup> See *Zubulake V*, 229 F.R.D. 422. While a duty to preserve existed in the Southern District of Florida at the time this action was filed, no court in the Eleventh Circuit articulated a “litigation hold” requirement until 2007. Compare *Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 F. Supp. 2d 1273, 1277 (S.D. Fla. 1999) (“A litigant is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in an action. . . . Sanctions may be imposed upon litigants who destroy documents while on notice that they are or may be relevant to litigation or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence.”) with *In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 663 (M.D. Fla. 2007) (adopting the Southern District of New York’s litigation hold requirement).

demonstrated that any documents were destroyed *after* 2005. They have not done so.<sup>91</sup> It is likely that most of the evidence was lost before that date due to the failure to institute written litigation holds.

Almost all plaintiffs' pre-2005 conduct, apart from the failure to issue written litigation holds, is best characterized as either grossly negligent or negligent because they failed to execute a comprehensive search for documents and/or failed to sufficiently supervise or monitor their employees' document collection. For some plaintiffs, no further evidence of culpable conduct is offered. For others, the Citco Defendants have provided additional evidence. For example, one plaintiff – the Bombardier Foundation – admitted that it destroyed backup data in 2004, after the duty to preserve at least some backup tapes was well-established. Similarly, several plaintiffs failed to collect and preserve documents of key players – including members of investment committees and/or boards of directors.<sup>92</sup> One further problem bears mention. Each plaintiff was directed by

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<sup>91</sup> See *Farella v. City of New York*, Nos. 05 Civ. 5711 & 05 Civ. 8264, 2007 WL 193867, at \*2 (S.D.N.Y. Jan. 25, 2007) (“[F]or sanctions to be appropriate, it is a necessary, but insufficient, condition that the sought-after evidence actually existed and was destroyed.”) (emphasis omitted).

<sup>92</sup> These plaintiffs include Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation. See, e.g., *In re NTL Sec. Litig.*, 244 F.R.D. at 198-99 (finding gross negligence when not all key players received the litigation hold memoranda).



this Court to submit a declaration documenting its search efforts for two periods – 2003/2004 and 2007/2008, as well as any steps taken in between. In the end, almost every plaintiff submitted a declaration that – at best – lacked attention to detail, or – at worst – was intentionally vague in an attempt to mislead the Citco Defendants and the Court. In addition, plaintiffs had a duty to adequately prepare knowledgeable witnesses with respect to these topics. Which files were searched, how the search was conducted, who was asked to search, what they were told, and the extent of any supervision are all topics reasonably within the scope of the inquiry. Several plaintiffs violated this duty.<sup>93</sup>

From my review of the evidence submitted by the parties and discussed at the hearings held on October 30, 2007 and April 22, 2008, I conclude that no plaintiff engaged in willful misconduct. However, as outlined below, I find that 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts,

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<sup>93</sup> All plaintiffs failed in this duty to the extent that they stated that *all* documents were produced when this was not so. However, in particular, 2M, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation submitted misleading or inaccurate declarations. *See, e.g., Continental Cas. Co. v. Compass Bank*, No. 04 Civ. 766, 2006 WL 533510, at \*17 (S.D. Ala. Mar. 3, 2006) (ordering monetary sanctions where affidavit suggested that defendant had not found any responsive documents in its possession at the time of the request, but responsive documents were later found after a more thorough search). While Counsel took substantial steps to ensure that plaintiffs' declarations were truthful, the declarants appear to have ignored Counsel's instructions to verify the accuracy of the declaration prior to signing.

and the Bombardier Foundation acted with gross negligence, and the Altar Fund, L'Ecole Polytechnique, Okabena, the Corbett Foundation, Commonfund, KMEFIC, and UM acted in a negligent manner.

### **C. Relevance and Prejudice**

For those plaintiffs that were grossly negligent, I find that the Citco Defendants have “adduced enough evidence” that plaintiffs have failed to produce relevant documents and that the Citco Defendants have been prejudiced as a result. Thus, a jury will be permitted to presume, if it so chooses, both the relevance of the missing documents and resulting prejudice to the Citco Defendants, subject to the plaintiffs’ ability to rebut the presumption to the satisfaction of the trier of fact.

For those plaintiffs that were negligent, the Citco Defendants must demonstrate that any destroyed documents were relevant and the loss was prejudicial. To meet this burden, the Citco Defendants begin by pointing to the 311 Documents. While many of these documents may be relevant, the Citco Defendants suffered no prejudice because all were eventually obtained from other sources. As noted by plaintiffs, “Citco possesses every one of the 311 [D]ocuments; indeed, every one of these documents was marked as an exhibit and used by Citco at depositions.”<sup>94</sup> The Citco Defendants had the opportunity to

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<sup>94</sup> Pl. Opp. at 6.

question witnesses about these documents and will be able to introduce them at trial. Severe sanctions based on the failure to produce the 311 Documents is not justified.

By contrast, it is impossible to know the extent of the prejudice suffered by the Citco Defendants as a result of those emails and documents that have been permanently lost due to plaintiffs' conduct. The volume of missing emails and documents can never be learned, nor can their substance be known. "Because we do not know what has been destroyed, it is impossible to accurately assess what harm has been done to the [innocent party] and what prejudice it has suffered."<sup>95</sup> Such documents may have been helpful to the Citco Defendants, helpful to plaintiffs, or of no value to any party. But it is plaintiffs' misconduct that destroyed the emails and documents. Given the facts and circumstances presented here, I can only conclude that the Citco Defendants have carried their

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<sup>95</sup> *Philip Morris*, 327 F. Supp. 2d at 25. *Accord United States ex rel. Miller v. Holzmann*, No. 95 Civ. 1231, 2007 WL 781941, at \*1 (D.D.C. Mar. 12, 2007) ("The government's conduct created a situation where we cannot assess exactly what or how much information was lost and what or how much information was important to the defendants' case. It would defy logic at this point to give the government the benefit of the doubt on its word alone that it gave the defendants the functional equivalent of the information contained within those documents in some form or another. The government is in little better position to make such a statement based on information or belief than defendant is in arguing that every document destroyed was a potential 'smoking gun.' The documents are lost. The fact is that there is no way of verifying either contention, and this is caused directly by the government's conduct in handling these documents.").

limited burden<sup>96</sup> of demonstrating that the lost documents would have been relevant. The documents that no longer exist were created during the critical time period. Key players must have engaged in correspondence regarding the relevant transactions. There can be no serious question that the missing material would have been relevant.

Prejudice is another matter. The Citco Defendants have gathered an enormous amount of discovery – both from documents and witnesses.<sup>97</sup> Unless they can show through extrinsic evidence that the loss of the documents has prejudiced their ability to defend the case, then a lesser sanction than a spoliation charge is sufficient to address any lapse in the discovery efforts of the negligent plaintiffs.

#### **D. Individual Plaintiffs**

Because this motion involves the conduct of thirteen plaintiffs, and

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<sup>96</sup> While I have already noted that this burden cannot be too strict, the citation bears repeating. *See Residential Funding*, 306 F.3d at 109 (noting that the prejudiced party should not be held “to too strict a standard of proof regarding the likely contents of the destroyed evidence,’ because doing so ‘would . . . allow parties who have . . . destroyed evidence to profit from that destruction’”) (quoting *Kronisch*, 150 F.3d at 128).

<sup>97</sup> Plaintiffs state that they “produced some 43,000 pages of documents . . . .” Pl. Opp. at 4. They do not explain, however, whether the 43,000 figure includes all ninety-six plaintiffs, the twenty Phase I plaintiffs, or the thirteen plaintiffs discussed in this motion.

because the Citco Defendants have charged each plaintiff with distinct discovery misconduct, a factual summary as to each plaintiff is required.<sup>98</sup> In addition, because the stakes are high for both sides, and because sanctions should not be awarded lightly nor should discovery misconduct be tolerated, it is important to carefully review that conduct to determine whether any plaintiff engaged in culpable conduct and, if so, what level of culpability should be assigned. Each plaintiff's discovery efforts is described below together with my determination of the adequacy of those efforts .

#### **1. Plaintiffs that Acted in a Grossly Negligent Manner**

As detailed below, 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation were grossly negligent in their discovery efforts. In each instance, these plaintiffs' 2003/2004 Searches were severely deficient. In addition to failing to institute a timely written litigation hold, one or more of these plaintiffs failed to collect or preserve *any* electronic documents prior to 2007, continued to delete electronic documents after the duty to preserve arose, did not request documents from key players, delegated

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<sup>98</sup> The parties submitted nearly sixty-five pages of briefing consisting almost entirely of factual arguments and almost five hundred pages of evidence. To detail every plaintiff's search efforts and their alleged faults would be extremely onerous. Although all submitted materials were carefully considered, this Opinion and Order sets forth a limited recitation of the material evidence.

search efforts without any supervision from management, destroyed backup data potentially containing responsive documents of key players that were not otherwise available, and/or submitted misleading or inaccurate declarations.<sup>99</sup> From this conduct, it is fair to presume that responsive documents were lost or destroyed. The relevance of any destroyed documents and the prejudice caused by their loss may also be presumed.

Because this permissive presumption is rebuttable, I find that no reasonable juror could conclude that the Citco Defendants were prejudiced by plaintiffs' failure to produce the 311 Documents. With regard to those documents that are missing or destroyed, however, the Citco Defendants are entitled to a spoliation instruction permitting the jury to presume, if it so chooses, that these documents would have been both relevant and prejudicial. The jury must then consider whether the plaintiffs have successfully rebutted this presumption. If plaintiffs succeed, no adverse inference will be drawn. If plaintiffs cannot rebut the presumption, the jury will be entitled to draw an adverse inference in favor of

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<sup>99</sup> A cautionary note with respect to backup tapes is warranted. I am not requiring that *all* backup tapes must be preserved. Rather, if such tapes are the *sole* source of relevant information (*e.g.*, the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes. *See* Fed. R. Civ. P. 26(b)(2)(B).

the Citco Defendants.

**a. 2M**

In his October, 2007 deposition, Letier, 2M's former Chief Financial Officer ("CFO"), testified that although he served as the lead contact with Counsel prior to leaving 2M in 2004, he was not in charge of gathering and producing documents.<sup>100</sup> He further testified that he neither took any steps to ensure that emails relating to the Funds were not deleted nor was he aware of anyone else at 2M doing so.<sup>101</sup> He testified that he did not recall "ever giv[ing] instructions to anyone to preserve" Lancer-related documents and never received any such instructions.<sup>102</sup> On March 31, 2008, Letier submitted a declaration stating that he directed other employees to locate and preserve Lancer-related documents and that "all documents" related to Lancer had been produced to Counsel during the 2003/2004 Search.<sup>103</sup> Letier also declared that to the best of his knowledge no Lancer-related documents were discarded or destroyed after Counsel instructed

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<sup>100</sup> See Deposition of Scott Letier, Ex. 2 to Feinberg Decl. & Ex. 1 to Supp. Feinberg Decl. ("Letier Dep."), at 27, 100-101.

<sup>101</sup> See *id.* at 109-110.

<sup>102</sup> *Id.* at 110.

<sup>103</sup> 3/31/08 Declaration of Scott Letier, Ex. 2 to Feinberg Decl., ¶¶ 3, 4.

2M to locate all documents in its possession in late 2003 or early 2004.<sup>104</sup>

Subsequently, Letier amended his declaration to clarify that only “*paper documents*” had been produced.<sup>105</sup>

Trumpower, 2M’s current CFO and General Counsel, also submitted a declaration requiring amendment. Trumpower’s initial declaration indicated that 2M had searched for electronic documents prior to his arrival at 2M in 2007. In his amended declaration, Trumpower clarified that his declaration addressed only the 2007/2008 Search.<sup>106</sup> Trumpower also declared that to the best of his knowledge, all relevant documents in 2M’s possession at the time of the 2007/2008 Search were submitted to Counsel and no documents had been discarded or destroyed at 2M since his arrival in February 2007.<sup>107</sup> Trumpower

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<sup>104</sup> See *id.* ¶¶ 2, 5-6.

<sup>105</sup> 6/19/08 Amended Declaration of Scott Letier, Ex. 1 to Gotko Decl., ¶ 4 (emphasis added).

<sup>106</sup> Compare Declaration of Ian Trumpower, Ex. 2 to Feinberg Decl., ¶ 3 (“In October 2007, 2M was requested (the ‘Request’) to conduct *another search* for any electronic documents and e-mails relating to the Meyerson Entities’ investments in Lancer.”) (emphasis added) with Amended Declaration of Ian Trumpower, Ex. 1 to Gotko Decl., (“Am. Trumpower Decl.”) ¶ 3 (“In October 2007, 2M was requested to conduct another search, *including a search for any electronic documents and e-mails relating to the Meyerson Entities’ investments in Lancer*. In May 2008, 2M was requested to confirm that it had searched its network computer server for any electronic documents relating to Lancer that were not attachments to emails (together, the ‘Request’).”).

<sup>107</sup> See Am. Trumpower Decl. ¶¶ 2, 5-6.



testified that no emails had been deleted from 2M's server since 2004 and personal folders were not automatically deleted from 2M's network.<sup>108</sup> The Citco Defendants also complain that 2M failed to produce "reams of research" on Lancer referenced in Trumpower's deposition and another email.<sup>109</sup> This research was, in fact, destroyed after April, 2003.<sup>110</sup> Finally, the Citco Defendants have identified forty-six emails<sup>111</sup> that were sent or received by 2M between June 9, 2003 and October 28, 2003, that were not produced by 2M.<sup>112</sup> 2M "did not produce a single

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<sup>108</sup> See Deposition of Ian Trumpower, Ex. 5 to Gotko Decl., at 49; 8/7/09 Declaration of Andrew S. Pak, plaintiffs' counsel, in Opposition to Citco Defendants' Motion for Sanctions ("Pak Decl.") ¶¶ 22-24. The majority of the Pak Declaration is comprised of inadmissible hearsay gleaned from "follow-up" information from clients. Only those portions of the Pak Declaration substantiated by documentary evidence were considered. See *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988) ("A hearsay affidavit is not a substitute for the personal knowledge of a party."). Even if the unsubstantiated assertions in the Pak Declaration had been considered, they would not have affected the outcomes for any plaintiff.

<sup>109</sup> Citco Mem. at 7.

<sup>110</sup> See 4/22/08 Email to Counsel, Ex. 14 to Gotko Decl., at IC 25.

<sup>111</sup> Plaintiffs quibble with defendants over the number of emails each plaintiff failed to produce, arguing, among other things, that defendants double counted emails. For example, if a single email was sent to five plaintiffs and no plaintiff produced the email, the Citco Defendants counted the email against each plaintiff that received it. Plaintiffs' argument is unavailing. If each plaintiff had preserved and produced the same email, then the Citco Defendants should have received five copies it – one from each plaintiff.

<sup>112</sup> See Documents Not Produced by [2M], Ex. 2 to Feinberg Decl.

email or electronic document” until 2008.<sup>113</sup> Then, on August 7 and 21, 2009, just days after plaintiffs submitted their opposition to this motion, 2M produced 8,084 pages of documents – more than three times the number of documents previously produced.<sup>114</sup> This production included nearly seven hundred emails.<sup>115</sup>

The Citco Defendants have shown that 2M took no action to collect or preserve electronic documents prior to 2007, did not produce a single email or electronic document until 2008, and then dumped thousands of pages on the Citco Defendants only when it faced the prospect of sanctions.<sup>116</sup> Although 2M can verify that it has not deleted any emails from its server since 2004, there is no similar representation for the most relevant period – *i.e.*, *prior* to 2004. 2M also concedes that its employees’ collection lacked oversight and that no direction was given either orally or in writing to preserve documents or cease deleting emails, until a written litigation hold was issued in 2007. Finally, 2M’s initial declarations were misleading as to whether 2M had conducted any electronic searches prior to 2007. These declarations, alone, would have supported a finding

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<sup>113</sup> Citco Mem. at 5.

<sup>114</sup> See Citco Reply at 7 n.10.

<sup>115</sup> See *id.*

<sup>116</sup> That documents were suddenly discovered a few months ago only heightens the concern that there may be additional relevant documents that still have not been produced.

of bad faith. However, given that each declarant submitted an amended declaration within a reasonable time of being notified of the deficiencies in the original declaration,<sup>117</sup> 2M's conduct, on the whole, amounts to gross negligence.

**b. Hunnicutt**

At his deposition, William Hunnicutt, President of Hunnicutt, testified that to the best of his recollection, he maintained all of the emails he sent regarding Lancer from the inception of his relationship with Lancer in April 1998 through the first quarter of 2003.<sup>118</sup> However, Mr. Hunnicutt also testified that he had a practice of deleting emails unless he “felt there was an important reason to keep them” and did not recall anyone ever instructing him to discontinue that practice.<sup>119</sup> In addition, Mr. Hunnicutt took no steps during the 2003/2004 Search to request documents from, or search the files of, one current and one former employee to whom Hunnicutt assigned Lancer-related work.<sup>120</sup> Some of this work was done by the employees on their personal computers outside of Hunnicutt's

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<sup>117</sup> See Fed. R. Civ. P. 26(e)(1).

<sup>118</sup> See Deposition of William Hunnicutt, Ex. 3 to Feinberg Decl. (“Hunnicutt Dep.”), at 25-27.

<sup>119</sup> *Id.* at 36-37. *Accord* Pl. Opp. at 10 (admitting that after November 2003, “Hunnicutt apparently did not alter his practice of deleting received emails that he did not think sufficiently important to be saved”).

<sup>120</sup> See Hunnicutt Dep. at 32-35. The record does not reflect when the former employee stopped working for Hunnicutt.

offices.<sup>121</sup> When shown emails he had sent but not produced, Mr. Hunnicutt could not explain why he had not produced them.<sup>122</sup> However, when Mr. Hunnicutt submitted his declaration approximately two months later, he stated that he now recalled having accidentally deleted his email “sent” file prior to March 13, 2003.<sup>123</sup> The Citco Defendants have identified fifty-seven emails that Mr. Hunnicutt sent between February 3, 1999 and May 14, 2003, but did not produce.<sup>124</sup>

Mr. Hunnicutt’s continued deletion of emails long after 2003 is inexcusable, as is Hunnicutt’s failure to seek *any* Lancer-related documents or emails from one current employee and one former employee who worked on the Lancer investment.<sup>125</sup> These actions and inactions – including the loss of the fifty-

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<sup>121</sup> *See id.*

<sup>122</sup> *See id.* at 26, 37-38.

<sup>123</sup> *See* Hunnicutt Decl. ¶ 8.

<sup>124</sup> *See* Documents From Hunnicutt Not Produced, Ex. 3 to Feinberg Decl. While only one of these emails post-date April, 2003, it is likely that as of that date many of these emails would have been in the possession of Hunnicutt, as most entities maintain electronic records for at least a year on active servers or on backup media.

<sup>125</sup> Although this employee’s files were not physically in Hunnicutt’s possession because she worked outside Hunnicutt’s offices, this fact does not affect Hunnicutt’s obligation to search her files. *See In re NTL, Inc. Sec. Litig.*, 244 F.R.D. at 195 (“Under Rule 34, control does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party’s control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the

seven emails – lead inexorably to the conclusion that relevant documents were not produced and are now lost. This conduct amounts to gross negligence.

**c. Coronation**

Coronation, operating out of offices in London and Cape Town, South Africa, delegated the 2003/2004 Search to Mei Hardman, an employee in the “due diligence area.”<sup>126</sup> Despite declaring that to the best of her knowledge Coronation located and preserved “all documents relating to Lancer,”<sup>127</sup> Hardman testified at her deposition that she had no experience conducting searches, received no instruction on how to do so, had no supervision during the collection, and no contact with Counsel during the search.<sup>128</sup> Hardman stated that she searched only the investment team’s drive on the London computer network, even though she was aware that not all emails or electronic documents on the office computers of investment team members would be on that drive.<sup>129</sup> Hardman

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action.”) (quotation marks omitted). Hunnicutt may also have had an obligation to request documents from its former employees during the 2003/2004 Search, assuming it had the “practical ability” to do so.

<sup>126</sup> Declaration of Mei Hardman, Ex. 3 to Gotko Decl., ¶ 1.

<sup>127</sup> *Id.* ¶ 8.

<sup>128</sup> *See* Deposition of Mei Hardman, Ex. 4 to Feinberg Decl. & Ex. 10 to Gotko Decl. (“Hardman Dep.”), at 18-21, 47-48, 39-42, 41-43, 55-57, 62-64, 73-74, 81.

<sup>129</sup> *See id.* at 47-48.

communicated the request for documents to the Cape Town office during a brief telephone conversation without imparting instructions.<sup>130</sup> Hardman was also aware that Coronation kept backup tapes, but never searched them for Lancer-related documents and was unaware of anyone else doing so.<sup>131</sup>

Hardman also asked only three employees – Stuart Davies, Anthony Gibson, and Maria Meadows – out of a number of other employees in the London office to search their computers for emails and electronic documents.<sup>132</sup>

According to an internal Coronation memorandum, Davies, Gibson, and Meadows were part of a larger “investment team” comprised of up to twenty “investment specialists” in London, including fund managers, research analysts, due diligence analysts, and risk managers.<sup>133</sup> Although Hardman resisted the characterization that the other investment specialists would have been involved in Lancer-related

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<sup>130</sup> See *id.* at 55-57, 73-74, 81, 62-64, 68-75, 84-90. Plaintiffs respond that the files of employees in the Cape Town office, who played a role in Coronation’s investment decisions, were produced. See Pl. Opp. at 11-12.

<sup>131</sup> See Hardman Dep. at 41-43. Plaintiffs argue that Hardman was not obligated to search the backup tapes because they are server-wide and not readily accessible, and that the key players searched their own computers. They further argue that there is no evidence that any other employees had Lancer-related documents. See Pl. Opp. at 12.

<sup>132</sup> See Hardman Dep. at 57.

<sup>133</sup> See *id.* at 70-71.

decisions,<sup>134</sup> she acknowledged that investment specialist Fred Ingham was involved in Lancer-related decisions in July, 2003.<sup>135</sup> Hardman also acknowledged that the files of Amrusta Blignaut, Coronation's compliance officer and Arne Hassel, Chief Investment Officer of Coronation's investment team, were never searched, but she did not know whether either Blignaut or Hassel held those positions prior to late 2003.<sup>136</sup> The Citco Defendants have identified thirty-nine emails from May 16, 2003 through September 19, 2003 that Coronation did not produce.<sup>137</sup> Coronation produced *no emails or correspondence* from 1998 through 1999 and only limited emails and correspondence from 2000 through 2002.<sup>138</sup>

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<sup>134</sup> See *id.* at 72 (“Q. Did you have an understanding one way or the other whether those were the only three individuals in the London office who were involved in either the due diligence for the Lancer investments or the monitoring of the Lancer investments? A. Yes, those were the only people involved. . . . [Meadows], other than [Davies and Gibson], is the only employee that was there at the time when Lancer was invested in I believe.”).

<sup>135</sup> See *id.* at 69-70.

<sup>136</sup> See *id.* at 74.

<sup>137</sup> See Documents Not Produced by Coronation, Ex. 5 to Feinberg Decl.

<sup>138</sup> Coronation produced one email from 2000, six emails and three letters from 2001, and eight emails and three letters from 2002. See Citco Mem. at 11. While it is impossible to know whether emails and correspondence from 1998 through 2002 were still in Coronation's possession in April, 2003, Coronation did produce some documents from this time frame. Thus, it is fair to presume that some records from this time frame were in Coronation's possession at the time the duty to preserve arose. See *supra* n.123.

Hardman was ill-equipped to handle Coronation's discovery obligations without supervision. Given her inexperience, Hardman should have been taught proper search methods, remained in constant contact with Counsel, and should have been monitored by management. She searched only one network drive, permitted other employees to conduct their own searches, and delegated the Cape Town office search without follow-up. Hardman knew that backup tapes existed, but did not search them and, to the best of her knowledge, they have not been searched to this day.<sup>139</sup>

In addition to the paucity of Coronation's document production for the years 1998 through 2002 and the recent production of emails by 2M including many that were copied to Coronation, the Citco Defendants have identified a number of employees Coronation should have searched but did not – including approximately seventeen members of the investment team, Coronation's compliance officer, and Coronation's chief investment officer. While it is not entirely clear that all of these people were involved with Lancer, it is clear that Ingham's files were not searched and there is no question that Ingham was

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<sup>139</sup> See Hardman Dep. at 41-43. Because Coronation still has relevant backup tapes and because a search of these tapes is now justified, particularly given the very limited production of documents for the relevant period, Coronation is directed to search these tapes at its expense or explain why it is no longer possible to conduct such a search.



involved with Lancer-related investments in July, 2003. Based on the all of these facts it is apparent that Coronation acted in a grossly negligent manner.

**d. The Chagnon Plaintiffs**

The Chagnon Plaintiffs proffered Normand Gregoire, their Vice President of Investments,<sup>140</sup> as their declarant with regard to their discovery efforts.<sup>141</sup> Having joined the Chagnon Plaintiffs in 2004, the majority of Gregoire's declaration pertaining to the 2003/2004 Search was based on information given to him by others.<sup>142</sup> Gregoire's declaration stated that the Chagnon Plaintiffs produced "all documents" – including emails and electronic documents – in their possession to Counsel in February or March 2004.<sup>143</sup>

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<sup>140</sup> See Deposition of Normand Gregoire, Ex. 6 to Feinberg Decl. & Exs. 9 & 10 to Gotko Decl. ("Gregoire Dep."), at 10.

<sup>141</sup> The Citco Defendants fault the Chagnon Plaintiffs for not providing current General Counsel, Jean Maurice Saulnier, as their declarant because, according to the Citco Defendants, Saulnier "oversaw" the 2003/2004 Search. See Citco Mem. at 13. Gregoire's deposition testimony is clear that, although Saulnier was involved in the search effort, it was former employee Johnny Quigley that coordinated the earlier search. See Gregoire Dep. at 30.

<sup>142</sup> See Amended Declaration of Normand Gregoire ("Gregoire Decl."), Exs. 1-2 to Gotko Decl., ¶ 2 (stating that he was "relying on information and documents provided to [him] by current and former employees . . ."). In addition to Gregoire's admissions to this effect, Gregoire did not know how searches were conducted or the instructions given to employees and was unsure whether the Chagnon Plaintiffs' network was searched for emails and electronic documents.

<sup>143</sup> *Id.* ¶ 4.

Gregoire then admitted that some emails that had been located in 2004 were not provided to Counsel until 2008.<sup>144</sup>

In response to a questionnaire served on all plaintiffs, the Chagnon Plaintiffs identified at least twelve employees as having either been involved in decisions to invest in Lancer or having had some contact with Lancer on behalf of Chagnon.<sup>145</sup> Of the twelve, Gregoire could only state conclusively that four were asked to search for relevant documents in the 2003/2004 Search.<sup>146</sup> When some of the eight were later questioned in connection with the 2007/2008 Search, the conversations were brief – the Chagnon Plaintiffs received cursory confirmation that the employees either had no documents or had only a few that had already been produced, and the Chagnon Plaintiffs did not follow up or conduct their own search.<sup>147</sup> The Citco Defendants have identified three emails from May and June

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<sup>144</sup> See Gregoire Dep. at 57-59.

<sup>145</sup> See *id.* at 69-75.

<sup>146</sup> See *id.* at 70-75.

<sup>147</sup> See *id.* at 89-96. The Citco Defendants specifically focus on Germaine Bourgeois, a former employee of the Chagnon Plaintiffs. See Citco Mem. at 14. Bourgeois testified that he did not recall anyone from the Chagnon Plaintiffs asking him if he had any documents even though Gregoire's declaration states that he asked Bourgeois to search for and preserve all documents, including electronic data and email correspondence. See Gregoire Decl. ¶ 3(c); Deposition of Germaine Bourgeois, Ex. 6 to Feinberg Decl. ("Bourgeois Dep."), at 154-55. Despite his deposition testimony to the contrary, Counsel's records reflect that the Chagnon Plaintiffs did request such documents from Bourgeois and he turned

2003 that the Chagnon Plaintiffs did not produce.<sup>148</sup> The Citco Defendants also note that the Chagnon Plaintiffs produced only two emails and two pieces of correspondence from 1998 through 2002.<sup>149</sup> The Chagnon Plaintiffs produced an unspecified number of emails from 2003.<sup>150</sup>

Gregoire's declaration was misleading and inaccurate in that it indicated "all" documents had been produced, when, as Gregoire admitted, some emails located in 2004 were not provided to Counsel until 2008. The Chagnon Plaintiffs produced an unusually small number of emails and correspondence from 1998 through 2002 – a total of four.<sup>151</sup> In addition, the recent production of emails by 2M included a number of emails on which the Chagnon Plaintiffs were copied. These emails were not produced by the Chagnon Plaintiffs. Two-thirds of the key players were never asked for documents during the 2003/2004 Search. When they

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them over to Counsel in February 2004. *See* Parker Decl. ¶¶ 10-11 and documents cited therein.

<sup>148</sup> *See* Documents Not Produced by the Chagnon Plaintiffs, Ex. 6 to Feinberg Decl. Although the Citco Defendants represent that the Chagnon Plaintiffs did not produce seven emails, plaintiffs demonstrate that four were produced by the Chagnon Plaintiffs. *See* Chart, Ex. 11 to Gotko Decl., at GD 156 (identifying these documents as produced by the Chagnon Plaintiffs).

<sup>149</sup> *See* Citco Mem. at 13. *See also supra* n.137.

<sup>150</sup> *See id.* at 13 n.11.

<sup>151</sup> *See supra* nn.123 & 137.

were contacted in 2007/2008, those employees had few, if any, documents. This combination of facts supports the conclusion that the Chagnon Plaintiffs were grossly negligent.

**e. Bombardier Trusts**

Patricia Romanovici, who joined Bombardier Trusts as Advisor, Compliance and Committee Secretary in May, 2007, submitted a declaration and testified regarding Bombardier Trusts' search efforts. Because her arrival at Bombardier Trusts post-dated the 2003/2004 Search, she relied in large part on information provided to her by another employee, Guy Dionne.<sup>152</sup> Romanovici declared that Bombardier Trusts had preserved and located "all documents" in their possession in 2003,<sup>153</sup> but also admitted that Bombardier Trusts failed to search for or preserve emails or electronic documents *prior to 2007*, despite the inherent conflict in these two statements.<sup>154</sup>

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<sup>152</sup> See Deposition of Patricia Romanovici, Ex. 7 to Feinberg Decl. & Ex. 10 to Gotko Decl. ("Romanovici Dep."), at 17-21. Although still a Bombardier Trusts employee, Dionne no longer holds the same position.

<sup>153</sup> Declaration of Patricia Romanovici, Ex. 2 to Gotko Decl. ("Romanovici Decl."), ¶ 10.

<sup>154</sup> See *id.* ¶ 3 (declaring that in 2003 employees had been asked to "locate and preserve all *paper* documents relating to Lancer") (emphasis added); *id.* ¶ 4 ("Bombardier preserved all *paper* documents collected in response to" Counsel's request) (emphasis added).

In 2007, Bombardier Trusts hired a vendor to retrieve from backup tapes electronic data and email relating to Bombardier Trusts' investments in Lancer.<sup>155</sup> Romanovici stated that to the best of her understanding, "it is the practice of Bombardier's Information Technology [(“IT”)] Department to back up electronic data and email correspondence monthly, but not necessarily to preserve it indefinitely."<sup>156</sup> This practice was not suspended for any employee at any time. "For a number of months during the years 2001 and 2002," Bombardier Trusts was not able to recover emails because backup tapes either never existed or were blank.<sup>157</sup> Romanovici speculated that the loss of these tapes was "possibl[y] due to systemic technological problems."<sup>158</sup>

Romanovici also acknowledged that only five current and former employees were asked to produce documents in the 2003/2004 Search.<sup>159</sup> At least eleven individuals on the Investment Committee of the Bombardier Trusts were not asked for any documents – paper or electronic – during the 2003/2004 Search, even though they may have been involved in the decisions to invest or redeem

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<sup>155</sup> See *id.* ¶ 6.

<sup>156</sup> *Id.* ¶ 7.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See *id.* ¶ 3; Romanovici Dep. at 41-44.

shares in the Funds.<sup>160</sup> Romanovici did not know whether the company's central files had been searched during the 2003/2004 Search or the extent of communication between Dionne and Counsel.<sup>161</sup> Romanovici also admitted that personal computers were not searched in the 2003/2004 Search and that if any documents were deleted from the server prior to the 2007/2008 Search, they would not be retrievable unless stored on a backup tape.<sup>162</sup> The Citco Defendants have identified thirteen emails from June 10, 2003 through August 17, 2003 that Bombardier Trusts did not produce.<sup>163</sup>

In addition to submitting a misleading and inaccurate declaration, Bombardier Trusts failed to search for, or take steps to preserve, *any* electronic documents prior to 2007.<sup>164</sup> Instead, it admittedly collected only *paper* documents from its employees who worked on Lancer.<sup>165</sup> That the vendor hired in 2007 was not able to retrieve e-mails from some backup tapes is not surprising given that the

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<sup>160</sup> See Romanovici Dep. at 51-52, 67-68.

<sup>161</sup> See *id.* at 105-107.

<sup>162</sup> See *id.* at 83-84, 87, 90.

<sup>163</sup> See Documents Not Produced by Bombardier Trusts, Ex. 6 to Feinberg Decl.

<sup>164</sup> See Romanovici Decl. ¶ 7. Notably, no personal computers were searched in 2003/2004.

<sup>165</sup> See *id.* ¶ 3.

recycling of backup tapes was never suspended. In addition, at least eleven members of its Investment Committee were not asked for *any* documents – paper or electronic – or instructed to preserve documents, until 2007.<sup>166</sup> Finally, a number of emails were never produced, including emails only recently produced by 2M on which Bombardier Trusts was copied. The combination of these actions and inactions – coupled with Bombardier Trusts’ failure to produce a number of emails – amounts to gross negligence.

#### f. The Bombardier Foundation

Lyne Lavoie, the Bombardier Foundation’s director of administration and grants, supervised the Bombardier Foundation’s search efforts. Lavoie declared in 2004 that she instructed the Bombardier Foundation employees to locate and preserve “all files relating to Lancer.”<sup>167</sup> There is no indication that the Bombardier Foundation searched for electronic documents or emails at that time. Lavoie admitted that the Bombardier Foundation gave Counsel only those documents the Foundation “understood to be responsive,” even though additional Lancer-related documents were preserved.<sup>168</sup> The documents that were preserved

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<sup>166</sup> See *id.*; Romanovici Dep. at 41-44, 51-52, 67-68.

<sup>167</sup> Declaration of Lyne Lavoie, Ex. 3 to Gotko Decl. (“Lavoie Decl.”), ¶¶ 3-4.

<sup>168</sup> *Id.*

after the 2003/2004 Search were not produced to Counsel until 2007.<sup>169</sup>

The Bombardier Foundation “backs up electronic documents and e-mails for a period of one year, then overwrites the prior year’s backed-up data with information from the next year.”<sup>170</sup> This practice was never suspended.<sup>171</sup> In 2007, the Bombardier Foundation directed a vendor to search the company’s servers for electronic documents and email relating to Lancer between January 1, 1999 and December 31, 2003.<sup>172</sup> This search “did not capture any documents or e-mails relating to Lancer that may have been deleted prior to 2007.”<sup>173</sup> Noting that pursuant to the Foundation’s document retention policy only backup data for the year 2003 would have been in existence in 2004, Lavoie admits that “certain electronic data and-or emails for the year 2003 [] may have been deleted from the [Foundation’s] servers prior to the time of its electronic search” in 2007.<sup>174</sup>

At her deposition, Lavoie testified that it was also possible that emails

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<sup>169</sup> See *id.* ¶ 5(c).

<sup>170</sup> *Id.* ¶ 9.

<sup>171</sup> See Deposition of Lyne Lavoie (“Lavoie Dep.”), Ex. 8 to Feinberg Decl., at 51-52.

<sup>172</sup> See Lavoie Decl. ¶ 5.

<sup>173</sup> *Id.* ¶ 9.

<sup>174</sup> *Id.* ¶ 11. *Accord id.* ¶ 12.



and electronic documents from 1999 through 2003 may have been in employees' possession but deleted after 2004.<sup>175</sup> Lavoie also testified that she instructed only two employees to search and preserve files related to Lancer, but did not recall telling them to preserve electronic documents or email and did not confirm that they had done so.<sup>176</sup> The documents of the members of the Foundation's Investment Committee or Board of Governors were never searched because any documents in their possession would be "duplicative."<sup>177</sup> The Bombardier Foundation contends that its investment decisions were handled by Bombardier Trusts and it is unlikely that the Foundation would have any documents that the Trusts did not have.<sup>178</sup> Plaintiffs provide no support for this contention. If this were correct, every document produced by the Bombardier Foundation would also have been produced by Bombardier Trusts. This is not the case. The Citco Defendants have not identified any emails or documents not produced by the Bombardier Foundation.

The Bombardier Foundation's failure to search for *any* electronic documents or emails related to Lancer *until 2007* cannot be rectified given

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<sup>175</sup> See Lavoie Dep. at 89-90.

<sup>176</sup> See *id.* at 21-25, 90.

<sup>177</sup> Lavoie Decl. ¶¶ 6-8.

<sup>178</sup> See Pl. Opp. at 17 (citing Pak Decl. ¶ 7).

Lavoie's admission that relevant information has been deleted from the Foundation's servers. The Bombardier Foundation's discovery efforts failed in other significant respects: It failed to request any documents – paper or electronic – from the Foundation's Investment Committee or its Board of Governors; it never altered its practice of overwriting backup data to preserve the records of key players; and it also withheld until 2008 documents it had collected in 2004, but had independently and arbitrarily decided were not "responsive." Such conduct, coupled with the Bombardier Foundation's misleading and inaccurate declaration, amounts to gross negligence.

## **2. Plaintiffs that Acted in a Negligent Manner**

The Altar Fund, L'Ecole Polytechnique, Okabena, the Corbett Foundation, Commonfund, KMEFIC, and UM were negligent in their discovery efforts. None of them instituted a written litigation hold in a timely manner, although all of them did so by 2007. Employees with possible Lancer involvement were not clearly instructed to preserve and collect all Lancer-related records. I have already held that after mid-2004, in the Southern District of New York, the failure to issue a written litigation hold in a timely manner amounts to gross negligence. I must therefore explain why, after careful consideration, I have found that these plaintiffs were negligent rather than grossly negligent.

The failure to institute a written litigation hold in early 2004 in a case brought in federal court in Florida was on the borderline between a well-established duty and one that was not yet generally required. Thus, the rule of lenity compels the conclusion that this conduct *alone*, under these circumstances, is not sufficient to find that a plaintiff acted in a grossly negligent manner.<sup>179</sup> I therefore have looked to any additional errors made during the discovery phase to determine whether the conduct was negligent or grossly negligent. Here, as described below, each of the plaintiffs in this category engaged in additional negligent conduct in carrying out its discovery obligations.

**a. The Altar Fund**

Richard Lombardi, president of Altar Asset Management Inc., which served as investment advisor to the Altar Fund, was the sole decision-maker regarding the Altar Fund's Lancer investments.<sup>180</sup> Lombardi declared that he conducted the 2003/2004 Search and everything in the Altar Fund's possession

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<sup>179</sup> I reach this conclusion, in part, because once the duty to institute a litigation hold was clearly established – when the case was transferred to this District in 2005, it is very likely that electronic records that existed in 2003 would have been lost or destroyed. Thus, instituting the litigation hold in 2005 instead of 2007 may not have made any difference.

<sup>180</sup> See Deposition of Richard Lombardi, Ex. 5 to Feinberg Decl. & Ex. 10 to Gotko Decl. ("Lombardi Dep."), at 383. Other than his two assistants, the Altar Fund's only other employee was his part-time analyst. See *id.*

was produced.<sup>181</sup> According to Lombardi, in the normal course of business, employees are instructed to print all communications, including emails, related to clients.<sup>182</sup> Those hard copies are then filed and those files on Lancer and the Funds were produced.<sup>183</sup> When examined at his deposition, Lombardi did not know what email systems his company used, how electronic documents were stored, and admitted that he did not personally perform any electronic searches for responsive documents.<sup>184</sup> Instead, Lombardi had instructed two assistants to conduct the searches without any supervision and was unfamiliar with the extent of their search.<sup>185</sup> The Citco Defendants have identified fifty-three emails from March 20, 1997 through September 19, 2003 that the Altar Fund did not produce.<sup>186</sup> These documents included emails to Lauer, Lancer, other plaintiffs and investors. The Citco Defendants have also identified five paper documents, as well as Lancer Offshore financial statements for 1998 through 2000, that were not

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<sup>181</sup> See Declaration of Richard Lombardi, Ex. 4 to Gotko Decl., ¶¶ 3, 5, 9, 10.

<sup>182</sup> See Lombardi Dep. at 582-585, 590-594.

<sup>183</sup> See *id.*

<sup>184</sup> See *id.* at 592-593, 598-599.

<sup>185</sup> See *id.* at 608-609.

<sup>186</sup> See Documents Not Produced by the Altar Fund, Ex. 5 to Feinberg Decl.

produced.<sup>187</sup>

Lombardi delegated the search for records to his assistants, but failed to provide any meaningful supervision. He was unfamiliar with the Altar Fund's email systems or how the Altar Fund maintained its electronic files. Moreover, the Citco Defendants have identified *nearly fifty* emails sent or received by Lombardi between May 2003 and September 2003 that were not produced by the Altar Fund as well as several paper documents. Moreover, the Altar Fund failed to produce emails it received that were discovered as a result of 2M's recent production of emails. This, alone, demonstrates that the Altar Fund's effort to find and produce all relevant documents was insufficient. The totality of the circumstances supports a finding of negligence.

**b. L'Ecole Polytechnique**

Declarant Isabelle Poissant, Director of L'Ecole Polytechnique,

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<sup>187</sup> See Citco Mem. at 12. See also Pl. Opp. at 14 n.13 (identifying the five documents as follows: two were produced by other plaintiffs; of the remaining three that were produced either by the Receiver or Lancer, one is a promissory note for \$15,000, dated March 20, 1997, from Lombardi to Lancer, which he received as an advance on expenses he had incurred in his then-capacity as a marketing agent for Lancer; another is an October 2002 invoice from Lombardi to Lancer; and the last is an April 3, 2000 fax from Lombardi to Lauer, in which Lombardi confirms certain investor meetings).

supervised the 2003/2004 Search.<sup>188</sup> In late 2003, Poissant undertook to produce and preserve “all” employees’ documents, including emails.<sup>189</sup> L’Ecole Polytechnique delegated the management of its assets, including recommending, monitoring, and discontinuing its investments, to its Investment Committee.<sup>190</sup> Despite the Investment Committee’s role in L’Ecole Polytechnique’s Lancer investments, Poissant recalled asking at most five Investment Committee members to search for Lancer-related documents and asked only one to preserve Lancer-related documents prior to 2007.<sup>191</sup> Francois Morin, chair of the Investment Committee during the relevant period, was the one member both asked to search and preserve his paper and electronic documents during the 2003/2004 Search, which he confirmed doing.<sup>192</sup> The Citco Defendants identify an additional three individuals who they claim should have been contacted for documents: (1) Pierre Bataille, whose role is not clear from the evidence; (2) Mario Lefebvre, who was a

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<sup>188</sup> See 6/19/08 Amended Declaration of Isabelle Poissant Decl. (“Am. Poissant Decl.”) ¶ 1.

<sup>189</sup> See *id.* ¶ 2.

<sup>190</sup> See Deposition of Isabelle Poissant, director of L’Ecole Polytechnique, Ex. 8 to Feinberg Decl. (“Poissant Dep.”), at 24-25; Am. Poissant Decl. ¶ 1.

<sup>191</sup> See Poissant Dep. at 45-51, 53-54, 70-71.

<sup>192</sup> See Deposition of Francois Morin, Ex. 10 to Gotko Decl., at 197-199, 202-207, 209.

member of the Investment Committee until March 15, 2000; and (3) Louis Lefebvre, who joined the Investment Committee in September 2003.<sup>193</sup> When L'Ecole Polytechnique performed a system-wide search of its electronic documents and emails in 2007 and 2008, the only responsive emails that were located were found on Poissant's computer, because she had a practice of preserving every email that she sent or received.<sup>194</sup> Poissant, however, played no role in the Investment Committee's decision to invest in Lancer<sup>195</sup> and no emails were recovered for any other member of the Investment Committee.<sup>196</sup> The Citco Defendants have identified nine emails from March 26, 2003 through August 17, 2003 that were sent to or from Morin that were not produced by L'Ecole Polytechnique.<sup>197</sup>

L'Ecole Polytechnique failed to conduct a thorough search of its

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<sup>193</sup> See Poissant Dep. at 51-52. Plaintiffs note that Mario Lefebvre was no longer an Investment Committee member when the duty to preserve arose and Louis Lefebvre could not have created any relevant material because he did not join the Committee until September 2003 – long after the Funds entered into receivership. See Pl. Opp. at 17-18.

<sup>194</sup> See Am. Poissant Decl. ¶ 6.

<sup>195</sup> See Citco Mem. at 18 n.13.

<sup>196</sup> See Am. Poissant Decl. ¶ 7.

<sup>197</sup> See Documents Not Produced by L'Ecole Polytechnique, Ex. 9 to Feinberg Decl.

computer system for Lancer-related documents and failed to specifically direct all the members of the Investment Committee of the need to preserve Lancer-related documents. Nonetheless, the chair of the Committee and five of its members of the Committee did search their records. Bataille's records should have been searched during the 2003/2004 Search, although it is unclear whether he was even a member of the Investment Committee or played any role in L'Ecole Polytechnique's Lancer investment.<sup>198</sup> Finally, the Citco Defendants have identified nine emails that were not produced by L'Ecole Polytechnique, plus an unspecified number recently produced by 2M on which L'Ecole Polytechnique was copied. Taken together, L'Ecole Polytechnique's conduct was negligent.

**c. Okabena**

Sherry Van Zee, Vice President of Investment Administration and Chief Compliance Officer, served as Okabena's declarant.<sup>199</sup> Van Zee declared that Okabena located and preserved "all documents," including electronic data and emails, in connection with the 2003/2004 Search.<sup>200</sup> She also declared that all files

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<sup>198</sup> The failure to search the records of a single possible member of the Investment Committee – where the records of five other committee members and the Chair *were searched* – is negligent but not grossly negligent.

<sup>199</sup> See Van Zee Decl. ¶ 1.

<sup>200</sup> *Id.* ¶ 5.



of employees who were involved in Okabena's Lancer investment were searched, including electronic files and all "servers" had been searched for email and electronic documents at that time.<sup>201</sup> At her deposition, Van Zee testified that Okabena actually searched only certain email in-boxes and the "F" drive.<sup>202</sup> Van Zee also testified that although she was aware that Okabena backed up its electronic data four times a year and maintains the tapes in a safety-deposit box, these tapes were never searched.<sup>203</sup> While routine searches of backup tapes are not required, they should be searched when it has been shown that relevant material existed but was not produced, or relevant material *should have* existed but was not produced. Because both conditions are met, Okabena is required to conduct this

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<sup>201</sup> *Id.* The Citco Defendants complain that at least two key employees – Bruce Lueck, President and Chief Investment Officer of Okabena from pre-2000 to 2003, and Adele Gorilla, Investment Manager for Okabena Investment Services until October 2003 – testified that they had no recollection of receiving any instructions to preserve documents. *See* Citco Mem. at 19. However, there is no indication that their documents were not collected as part of Okabena's search efforts. In fact, the opposite appears to be true. *See* Deposition of Bruce Lueck, Ex. 9 to Feinberg Decl., at 83 (testifying that he was asked to search his files for documents relating to Lancer "[e]arly on"); Deposition of Adele Gorilla, Ex. 9 to Feinberg Decl., at 70-75 (testifying that before her departure she collected and produced to Okabena all Lancer-related documents, including email and electronic documents).

<sup>202</sup> *See* Deposition of Sherry Van Zee, Ex. 9 to Feinberg Decl. & Ex. 10 to Gotko Decl., at 74-77. The "F" drive appears to be a shared network drive.

<sup>203</sup> *See id.* at 85-89.

search or explain why it is unable to do so.

The Citco Defendants have identified thirty-nine emails from August 26, 1999 through September 19, 2003 that were not produced by Okabena<sup>204</sup> and note that Okabena produced approximately ten emails for the entire relevant period.<sup>205</sup> On August 7, 2009, after plaintiffs filed their opposition to this motion, Okabena produced three of the thirty-nine emails previously produced by others.<sup>206</sup> Finally, when 2M produced the seven hundred new emails in August, 2009, Okabena was among those plaintiffs to whom some of them were copied. The very small number of emails produced by Okabena, the failure to produce thirty-nine emails, and the recent production of emails by 2M including many that were copied to Okabena, together with the failure to conduct a thorough search for

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<sup>204</sup> See Documents Not Produced by Okabena, Ex. 10 to Feinberg Decl. Thirty-five of the emails not produced date from June through September, 2003. The remaining four are: (1) an August 26, 1999 fax from Okabena to Lancer analyst Martin Garvey requesting Lancer's historical returns for an internal project (plaintiffs claim that Okabena produced Garvey's response); (2) a February 8, 2000 email stating that Offshore was performing well; (3) a June 28, 2000 letter from Van Zee to Quilligan of Citco NV, asking him to send the June 30, 2000 market valuations (plaintiffs note that Okabena produced Citco NV's July 5, 2000 response); and (4) a May 22, 2002 request from Adele Gorilla (née Neumann) of Okabena to Hunnicutt following up on Lancer's delayed IRS filling. See Exs. 6, 7 to Gotko Decl. at GD 87-96.

<sup>205</sup> See Citco Mem. at 20 (stating that Okabena produced two emails for 1999, four emails for 2000, two emails for 2001, and two emails for 2002).

<sup>206</sup> See Citco Reply at 12.

ESI, demonstrates that Okabena was negligent in carrying out its discovery obligations.

**d. The Corbett Foundation**

Richard Corbett initially testified on behalf of the Corbett Foundation with regard to its discovery efforts. Corbett testified that at no point during the 2003/2004 Search had he personally instructed anyone to preserve emails and documents.<sup>207</sup> He also did not know what steps were taken to search for documents, or which files, offices, and computers were searched.<sup>208</sup> Corbett then clarified that his assistant, Melanie Craig, had actually directed the search. She subsequently submitted a declaration.<sup>209</sup>

Craig stated that during the 2003/2004 Search, she located and preserved all responsive documents, including electronic documents and emails.<sup>210</sup> She searched her own computer and Corbett's other assistant was tasked with

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<sup>207</sup> See Deposition of Richard Corbett, Ex. 10 to Feinberg Decl. & Ex. 9 to Gotko Decl., at 255-260.

<sup>208</sup> See *id.*

<sup>209</sup> See *id.* at 255-256.

<sup>210</sup> See 1/10/08 Declaration of Melanie Craig, Ex. 10 to Feinberg Decl., ¶ 2.

searching the Foundation's only other computer.<sup>211</sup> Craig did not oversee that search and did not search Corbett's palm pilot.<sup>212</sup> The Citco Defendants have identified twenty-two emails that the Corbett Foundation received between June 23, 2003 and August 17, 2003, but that were not produced by the Corbett Foundation.<sup>213</sup>

Craig admitted that she failed to search Corbett's palm pilot, which may have contained emails. Neither Corbett nor Craig instructed employees to preserve their emails or paper documents. This conduct, together with the Corbett Foundation's failure to produce the twenty-two emails identified by the Citco Defendants, demonstrates that the Corbett Foundation was negligent in meeting its discovery obligations.

**e. Commonfund**

John Auchincloss, Commonfund's general counsel, declared that he supervised Commonfund's 2003/2004 Search and that all Commonfund

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<sup>211</sup> See Deposition of Melanie Craig, Ex. 10 to Feinberg Decl., at 173-176.

<sup>212</sup> See *id.*

<sup>213</sup> See Documents Not Produced by Corbett Foundation, Ex. 10 to Feinberg Decl.

documents were located and produced in the first half of 2004.<sup>214</sup> At his deposition, Auchincloss testified that he delegated the search to paralegal Carolyn Blanch.<sup>215</sup> When pressed, Auchincloss did not know the details of Blanch's communication with employees regarding preservation or whether employees complied.<sup>216</sup> On October 7, 2004, Blanch distributed a company-wide email directing employees to search their records for Lancer-related documents.<sup>217</sup> For the same reasons discussed earlier with respect to Counsel's email directions to all plaintiffs, this email is insufficient to constitute a written litigation hold.<sup>218</sup>

As far as Auchincloss was aware, no request for preservation or collection was made to Commonfund's Audit and Risk Management Committee.<sup>219</sup> Although Auchincloss testified that concerns related to Lancer "may" have been communicated to the Committee, the minutes of Committee

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<sup>214</sup> See 12/21/07 Declaration of John Auchincloss, Ex. 5 to Gotko Decl., ¶¶ 2-5.

<sup>215</sup> See Deposition of John Auchincloss, Ex. 10 to Feinberg Decl. & Ex. 9 to Gotko Decl. ("Auchincloss Dep."), at 11.

<sup>216</sup> See *id.* at 66.

<sup>217</sup> See 10/7/04 Blanch email, Ex. 15 to Gotko Decl., at IC 48.

<sup>218</sup> See *supra* Part V.B.

<sup>219</sup> See Auchincloss Dep. at 67.

meetings “specifically mention the Lancer investment.”<sup>220</sup> The Citco Defendants have identified twenty-five emails between July 12, 1999 and April 10, 2002 sent between Commonfund employees and Hunnicutt, but not produced to the Citco Defendants.<sup>221</sup> Twenty-four of these emails were produced by Commonfund in the SEC Action, but not identified to the Citco Defendants as Commonfund documents until September 10, 2007 – after the deposition of a key Commonfund employee.<sup>222</sup> The single email Commonfund never produced attached a March 1, 2000 Monthly Performance Review for Lancer. Commonfund produced the Performance Review, but not the cover email.<sup>223</sup> On August 7, 2009, after plaintiffs filed their opposition to this motion, Commonfund produced minutes of meetings of its Audit and Risk Management Committee for September 20, 2002, February 15, 2003, and June 21, 2003.<sup>224</sup>

Auchincloss signed his declaration without fully investigating

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<sup>220</sup> Citco Reply at 12.

<sup>221</sup> See Documents Not Produced by Commonfund, Ex. 11 to Feinberg Decl.

<sup>222</sup> See Citco Mem. at 13; 9/10/07 Letter, Ex. 7 to Gotko Decl., at GD 97.

<sup>223</sup> See 3/1/00 Lancer Monthly Performance Review, Ex. 7 to Gotko Decl., at GD 104-105.

<sup>224</sup> See 8/7/09 Letter from Counsel to the Citco Defendants, Ex. 1 to Supp. Feinberg Decl.

Commonfund's 2003/2004 Search and lacked personal knowledge of the steps taken by Commonfund to preserve and produce documents. Although Commonfund contacted a number of key players to collect documents, Commonfund failed to collect documents from its Audit and Risk Management Committee. Because the Citco Defendants have demonstrated that the Committee had some involvement in Lancer – although not at the level of key decision makers – their documents should have been collected. This conduct – together with the failure to produce a variety of documents to the Citco Defendants<sup>225</sup> and the late production of the Committee minutes – supports the conclusion that Commonfund was negligent in complying with its discovery obligations.

**f. KMEFIC**

Abdullateef Al-Tammar, who joined KMEFIC in September, 2007 as the General Manager, International Investments Division, submitted a declaration on behalf of KMEFIC. Al-Tammar acknowledged that his understanding of KMEFIC's 2003/2004 Search stemmed from discussions with Mohamed Almarzook, KMEFIC's former General Manager.<sup>226</sup> Al-Tammar stated that “all

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<sup>225</sup> Because Commonfund produced twenty-four of these documents in the SEC action, there is no doubt that these documents were in its possession after the duty to preserve arose.

<sup>226</sup> See Declaration of Abdullateef Al-Tammar, Ex. 3 to Gotko Decl. (“Al-Tammar Decl.”), ¶ 2.

documents” were located and preserved.<sup>227</sup> But his declaration reveals that the employees were directed to search *their own* computers and files. KMEFIC did not conduct its own search of its servers and employee hard drives until 2007.<sup>228</sup> Al-Tammar also stated that Almarzook, who bore primary responsibility for monitoring KMEFIC’s investments in Lancer, had informed him that Almarzook would have been copied on all Lancer-related emails.<sup>229</sup> His emails were searched and produced.<sup>230</sup> Prior to the 2007/2008 Search, members of KMEFIC’s Investment Committee – which voted on investment decisions – were not asked to search for or retain documents.<sup>231</sup>

At his deposition, Al-Tammar was unable to testify to the facts underlying the statements related to the 2003/2004 Search in his declaration. When faced with two Lancer-related emails produced by KMEFIC on which Almarzook was not copied, Al-Tammar stated that Almarzook, in fact, never told him that Almarzook was copied on all emails.<sup>232</sup> Yet, Al-Tammar had previously

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<sup>227</sup> *Id.* ¶¶ 2, 3-6.

<sup>228</sup> *See id.* ¶ 6.

<sup>229</sup> *See id.*

<sup>230</sup> *See id.*

<sup>231</sup> *See id.* ¶¶ 9, 12.

<sup>232</sup> *See Al-Tammar Dep.* at 76-77.



sent an email to Counsel, copying Almarzook, stating that Almarzook had “confirmed that *he would have been copied on all correspondence concerning Lancer.*”<sup>233</sup> While the Citco Defendants have not identified any emails that KMEFIC has failed to produce, they state that KMEFIC failed to produce a 1997 executive summary. Regarding the executive summary, Al-Tammar declared that “an *additional search*” for the missing executive summary was conducted during the 2007/2008 Search,<sup>234</sup> but he testified that he did not know whether a search for this document was ever done previously.<sup>235</sup>

KMEFIC did not request documents from its Investment Committee before 2007. Key players searched their own files without supervision from management or counsel. Finally, Al-Tammar failed to carefully inquire into the details of KMEFIC’s search prior to signing his declaration and relied on the possibly false assertion that one employee – Almarzook – would have been copied on any Lancer-related email. This conduct was negligent.

**g. UM**

Andree Mayrand, Director, Investment Management of UM, declared

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<sup>233</sup> See 3/27/08 email, Ex. 14 to Gotko Decl., at IC 28 (emphasis in original).

<sup>234</sup> See Al-Tammar Decl. ¶ 9 (emphasis added).

<sup>235</sup> See Al-Tammar Dep. at 102-103.

that at the time White & Case was retained in June, 2003, UM searched and preserved “all” Lancer-related documents, including electronic documents and email, in the possession of current and former UM employees.<sup>236</sup> UM searched again when Counsel was retained in January 2004.<sup>237</sup> But, in fact, UM’s efforts did not include searching the electronic files of all employees. Rather, the search consisted of reviewing *only* UM’s server’s subfiles titled “Lancer.”<sup>238</sup> Mayrand conducted this initial search herself, but consulted UM’s IT personnel, possibly as early as 2004 or as late as 2006.<sup>239</sup> In early 2004, she contacted current and former

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<sup>236</sup> See Mayrand Decl. ¶ 2. The Citco Defendants baselessly assert that Mayrand “admit[s]” that UM failed to preserve any documents after it retained White & Case in 2003 in connection with UM’s first contemplated suit against Lancer and the Funds. Citco Mem. at 24. Mayrand not only makes no such admission, but expressly states that “[a]t or around that time, I undertook to locate and preserve all documents” related to that action. Mayrand Decl. ¶ 2. The evidence also contradicts the Citco Defendants’ assertion, demonstrating that UM sent White & Case documents “directly related with [UM] investments and redemption notices” in May and June 2003. Lancer Offshore Background Documents, Ex. 8 to Gotko Decl., at GD 107-108 (identifying documents “sent to White and Case on May 30 and June 2, 2003”). Accord 7/10/03 Letter to White & Case, Ex. 15 to Gotko Decl., at IC 49-50 (attaching responsive documents).

<sup>237</sup> See Mayrand Decl. ¶¶ 4-5.

<sup>238</sup> See Deposition of Andree Mayrand, Ex. 12 to Feinberg Decl. (“Mayrand Dep.”), at 137-138.

<sup>239</sup> See *id.* at 124-129, 137-138. The Citco Defendants claim that Germaine Bourgeois – the Director of Investments for UM at the time of the Lancer investment until 2001 – was never asked for his Lancer-related documents. See Citco Mem. at 25. Yet, Counsel’s records show that Bourgeois was asked for documents, which he produced in February, 2004. See Parker Decl. ¶ 11.

members of UM's Investment Committee and asked for any Lancer-related documents.<sup>240</sup> However, she did not recall asking for emails or instructing them to preserve all Lancer-related materials.<sup>241</sup>

The Citco Defendants identify five documents that were never produced by UM.<sup>242</sup> The first is a September 30, 1998, "lock up" letter imposing restrictions on UM's ability to redeem its shares.<sup>243</sup> The second is a June 30, 2000 letter from Citco NV, containing a list of securities held by Lancer as of June 30, 1999.<sup>244</sup> The third and fourth are two sets of written questions by Mathieu Poulin, an analyst at UM, regarding concerns about Lancer in April and July, 2002.<sup>245</sup> Poulin testified that he drafted these questions on his computer and did not recall deleting them, but they were never produced by UM.<sup>246</sup> Instead, they were

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<sup>240</sup> See Mayrand Dep. at 139-140.

<sup>241</sup> See *id.* at 124-129, 137-138.

<sup>242</sup> The Citco Defendants offer no evidence that four of these documents were in UM's possession as of April, 2003.

<sup>243</sup> See 9/30/98 Letter, Ex. 13 to Feinberg Decl.

<sup>244</sup> See 6/30/00 Letter, Ex. 13 to Feinberg Decl.

<sup>245</sup> See Poulin Lists, Ex. 13 to Feinberg Decl.

<sup>246</sup> See Deposition of Mathieu Poulin, Ex. 13 to Feinberg Decl., at 223-225.

produced from Poulin's current employer, the Chagnon Plaintiffs.<sup>247</sup> The fifth is the 1999 Lancer Year End Review Newsletter (the "1999 Newsletter").<sup>248</sup> The 1999 Newsletter first produced by UM was missing the page that disclosed a surge in redemptions in the summer of 1998, which necessitated a liquidation of part of the portfolio resulting in losses to the Fund.<sup>249</sup> Plaintiffs contend that the document was accidentally copied double sided to single sided. The document was recopied and reproduced.<sup>250</sup> However, the reproduced copy did not include the same handwritten notation "copie," as did the originally produced copy.

UM did not do a complete search of its ESI. UM searched only its electronic server's subfiles titled "Lancer." This folder may, or may not, have encompassed all Lancer-related documents. UM did not check the electronic files of each employee to confirm that his or her search was complete. Although UM sought documents from the Investment Committee in 2004, that request may not have included ESI. Finally, UM's initial production of the 1999 Newsletter was –

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<sup>247</sup> See Poulin Lists, Ex. 13 to Feinberg Decl. (bearing Bates stamps indicating that they were produced from the Chagnon Plaintiffs).

<sup>248</sup> See 1/28/99 Lancer Offshore Year End Review, Ex. 14 to Feinberg Decl.

<sup>249</sup> See *id.*

<sup>250</sup> See Pak Decl. ¶ 13; 1/28/99 Lancer Offshore Year End Review, Ex. 8 to Gotko Decl., at GD 109-119.

at best – sloppy and – at worst – was an attempt to suppress information. I decline to credit the latter explanation offered by the Citco Defendants. In sum, UM was negligent in meeting its discovery obligations.

#### **E. Sanctions**

The Citco Defendants have demonstrated that most plaintiffs conducted discovery in an ignorant and indifferent fashion. With respect to the grossly negligent plaintiffs – 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation – I will give the following jury charge:

The Citco Defendants have argued that 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation destroyed relevant evidence, or failed to prevent the destruction of relevant evidence. This is known as the “spoliation of evidence.”

Spoliation is the destruction of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation. To demonstrate that spoliation occurred, the Citco Defendants bear the burden of proving the following two elements by a preponderance of the evidence:

*First*, that *relevant* evidence was destroyed after the duty to preserve arose. Evidence is relevant if it would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence; and

*Second*, that if relevant evidence was destroyed after the duty to preserve arose, the loss of such evidence would

have been favorable to the Citco Defendants.

I instruct you, as a matter of law, that each of these plaintiffs failed to preserve evidence after its duty to preserve arose.<sup>251</sup> This failure resulted from their gross negligence in performing their discovery obligations. As a result, you may presume, if you so choose, that such lost evidence was relevant, and that it would have been favorable to the Citco Defendants. In deciding whether to adopt this presumption, you may take into account the egregiousness of the plaintiffs' conduct in failing to preserve the evidence.

However, each of these plaintiffs has offered evidence that (1) no evidence was lost; (2) if evidence was lost, it was not relevant; and (3) if evidence was lost and it was relevant, it would not have been favorable to the Citco Defendants.

If you decline to presume that the lost evidence was relevant or would have been favorable to the Citco Defendants, then your consideration of the lost evidence is at an end, and you will *not* draw any inference arising from the lost evidence.

However, if you decide to presume that the lost evidence

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<sup>251</sup> It is important to explain that the jury is bound by the Court's determination that certain plaintiffs destroyed documents after the duty to preserve arose. *See West*, 167 F.3d at 780 (upholding jury instruction that directed the jury to presume certain facts). However, the jury is not instructed that the Court has made any finding as to whether that evidence is *relevant* or whether its loss has caused any *prejudice* to the Citco Defendants. The jury must make these determinations because, if the jury finds both relevance and prejudice, it then may decide to draw an adverse inference in favor of the Citco Defendants which could have an impact on the verdict. Such a finding is within the province of the jury not the court. *Cf. Nucor*, 251 F.R.D. at 202-03 (discussing that certain sanctions, such as default, are imposed by the court rather than the jury).

was relevant and would have been unfavorable to the Citco Defendants, you must next decide whether any of the following plaintiffs have rebutted that presumption: 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, or the Bombardier Foundation. If you determine that a plaintiff has *rebutted* the presumption that the lost evidence was either relevant or favorable to the Citco Defendants, you will *not* draw any inference arising from the lost evidence against that plaintiff. If, on the other hand, you determine that a plaintiff has *not rebutted* the presumption that the lost evidence was both relevant and favorable to the Citco Defendants, you may draw an inference against that plaintiff and in favor of the Citco Defendants – namely that the lost evidence would have been favorable to the Citco Defendants.

Each plaintiff is entitled to your separate consideration. The question as to whether the Citco Defendants have proven spoliation is personal to each plaintiff and must be decided by you as to each plaintiff individually.

In addition, all plaintiffs are subject to monetary sanctions. The Citco Defendants are entitled to an award of reasonable costs, including attorneys' fees, associated with reviewing the declarations submitted, deposing these declarants and their substitutes where applicable, and bringing this motion. The Citco Defendants shall submit a reasonable fee application to this Court for approval. Once approved, the costs are to be allocated among these plaintiffs.

I have also considered whether the Citco Defendants should be entitled to additional discovery. If a lesser sanction is appropriate that is always a better course. With regard to Coronation and Okabena, plaintiffs admit that backup

tapes exist and have not been searched. They do not explain why such a search cannot still be conducted. The goal of discovery is to obtain evidence, not to issue sanctions. Thus, Coronation and Okabena are ordered to search their backup tapes for the relevant period at their expense, or demonstrate why such backup tapes cannot be searched, within thirty days.

Further discovery is not necessary for the remaining plaintiffs. Given the number of submitted declarations and numerous depositions that have already occurred in this action, more discovery of the remaining plaintiffs would not be fruitful. At this stage, the costs of conducting further discovery would far outweigh the benefit of any results. Therefore, no further discovery is warranted.

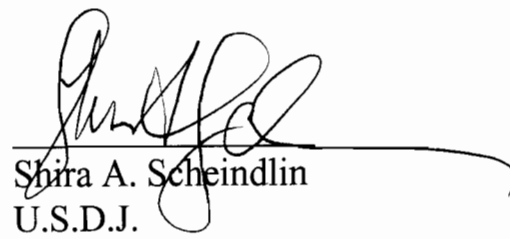
## **VI. CONCLUSION**

For the reasons discussed above, the Citco Defendant's motion for sanctions is granted in part. While litigants are not required to execute document productions with absolute precision, at a minimum they must act diligently and search thoroughly at the time they reasonably anticipate litigation. All of the plaintiffs in this motion failed to do so and have been sanctioned accordingly.

The Clerk of the Court is directed to close this motion (Docket No. 248).

SO ORDERED:





Shira A. Scheindlin  
U.S.D.J.

Dated: New York, New York  
January 15, 2010

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The Amended Opinion and Order filed January 15, 2010 is hereby corrected as follows:

At page 10, lines 7-10 replace <By contrast, the failure to obtain records from all employees (some of whom may have had only a passing encounter with the issues in the litigation), as opposed to key players, likely constitutes negligence as opposed to a higher degree of culpability.> with <By contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to key players, could constitute negligence.>.

SO ORDERED:



Shira A. Scheindlin  
U.S.D.J.

THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MARYLAND

VICTOR STANLEY, INC.

Plaintiff,

v.

CREATIVE PIPE, INC., ET AL.

Defendants.

Civil No. MJG-06-2662

\* \* \* \* \*

**MEMORANDUM, ORDER AND RECOMMENDATION**

This Memorandum, Order and Recommendation addresses Plaintiff’s Motion For Terminating And Other Sanctions Arising Out Of Defendants’ Intentional Destruction Of Evidence And Other Litigation Misconduct (“Pl.’s Mot.”), ECF<sup>1</sup> No. 341, which Plaintiff Victor Stanley, Inc. (“VSI”) filed; Plaintiff’s Supplemental Memorandum Relating To Possible Misconduct By Others That Contributed To Defendants’ Spoliation Of Evidence, ECF No. 342; Defendants Creative Pipe, Inc. (“CPI”) And Mark Pappas’ Opposition To Victor Stanley, Inc.’s Motion For Sanctions (“Defs.’ Opp’n”), ECF No. 350; Plaintiff’s Reply to Defendants’ Opposition, ECF No. 368; and Defendants’ Surreply, ECF No. 372.<sup>2</sup>

<sup>1</sup> Court papers formerly were cited as “Paper No.” or “Doc. No.” The recently-published Nineteenth Edition of *The Bluebook* provides that electronically-filed documents should be cited as “ECF No.”

<sup>2</sup> On December 8, 2006, in accordance with 28 U.S.C. § 636 and Local Rules 301 and 302, Judge Garbis referred this case to me to resolve discovery disputes and related scheduling matters. ECF No. 21. Ordinarily, referral of a case to a Magistrate Judge to resolve discovery matters pursuant to 28 U.S.C. § 636(b)(1)(A) and Local Rule 301.5.a contemplates that the Magistrate Judge may order any appropriate relief short of issuing an order that is dispositive of one or more of the pending claims or defenses. Objections to such non-dispositive discovery orders must be

Through four years of discovery, during which Defendant Mark Pappas, President of Defendant CPI, had actual knowledge of his duty to preserve relevant information, Defendants delayed their electronically stored information (“ESI”) production; deleted, destroyed, and otherwise failed to preserve evidence; and repeatedly misrepresented the completeness of their discovery production to opposing counsel and the Court. Substantial amounts of the lost evidence cannot be reconstructed. After making repeated efforts throughout discovery to try to effect preservation of ESI evidence and obtain relevant ESI evidence to support its claims, Plaintiff has identified eight discrete preservation failures, as well as other deletions that did not permanently destroy evidence, in a byzantine series of events. These events culminated in a succession of requests by Plaintiff to obtain discovery that it consistently maintained Defendants had not provided despite numerous Court orders. Plaintiff sought permission to file its fourth motion for sanctions, and the Court held evidentiary hearings on October 29 and December 1 and 2, 2009. Ultimately, Plaintiff received permission and filed the above-referenced motion, which resulted in filings and exhibits exceeding the Manhattan telephone directory in girth, as well as

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served and filed within fourteen days of the entry of that order. Loc. R. 301.5.a. If a District Judge contemplates that the disposition of discovery disputes by a Magistrate Judge may involve sanctions that are dispositive of pending claims or defenses, such as those provided in Fed. R. Civ. P. 37(b)(2)(A)(v) and (vi), then the District Judge would direct the Magistrate Judge to propose findings of fact and recommendations for action to be taken pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 301.5.b. When a Magistrate Judge issues a Report and Recommendation, the parties have fourteen days to serve and file objections. Fed. R. Civ. P. 72(b); Loc. R. 301.5.b. Judge Garbis’s Order of Referral does not state whether it is pursuant to 28 U.S.C. § 636(b)(1)(A) or (B), but to the extent that this Memorandum and Order orders non-dispositive relief, it shall be pursuant to 28 U.S.C. § 636(b)(1)(A); to the extent that it recommends dispositive relief, it shall be pursuant to 28 U.S.C. § 636(b)(1)(B). Either way, the parties have fourteen days in which to serve and file objections to any aspect of this Memorandum, Order and Recommendation. Loc. R. 301.5.

As discussed *infra*, both non-dispositive and dispositive relief is granted; accordingly the format is a hybrid memorandum and order and, as to the dispositive relief sought, a recommendation. *See* 28 U.S.C. § 363(b)(1).

hearings jointly conducted before the undersigned and Judge Garbis on February 24, 2010; April 26, 2010; and June 25, 2010. At the end of the day, Defendant did not rebut, but indeed acknowledged, that the majority of Plaintiff's allegations were accurate. Moreover, without conceding any inappropriate motive on their part, Defendants stated their willingness to acquiesce in the entry of a default judgment on Count I (which alleges copyright infringement), the primary claim filed against them. That Defendants Pappas and CPI would willingly accept a default judgment for failure to preserve ESI in the primary claim filed against them speaks volumes about their own expectations with respect to what the unrebutted record shows of the magnitude of their misconduct, and the state of mind that must accompany it in order to sustain sanctions of that severity.

For the reasons stated herein, Plaintiff's Motion will be GRANTED IN PART and DENIED IN PART, and it further is recommended that, in addition to the relief ordered by this Memorandum and Order, Judge Garbis enter an Order granting a default judgment against Defendants with regard to Count I of the Complaint (which alleges copyright infringement). Among the sanctions this memorandum imposes is a finding, pursuant to Fed. R. Civ. P. 37(b)(2)(A)(vii), that Pappas's pervasive and willful violation of serial Court orders to preserve and produce ESI evidence be treated as contempt of court, and that he be imprisoned for a period not to exceed two years, unless and until he pays to Plaintiff the attorney's fees and costs that will be awarded to Plaintiff as the prevailing party pursuant to Fed. R. Civ. P. 37(b)(2)(C).<sup>3</sup> The

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<sup>3</sup> Imposing contempt sanctions pursuant to Rule 37(b)(2)(A)(vii), particularly including a sentence of imprisonment, is an extreme sanction, but this is an extreme case. For reasons that are much more fully explained below, this sanction is not a form of criminal contempt, which could not be imposed without compliance with Fed. R. Crim. P. 42, but rather a form of civil contempt, inasmuch as Pappas may purge himself of his contempt, and concomitantly avoid imprisonment, by performing the affirmative act of paying Plaintiff's attorney's fees and costs incurred in connection with successfully prosecuting this motion. *Hicks v. Feiock*, 485 U.S. 624,

recommendation that a default judgment be imposed as to Count I is made pursuant to Fed. R. Civ. P. 37(b)(2)(A)(vi), based on the Defendants' spoliation of evidence, as further described herein. As noted, Defendants themselves have agreed that such a sanction is appropriate. (Defs.' Opp'n 29.)

## I. BACKGROUND

Regrettably, the events underlying the pending motions are convoluted and cannot be summarized succinctly. They must be set forth in considerable detail, inasmuch as they spanned several years, involved multiple actors and a succession of defense attorneys, and are memorialized by hundreds of Court filings and affidavits, as well as countless hours of deposition and hearing testimony. Charting them has consumed, collectively, hundreds of hours of my time and my law clerk's time.<sup>4</sup> It is unfortunate that the Court lacks any effective means to order Defendants to pay a fine to the Clerk of the Court to recapture the cost to the Court of the time my staff and I spent on this motion, which prevented us from addressing deserving

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631-32 (1988); *Buffington v. Baltimore Cnty., Md.*, 913 F.2d 113, 133 (4th Cir. 1990). These cases are discussed in further detail below. A magistrate judge's finding of a party in civil contempt as a discovery violation is reviewable by the district court, as is any non-dispositive discovery order, pursuant to Local Rule 301.5.a, which permits a party to file objections to a magistrate judge's discovery rulings within fourteen days. *See, e.g., SonoMedica, Inc. v. Mohler*, No. 1:08-cv-230 (GBL), 2009 WL 2371507 (E.D. Va. July 28, 2009).

<sup>4</sup> I acknowledge with gratitude the copious-fact checking of Joshua Altman, Ashley Marucci, and Jessica Rebarber; the research assistance of Rignal Baldwin V, Matt Haven, and Ilan Weinberger; and the cite-checking of Eric Kunimoto, Marissa Lenius, and Melissa O'Toole-Loureiro, all of whom interned in my Chambers over the course of the past year. Further, the indispensable assistance of my law clerk, Lisa Yurwit, is gratefully acknowledged.



motions in other pending cases.<sup>5</sup> If such a sanction were reasonably available, however, this case would be the poster child demonstrating its appropriateness.

For ease of comprehension, after briefly describing the basis of the underlying lawsuit, the Background section of this Memorandum, Order and Recommendation chronicles Pappas's<sup>6</sup> dogged but unsuccessful attempts to prevent the discovery of ESI evidence against him, because it is relevant to his state of mind at the time of his myriad successful deletions. It then chronicles Pappas's successful, permanent deletions of countless ESI. In this regard, Plaintiff VSI is fortunate that Pappas's zeal considerably exceeded his destructive skill and his judgment in selecting confederates to assist in his efforts to destroy ESI without detection. While Pappas succeeded in destroying a considerable amount of ESI, Plaintiff was able to document this fact and ascertain the relevance of many deleted files. At the end of the day, this is the case of the "gang that couldn't spoliage straight." All in all, in addition to the attempted deletions that

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<sup>5</sup> I note that the Court lacks any "effective" means to order Defendants to pay a fine to the Clerk of the Court. Such an order is regarded as a form of criminal contempt, which may not be imposed without affording Defendants the procedural protections of Fed. R. Crim. P. 42(b). *See Buffington*, 913 F.2d at 131-34 (reversing order of district court finding defendants' attorneys in civil contempt for failing to comply with orders to produce evidence in a civil case and ordering each to pay a fine of nearly \$7,000 to the Court, because such a sanction is a form of criminal contempt that cannot be imposed without compliance with Fed. R. Crim. P. 42(b)). While it is technically accurate that a court may, after complying with those procedures, order a party to pay a fine to the Clerk of the Court as a sanction for discovery misconduct that consumed excessive court resources to resolve, it is a rare case in which a court will do so because Rule 42(b) contemplates a referral to the United States Attorney for criminal prosecution or, if that office declines to prosecute, appointment of a private prosecutor to bring the case. I seriously considered doing so in this case, for reasons explained below, but ultimately decided against it. This case has been pending for more than four years, and to perpetuate it in another form by initiating a criminal prosecution of Pappas just to impose a fine payable to the Clerk of the Court would be unwarranted, particularly because Fed. R. Civ. P. 37(b)(2)(A)(vii) allows the imposition of appropriately severe sanctions as a form of civil contempt.

<sup>6</sup> For ease of reference I will refer to Pappas's actions, but because Pappas controlled CPI at all times relevant to this case, his misconduct is attributable to him individually as well as to his company, CPI.

caused delay but no loss of evidence, there were eight discrete preservation failures: (1) Pappas's failure to implement a litigation hold; (2) Pappas's deletions of ESI soon after VSI filed suit; (3) Pappas's failure to preserve his external hard drive after Plaintiff demanded preservation of ESI; (4) Pappas's failure to preserve files and emails after Plaintiff demanded their preservation; (5) Pappas's deletion of ESI after the Court issued its first preservation order; (6) Pappas's continued deletion of ESI and use of programs to permanently remove files after the Court admonished the parties of their duty to preserve evidence and issued its second preservation order; (7) Pappas's failure to preserve ESI when he replaced the CPI server; and (8) Pappas's further use of programs to permanently delete ESI after the Court issued numerous production orders. The reader is forewarned that although organized into separate categories to facilitate comprehension of so vast a violation, many of the events described in the separate categories occurred concurrently.<sup>7</sup>

VSI filed a Complaint against CPI, Mark Pappas, Stephanie Pappas (Mark Pappas's wife at the time), and "John Doe a/k/a Fred Bass" on October 11, 2006, alleging, *inter alia*, violations

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<sup>7</sup> As will be discussed in detail later in this memorandum, when a court is evaluating what sanctions are warranted for a failure to preserve ESI, it must evaluate a number of factors including (1) whether there is a duty to preserve; (2) whether the duty has been breached; (3) the level of culpability involved in the failure to preserve; (4) the relevance of the evidence that was not preserved; and (5) the prejudice to the party seeking discovery of the ESI that was not preserved. There is something of a "Catch 22" in this process, however, because after evidence no longer exists, it often is difficult to evaluate its relevance and the prejudice associated with it. With regard to Pappas's many acts of misconduct, the relevance and prejudice associated with some of his spoliation can be established directly, or indirectly through logical inference. As to others, the relevance and prejudice are less clear. However, his conduct still is highly relevant to his state of mind and to determining the overarching level of his culpability for all of his destructive acts. When the relevance of lost evidence cannot be proven, willful destruction of it nonetheless is relevant in evaluating the level of culpability with regard to other lost evidence that was relevant, as it tends to disprove the possibility of mistake or accident, and prove intentional misconduct. Fed. R. Evid. 404(b).

of copyrights and patents, and unfair competition.<sup>8</sup> (Compl. ¶ 2, ECF No. 1.) Specifically, VSI claimed that someone at CPI downloaded VSI design drawings and specifications<sup>9</sup> extensively from VSI's website, using the pseudonym "Fred Bass," and that those drawings were used improperly in competition with VSI. (*Id.* ¶¶ 17, 20.) The Complaint was served on Mark Pappas on October 14, 2006. (ECF No. 8.) On October 23, 2006, Judge Garbis authorized immediate discovery—prior to Defendants' response to the Complaint—so that VSI could "ascertain the nature and scope of issues presented with regard to prior use of the Restricted Documents," i.e., "VSI product drawings and specifications as to which VSI claims copyright protection." (ECF No. 9.) VSI served limited document requests and interrogatories on Defendants on October 24, 2006. (ECF No. 22-1.)

*1. Pappas Attempted to Prevent the Discovery of Evidence Against Him*

The bulk of this factual background describes Pappas's successful deletions of ESI. To understand the gravity of these events, however, it is helpful to place them in the context of Pappas's state of mind during discovery. For years, Pappas engaged in a cat and mouse game to

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<sup>8</sup> According to a February 2, 2009 letter from Plaintiff's counsel, "Pappas became aware that Victor Stanley was contemplating a lawsuit against him and CPI" in July 2006. (Pl.'s Mot. Ex. 46, ECF No. 341-46.) Defense counsel acknowledged that "[f]iles had been deleted from Mark Pappas' laptop in July 2006." (June 9, 2009 Rothschild Ltr. to Court, ECF No. 300.)

Although Stephanie Pappas, Mark Pappas's wife, is also a defendant, Plaintiff seeks no relief against Stephanie Pappas. (Pl.'s Mot. 100 n.105.) References to "Pappas" in this memorandum are to Mark Pappas.

<sup>9</sup> VSI "manufactures a broad line of high quality site furnishings used in public and commercial sites, such as litter receptacles, benches, tables and chairs, ash urns, planters, tree guards, seats and bollards made from steel, cast ductile iron, several special of wood or recycled plastic." (Compl. ¶ 10.) The design drawings and specifications at issue were from VSI's "Product Library," which is posted on VSI's website, and which includes design drawings and specifications, as well as images, for VSI products. (*Id.* ¶ 13, 20.) CPI is a competitor selling similar products. (*Id.* ¶ 1.)

hide harmful ESI from production during discovery, repeatedly trying to stall or prevent VSI from discovering evidence that he improperly accessed or used VSI's website or drawings. Ultimately, after Plaintiff demonstrated the incompleteness of Pappas's ESI production, the Court compelled Pappas to produce the ESI evidence he had not succeeded in deleting. This evidence supported Plaintiff's claims. Therefore, Pappas's actions in this regard did not result in actual prejudice to Plaintiff's ability to obtain evidence to support its claims, although it clearly resulted in considerable delay in completion of discovery and expense associated with efforts to discover the nature and extent of the spoliation. Nonetheless, I shall catalog a representative sampling of them because they are probative of the intentionality and bad faith of Pappas's successful deletions.<sup>10</sup>

Evidence that Pappas used the pseudonym "Fred Bass" is relevant to and would support Plaintiff's claim that Pappas's improper downloads of documents from VSI's Product Library were as "Fred Bass," and Plaintiff sought such evidence in discovery. (Pl.'s Second Request for Prod. of Docs., Pl.'s Mot. Ex. 9, ECF No. 341-9.) Pappas initially denied that he had ever accessed the VSI website (Oct. 20, 2006 Hr'g Tr. 5:8-18, Pl.'s Mot. Ex. 3, ECF No. 341-3) or used the pseudonym "Fred Bass." (Pappas Dep. 29:2-8, 31:24 – 32:2, 148:10-22, Nov. 17, 2006.) Also, during discovery, Defendants produced only two of 110 known "bass@aol.com" downloads of VSI drawings from a CPI computer. (Fifth Slaughenhaupt Aff. ¶¶ 11-12, Pl.'s Reply to Opp'n to July 13, 2007 Mot. for Sanctions Ex. 1, ECF No. 134-1). These actions demonstrate Pappas's reluctance to produce evidence supporting Plaintiff's theory that "Fred

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<sup>10</sup> I note that this case is not Pappas's maiden voyage into spoliation. He appears to have served his apprenticeship during his divorce case involving Stephanie, where the Court found that he had deleted evidence relevant to the case. (Oct. 29, 2009 24:10-14 (Pappas Test.)) The Court entered a restraining order against Pappas, prohibiting him from making any further data alterations on the CPI computers. (*Id.*) This is relevant to his state of mind in this case as well. Fed. R. Evid. 404(b).

Bass” was a CPI employee. Moreover, after VSI filed suit, Pappas asked a business contact in Argentina who had been hired to prepare CPI design drawings based on the downloaded VSI drawings, identified only as “Federico,” to “destroy . . . all e-mail references” to VSI drawings, and he attempted to delete over 5,000 files that included email correspondence with Digican, Federico, and Steven Hair (CPI’s business contacts that would have been involved in the production and importation of VSI products under the CPI name).<sup>11</sup> (Pappas emails, Pl.’s Mot. Ex. 13; Dec. 1, 2009 Hr’g Tr. 76:2-25 (Spruill Test.), Pl.’s Mot. Ex. 26, ECF No. 341-26.) Pappas claimed to have moved the emails to a deleted items folder for “storage purposes,” (Feb. 16, 2010 Pappas Aff. ¶ 7), a claim that, considering all the evidence, cannot be regarded as credible. Indeed, it is hard to imagine that anyone would claim, with a straight face, that he deleted emails in order to “store” them in a deleted items folder. The more credible inference to be drawn is that Pappas wanted to destroy any evidence that would belie his sworn statements. The evidence that Defendants ultimately produced after Plaintiff filed motions to compel and for sanctions, and the Court repeatedly ordered production, strongly demonstrates Pappas’s use of the “Fred Bass” pseudonym, and Pappas eventually admitted that he accessed the VSI Library to look at the VSI drawings, and that he downloaded “some” of VSI’s files. (Oct. 29, 2009 Hr’g Tr. 64:2-4 (Pappas Test.)) Also, the 5,000 files ultimately were recovered.<sup>12</sup> (Dec. 1, 2009 Hr’g Tr. 81:7-9 (Spruill Test.)) Thus, Pappas’s efforts to subvert this evidence did not result in the

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<sup>11</sup> Digican was CPI’s connection to a Chinese supplier that manufactured CPI’s products that competed with VSI’s products. The emails that were destroyed related to VSI. (Pappas Dep. 88:19 - 91:6-21.) Hair was CPI’s shipping agent involved in CPI’s import of Chinese-made products that CPI subsequently sold under a false claim that they were “Made in the USA.” (Slaughenhaupt Aff. ¶ 42.) CPI sold these products in competition with VSI’s products, which are manufactured in Maryland. (*Id.*)

<sup>12</sup> As discussed *infra*, in Section I.3, although Pappas’s email deletion instructions to Federico were available for discovery, any emails that Federico may have destroyed per Pappas’s directions have not been produced.

loss of this evidence, although his efforts to eliminate it caused considerable delay and expense to VSI.

Additionally, Pappas delayed in producing relevant ESI after Plaintiff identified it and requested it in discovery, and he lied about the completeness of Defendants' ESI production. For example, Pappas swore on September 27, 2007 that "Defendants have produced to Plaintiff all non-privileged ESI sought by Plaintiff in its Rule 34 production requests." (Sept. 27, 2007 Pappas Aff. 2, ECF No. 150.) Yet, Defendants had not produced 2,477 fully intact "deleted emails," 1,589 of which were between CPI and Digican, which Defendants, through their attorney at the time, Christopher Mohr,<sup>13</sup> had been aware of since at least May 2007. Defendants ultimately produced 1,199 of the emails, but not until August 5, 2009, nearly two years later, and only after Plaintiff identified the emails, with no help from Defendants, and repeatedly requested their production. (Feb. 9, 2009 Turner Report 2, Pl.'s Mot. Ex. 35, ECF No. 341-35; Dec. 2, 2009 Hr'g Tr. 87:1 – 88:25 (Turner Test.); Ninth Slaughenhaupt Aff. ¶¶ 27-28; Aug. 12, 2009 Ogg Ltr., ECF No. 341-36.) Defendants concede, as they must, that the emails "should have been produced with the ESI produced to VSI in September/October 2007." (Defs.' Opp'n 19.) Also in May 2007, Defendants, through Mohr, were aware of a deleted internet form using the name "Fred Bass" on Pappas's home computer, but the form neither came to light nor was produced until December 2009. (Dec. 2, 2009 Hr'g Tr. 89:9-17, 93:1-13, 153:1 – 155:2 (Turner Test.)) These instances of Defendants' delayed production, coupled with the Court's need to order repeatedly that Defendants preserve relevant ESI in its native fashion and turn it

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<sup>13</sup> Counsel who currently represent Defendants, James Rothschild and Joshua Kaufman, were not counsel to Pappas or CPI during the times when the misconduct resulting in spoliation of evidence took place.

over to VSI, (Oct. 3, 2007 Hr'g Tr. 19:10 – 20:5 (Ct. order), Pl.'s Mot. Ex. 45, ECF No. 341-45), further evidence Pappas's efforts to thwart producing ESI that supported Plaintiff's case.

Moreover, at least two of Pappas's successful larger deletions of ESI occurred on the eve of scheduled discovery regarding the contents of Pappas's work computer. First, the Court scheduled a discovery hearing for February 1, 2007, and the afternoon before, Pappas deleted 9,234 files from his work computer, a password-protected laptop. (ECF No. 42; July 22, 2009 Spruill Report 3, ¶ 3.) Some, but not all, of these files reappeared in the middle of 2009, well after Plaintiff filed repeated motions to compel and the Court issued numerous orders to produce the evidence, as discussed *infra*. Second, an imaging of Pappas's work computer was scheduled for the week of February 21, 2007. Pappas deleted almost 4,000 files on February 16 and 17, 2007, and someone ran Microsoft Window's Disk Defragmenter program immediately afterward, rendering the files unrecoverable.<sup>14</sup> (Oct. 29, 2009 Hr'g Tr. 153:12-17, 161:8-11 (Pappas Test.); July 22, 2009 Spruill Report 4.) Despite the aforementioned motions and Court orders, these files were never produced. (July 22, 2009 Spruill Report 4.) The obvious relevance of the files deleted on January 31 and February 16 and 17, 2007 is discussed in detail, *infra*, in Sections I.6-7. The fact that Pappas undertook to delete these inculpatory files from his work computer on the eve of a discovery hearing and only days before a scheduled imaging of his

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<sup>14</sup> Disk Defragmenter, Microsoft Window's disk defragmentation program, is a system utility that "consolidates fragmented files and folders on [a] computer's hard disk, so that each occupies a single, contiguous space" in the system. [http://www.microsoft.com/resources/documentation/windows/xp/all/proddocs/en-us/snap\\_defrag.mspx?mfr=true](http://www.microsoft.com/resources/documentation/windows/xp/all/proddocs/en-us/snap_defrag.mspx?mfr=true). To consolidate fragmented files, the program moves the file fragments together by "overwriting all those places" where space in the system was occupied by deleted files. As a result, "the ability to recover deleted items virtually . . . disappears" because the same is occupied by other files. (Dec. 1, 2009 Hr'g Tr. 43:1 – 44:18 (Spruill Test.)) Cutting through all the techno-speak, it is foreseeable that the running of a disk defragmentation program, colloquially referred to as "defragging," can result in the loss of files that were recoverable before the defragmentation occurred.

work computer's contents compels the conclusion that he was knowingly engaged in efforts to destroy evidence that he regarded as harmful to Defendants and beneficial to Plaintiff.

## 2. *Pappas Failed to Implement a Litigation Hold*

Before litigation began, CPI stored all of its data on its server and backed up the data on ten backup tapes. (DeRouen Dep. 17:9-12, June 29, 2007, ECF No. 341-17.) Each tape would run for a day, and then someone at CPI would replace it with the next tape. (*Id.* at 46:10-19.) At the end of a two-week period, the process began again with the first tape, which was "amended" to incorporate any changes to the server since it last was recorded. (*Id.*) As to the reliability of the backup system, Evan DeRouen, Pappas's computer consultant of the past six years, testified that the system failed "[a]t least once or twice a week" when someone forgot to replace the backup tape. (*Id.* at 45:13-17, 46:1-3.) DeRouen added that sometimes a week went by before someone replaced the tape. (*Id.*) Additionally, all users had the ability to alter or delete data. (*Id.* at 90:20-91:25.) Therefore, without a litigation hold, ESI *could* be lost or modified at any time; without a change to the backup system, ESI *would* be lost or modified biweekly, under the best of circumstances.

The record is devoid of any evidence that Defendants considered, let alone implemented, a litigation hold after Plaintiff filed suit or after the Court issued preservation orders, discussed *infra*. To the contrary, DeRouen testified that after suit was filed, nothing was done to address the system's deficiencies and to ensure the preservation of relevant ESI; Pappas did not ask him to take any steps, nor did he take any steps, to prevent users from deleting files from the server, or even to advise them not to delete files. (*Id.*) VSI's ESI expert, Andreas Spruill of Guidance Software, observed that "multiple users who ha[d] accounts on the server [were] adding,



deleting, creating, just carrying on business as usual.” (Dec. 1, 2009 Hr’g Tr. 123:25 – 124:75.) Although Defendants retained Genevieve Turner<sup>15</sup> as an ESI litigation consultant between December 2006 and January 2007 and asked her to preserve some data, they did not consult her specifically about implementing an ESI preservation plan or a litigation hold. (Oct. 29, 2009 Hr’g Tr. 118:20 – 119:13 (Pappas Test.); Dec. 2, 2009 Hr’g Tr. 10:13-18, 12:1-22, 21:1-14, 101:12 – 102:3 (Turner Test.).)

DeRouen testified in 2007 that Pappas and/or Mohr, Defendants’ counsel at the time, instructed him to retain the exchange server logs and not to delete anything. (DeRouen Dep. 87:4-25.) He stated that he therefore “removed the . . . function that allowed the [exchange server] logs to be purged once they’re backed up” and ensured that “the backups are done.” (*Id.* at 88:21 – 89:4.) However, Spruill testified in December 2009 that he had not “seen any exchange server logs that ha[d] been preserved or produced.” (Dec. 1, 2009 Hr’g Tr. 122:20 – 123:5.) Nor had he seen any evidence that DeRouen prevented the logs from being purged, as he said he had. (*Id.* at 123:6-24.) Spruill stated in his affidavit that he “saw no evidence of any litigation hold having been implemented in regards to CPI’s ESI as that term is commonly understood. No reasonable measures were taken to prevent potentially relevant data stored on any of CPI’s computer systems from being modified, overwritten, or deleted.” (Third Spruill Aff. ¶ 31.) Moreover, Defendants have produced only ten backup tapes, which contain only data from November 15, 2006, and January 17, 2007. (July 22, 2009 Spruill Report 4.) This hardly evidences an effective litigation hold.

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<sup>15</sup> There is no evidence to suggest that Ms. Turner was involved in any of the misconduct described in this memorandum. She testified credibly during the hearing and her testimony was helpful.

In evaluating the weight to be given to DeRouen's testimony, I cannot overlook his dependence on his wife's income, paid by CPI, and his qualifications as an ESI expert leave much to be desired, as he has not taken any college-level computer courses or passed any Microsoft proficiency tests.<sup>16</sup> In contrast, Plaintiff's ESI expert, Spruill, has passed Microsoft tests, teaches a college-level computer forensics course, and has worked on computers professionally since 1993. (Apr. 26, 2010 Hr'g Tr. 149:17 – 150:22 (Spruill Test.)) Accordingly, I found his testimony to be credible at the December 2009 and April 2010 hearings. Apart from the relative merits of their "expert," Defendants admit that "between October 14, 2006 and February 17, 2007 thousands of files were deleted from Pappas' laptop computer" (Defs.' Opp'n 5), an admission that would not have been necessary or possible had there been an appropriate litigation hold. The running of the Disk Cleanup, Disk Defragmenter, Easy Cleaner, and CCleaner programs, discussed later, further demonstrate that Defendants failed to implement an effective litigation hold. I find that Spruill's assessment that Defendants failed to take any "reasonable measures" to preserve data is accurate. The evidence of record is abundantly clear that Defendants did not implement any system to prevent users from deleting files from the server or to stop the backup system from being overwritten. (DeRouen Dep. 91:4-10.) The following discussion of Defendants' deletions demonstrates the prejudice caused by Defendants' failure to implement a litigation hold to prevent such deletions.

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<sup>16</sup> DeRouen testified that his wife, Christie DeRouen, has worked for CPI for more than a decade as an office manager and earns about \$68,000 annually, which represents approximately 75-80% of their family income. (Apr. 26, 2010 Hr'g Tr. 27:6-19.) With regard to his expertise, DeRouen is "certified from HP to repair their printers and computers," but failed the one Microsoft examination he took. (*Id.* 67:25 – 68:7.)

### 3. *Early Evidence of Pappas's Failure to Preserve ESI*

An examination of the CPI System Registry conducted during discovery showed 353 user-initiated deletions of files from Mark Pappas's work computer, a password-protected laptop, commencing soon after VSI filed suit, i.e., between October 11, 2006, and November 17, 2006. (July 22, 2009 Spruill Report 2-3, Pl.'s Mot. Ex. 14, ECF No. 341-14; Defs.' Opp'n 5.) In addition, on October 19, 2006, Pappas sent a series of emails instructing Federico, the Argentine contact, to destroy various emails and attachments relating to the VSI drawings that Pappas had sent to Federico for "conversion" to CPI drawings. (Pappas emails, Pl.'s Mot. Ex. 13, ECF No. 341-13.) Defendants have neither denied nor rebutted the evidence of these deletions and instructions to delete during the proceedings related to the pending motions. Nor have they produced the 353 files deleted from Pappas's work computer or any files or emails that Federico destroyed per Pappas's instruction.

Because Defendants had notice of the existing lawsuit at the time of the deletions, they clearly were under an obligation to preserve these potentially relevant files. Defendants, through their current attorney, James Rothschild, claimed that the files deleted from Pappas's work computer were preserved because the computer "was synchronized to the CPI server," such that the files were copied to the server and "still exist on the server." (Oct. 28, 2009 Rothschild Ltr., ECF No. 324.) However, the more believable evidence is to the contrary. As discussed in detail *infra*, CPI replaced its "Old Server" with a "New Server" in April 2007. DeRouen stated in an affidavit that before the server exchange in April 2007, "most of the files from Mark Pappas' workstation were not mapped [i.e., copied] to the server," (DeRouen Aff. ¶ 3), and he later testified in April 2010 that his affidavit was accurate. (Apr. 26, 2010 Hr'g Tr. 38:11-17.) DeRouen also stated that Pappas "was aware" that his files generally were not copied to the

server before April 2007. (*Id.* at 70:17-22.) Further, DeRouen testified that “some” of the files on Pappas’s work computer “would not be found” on the Old Server because it could not accommodate all of Pappas’s files. (*Id.* at 69:13 – 70:3.) DeRouen explained that for files on Pappas’s work computer to be copied to either server, Pappas would “have to put it in the folder that gets synchronized” because only “certain folders” were synchronized. (*Id.* at 117:20 – 118:6.) Defendants did not offer any evidence that Pappas put the deleted files into the synchronized folders so that they would be copied to the Old Server or the New Server. And, even if the files were copied to the Old Server, by the time VSI received the Old Server, it had become corrupted and could not be searched. (Apr. 26, 2010 Hr’g Tr. 153:16-20, 155:11-16 (Spruill Test.)) Given that Plaintiff has shown that the ESI evidence was deleted, Defendants’ claims to have preserved it are not credible.

Turner, CPI’s ESI litigation consultant, made an image (i.e., copy) of CPI’s New Server in July 2007, and Rothschild stated that “the image of the new server contains copies of the deleted files.” (Oct. 28, 2009 Rothschild Ltr.) Again, the evidence does not support this assertion. As noted above, not all of Pappas’s files were copied to the New Server, and therefore, they would not appear on an image of the New Server. Also, Turner testified that she “did not image” the New Server in its entirety; instead, she took a “targeted collection” of user files, folders, and emails, without imaging “unallocated space” where deleted files most likely would appear. (Dec. 2, 2009 Hr’g Tr. 105:15 – 107:22; Feb. 9, 2009 Turner Report 3.) Moreover, the files in question predated the New Server, and therefore only would appear on the New Server if they had been copied to the Old Server in the first place and then successfully transferred to the New Server.<sup>17</sup> Thus, Defendants have not shown that copies of any of these

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<sup>17</sup> The incompleteness of the data transfer between servers is discussed in further detail below.

deleted files were produced with the image of the New Server. Nor have they shown that any of the files later were restored and produced. Defendants failed to meet their obligation to preserve these files.

The relevance of any files or emails that Federico deleted pursuant to Pappas's instructions is readily apparent from Pappas's emails to Federico, which were preserved. They would have demonstrated the truth of VSI's core contention—that Pappas accessed VSI's website under a fictitious name on numerous occasions to download multiple design drawings of VSI and, in violation of the limited licensing agreement on the VSI website that had to be accepted before the drawings could be downloaded, sent them out of the country to be copied as CPI design drawings, sans any reference to their true origin, so that Pappas then could submit them as part of bid documents for the type of jobs for which CPI competed with VSI. If this is not “smoking gun” evidence, one wonders what is. That Defendants, despite their protests of innocent intent and conduct, produced no evidence in rebuttal, and have “acquiesced” in the entry of a default judgment with regard to Plaintiff's flagship claim, suggests that they too view this deleted ESI for what it is—critical evidence proving the guts of Plaintiff's liability claims. Equally clearly, the absence of these emails referring to the unauthorized conversion of VSI drawings to CPI files is prejudicial to Plaintiff's case. With regard to the 353 deleted files, although their contents are unknown, the only rational conclusion that can be drawn is that VSI suffered prejudice from the loss of these files, based on Pappas's bad faith, willful misconduct and the fact that the large quantity of deletions occurred shortly after VSI filed suit. Defendants have not offered any evidence to rebut this conclusion. To the contrary, they acquiesced in the entry of a default judgment on the copyright claim, essentially conceding the prejudice to VSI of the loss of the deleted files.

4. *Pappas Failed to Preserve His External Hard Drive Despite Plaintiff's Demand that Defendants Preserve ESI*

Pappas was deposed on November 17, 2006, and, at the conclusion of the deposition, VSI's counsel gave notice to Defendants that VSI would be filing a request to have the CPI hard drives imaged, and explicitly demanded that no files be deleted and that no data be scrubbed. (Pappas Dep. 148:23-25 – 149:1-9.) Pappas later admitted he was aware this request had been made. (Oct. 29, 2009 Hr'g Tr. 89:25 (Pappas Test.), Pl.'s Mot Ex. 12, ECF No. 341-12.)

Subsequent forensic examination of Pappas's work computer revealed the existence of a SimpleTech "Simple Drive"™ external hard drive ("EHD") that last was plugged into Pappas's work computer on November 7, 2006, and last used on November 20, 2006 (just days after VSI notified Defendants to preserve ESI), when the backup feature for the EHD was run and then the software for the EHD was "uninstalled" from Pappas's work computer. (July 22, 2009 Spruill Report 2, ¶¶ 3-6.) A subsequent examination of Pappas's work computer led Spruill, VSI's ESI expert, to conclude that the EHD must have been connected to it continuously from November 7 to November 20, 2006. (*Id.* at 2, ¶ 5.) Therefore, the EHD still was in Pappas's possession *after* VSI filed this lawsuit, and it also was in Pappas's possession on and after November 17, 2006, when Plaintiff informed Defendant that it would be requesting imaging of Defendants' computers.

The EHD contained 62,071 files that were transferred to it from Pappas's work computer on July 10, 2006, shortly before suit was filed. (*Id.* at 2, ¶ 3; Defs.' Opp'n 4.) Based on a log created on Pappas's work computer at the time of the transfer, VSI's IT director, Bryan Slaughenhaupt, concluded that the transferred files likely were relevant because the file names

corresponded with search terms contained in the Joint Search Protocol.<sup>18</sup> (Ninth Slaughenhaupt Aff. ¶ 49 & Ex. E). For example, Slaughenhaupt identified the file names “digicanCAD,” “digicanchina,” “nancadhistory,” “bassquote,” “Chicago.doc,” fuvista-vs.zip,<sup>19</sup> mpappas@www.victorstanley[1].txt, and victorstanley[1].htm, and a folder named “CompetitorCAD” with “hundreds of files.” (*Id.* ¶¶ 49, 54.) Importantly, as noted below, the EHD never has been produced by Defendants during discovery, despite the obvious relevance of the data it contained. The prejudice its loss caused to Plaintiff is unquestionable.

Pappas testified that he presumed that, even though the EHD was not produced, the information on the EHD had been, because the server was produced and it contained the same information. (Oct. 29, 2009 Hr’g Tr. 175:20 – 176:1.) However, as discussed above, at the time that the EHD was connected to Pappas’s work computer, not all of the files on that computer regularly were copied to the server. Moreover, as noted, the Old Server was corrupted and unsearchable when VSI received it. (Apr. 26, 2010 Hr’g Tr. 153:16-20, 155:11-16 (Spruill Test.)) And, because Defendants did not disclose the existence of the EHD to Genevieve Turner, their ESI litigation consultant who worked with Plaintiff’s ESI consultant to develop and implement the Joint Search Protocol for ESI, she did not image the EHD or search it for

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<sup>18</sup> After discovery commenced, the parties’ ESI consultants conferred and developed a Joint Search Protocol for ESI, dated June 28, 2007 (Pl.’s Mot. Ex. 41, ECF No. 341-41), in accordance with the Court’s Order (June 14, 2007 Conf. Tr. 16:14-21, Pl.’s Mot. Ex. 40, ECF No. 341-40). The Joint Search Protocol was amended in May 2009. (May 29, 2009 Spruill and Turner Ltr., ECF No. 299-1.) It was intended to facilitate VSI’s discovery of relevant ESI at a cost and burden proportional to what is at stake in this case.

<sup>19</sup> CPI named one of its product lines the “Fuvista” line. Pappas admitted during discovery that “Fuvista” stood for “Fuck you Victor Stanley,” (Pappas Dep. 22:20-24, Pl.’s Mot. Ex. 5, ECF No. 341-5), demonstrating that Pappas’s wit transcended sophomoric pranks such as logging into VSI’s web site as “Fred Bass” and extended to inventing insulting acronyms to name his competing products. When disclosed, the meaning of this acronym removes any doubt about his motive and intent. No doubt Pappas regarded this as hilarious at the time. It is less likely that he still does.

responsive ESI. (Dec. 2, 2009 Hr'g Tr. 55:19 - 56:5 (Turner Test.), Pl.'s Mot. Ex. 19, ECF No. 341-19). Again, the prejudice to Plaintiff is clear.

According to Defendants, Pappas did not “intentionally” dispose of the EHD “to keep the files on it from being subject to discovery.” (Defs.’ Opp’n 5.) This argument is absurd. Pappas purchased the EHD; attached it to his work computer immediately before suit was filed; used it for months, including after suit was filed and Plaintiff had demanded preservation of ESI; transferred 62,071 files to it, which included many files with names that render their relevance readily apparent; and kept its existence secret even from his own ESI litigation expert. He testified that he returned the EHD in November 2006—without having someone back up its contents—to “Bob from Office Max” because he was “frustrated” by its automatic backup features that “would flash messages and interrupt [his] work.” (Oct. 29, 2009 Hr'g Tr. 18:13 – 19:11.) Defendants failed to produce any documentation corroborating Pappas’s testimony that the EHD was returned to Office Max, such as an affidavit from “Bob,” a receipt from Office Max, or documents showing the crediting of the purchase price of the EHD back to CPI after it was returned. Yet Pappas expects the Court to accept his doe-eyed explanation at face value, rather than the untruth that it manifestly is. Even if true, this is of little moment, as Defendants concede that the EHD “should not have been disposed of since it was in existence after the lawsuit had been filed.” (Defs.’ Opp’n 5.) Moreover, the EHD and its contents never were made available for forensic examination during discovery and remain unavailable today. It does not require Napoleonic insight to recognize with a casual glance at the names of the unavailable files that what was lost was relevant to Plaintiff’s claims, and the absence of such a large quantity of clearly relevant files was prejudicial.



5. *Pappas Also Failed to Preserve Files and Emails Immediately Following Plaintiff's Demand that Defendants Preserve ESI*

On November 17, 2006, the very same day Defendants were put on notice not to destroy evidence relevant to this lawsuit, Curtis Edmondson, a lawyer who previously had done legal work for Pappas (and who is an engineer whose training emphasized “computer architecture”), visited the CPI offices to review CPI’s computer systems in regard to this litigation. (Edmondson website & invoice, Pl.’s Mot. Exs. 20-21, ECF Nos. 341-20 & 341-21.) Pappas testified that Edmondson accessed information on Pappas’s work computer. (Oct. 29, 2009 Hr’g Tr. 121:8-9.) Thereafter, between November 18, 2006 and December 22, 2006, the CPI System Registry for that computer showed thirteen user-initiated deletions of files. (July 22, 2009 Spruill Report 3.) Defendants’ contention that the files were preserved on the server does not hold water, as discussed above. Therefore, Defendants breached their duty by failing to preserve these files. Given that, shortly before these deletions, Pappas was put on notice to preserve relevant ESI and Edmondson visited CPI on the same day, and Pappas attempted to delete about 5,000 largely responsive emails around the same time, (Dec. 1, 2009 Hr’g Tr. 76:2-5 (Sпруill Test.); July 22, 2009 Spruill Report 4), the only logical inference to draw is that these files were relevant to this lawsuit and, when viewed with all the other evidence of Pappas’s willful destruction of relevant ESI, that their loss caused prejudice to Plaintiff.

6. *The Court Issued a Preservation Order and Pappas Continued to Delete ESI*

On December 7, 2006, VSI served a second Request for Production of Documents on Pappas and CPI.<sup>20</sup> (Pl.'s Second Request for Prod. of Docs., Pl.'s Mot. Ex. 9, ECF No. 341-9.) Defendants, by then having retained new counsel, moved for a two-week extension of time to file their responses and for a stay of discovery during that time. (ECF No. 38.) On December 22, 2006, I entered an order staying all discovery (except for an existing order that the parties meet and confer regarding discovery disputes, which had begun to multiply) until after a hearing scheduled for January 18, 2007. (ECF No. 41.) That order cautioned: “[B]oth parties are reminded of their substantive duty to preserve evidence, including electronic evidence, that is relevant to the case.”<sup>21</sup> (*Id.*) Pappas later admitted that he received that order the following day and that he understood what it meant. (Oct. 29, 2009 Hr’g Tr. 117:18 - 118:2 (Pappas Test.)) The Court rescheduled the discovery hearing for February 1, 2007. (ECF No. 42.)

Subsequent forensic examination of Defendants’ computers showed that the CPI System Registry reflected 9,282 user-initiated deletions of files from Pappas’s work computer between my December 22, 2006 order and the February 1, 2007 discovery hearing. (July 22, 2009 Spruill Report 3, ¶ 3.) The files, with names like “bollardcad8.doc,” “China-6.zip,” “nancadsamples.zip,” “UBBENCHCAD.doc,” and “victor.zip,” “appear to be related to ‘VSI-

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<sup>20</sup> At the parties’ initial Fed. R. Civ. P. 26(f) planning meeting on January 18, 2007, VSI reiterated its request for imaging of Defendants’ drives. (Joint Rule 26 Report of the Parties 3, ECF No. 51.)

<sup>21</sup> For the purpose of sanctions pursuant to Fed. R. Civ. P. 37(b)(2) for failure to obey a discovery order, it was in the December 22, 2006 Order that I first made the duty to preserve part of a Court order in this case. However, it was not the only preservation order. As discussed below, I issued another preservation order on February 1, 2007. Additionally, on August 1, 2007, August 30, September 21, and October 3, 2007, I ordered Defendants to produce all relevant, non-privileged ESI and a privilege log to Plaintiff. (ECF Nos. 131, 145, 149, 164, 341-45.)

like' site furnishing, sale of products made in China, Nancad (the company in Argentina with which Federico was affiliated), Digican, Victor Stanley products, Ecklund (a company that CPI used to manufacture site furnishings) and CAD drawings.” (Ninth Slaughenhaupt Aff. ¶ 33.) Almost all of the deletions occurred on January 31, 2007, the eve of the discovery hearing. (*Id.* ¶¶ 31, 44.) Pappas knew that the discovery hearing would be held the next day and that VSI's interest in imaging his computers “was at issue.” (Oct. 29, 2009 Hr'g Tr. 123:15 & 125:8-12 (Pappas Test.).)

Pappas testified that he believed that DeRouen, CPI's computer consultant, made the January 31, 2007 deletions. (*Id.* at 33:3-4.) In a February 2010 affidavit, undoubtedly drafted by counsel, DeRouen stated that he deleted a folder on Pappas's work computer containing the files in question because the folder was “a copy of a copy” of a folder that still existed on the server. (DeRouen Aff. ¶ 7.) However, previously, in a June 2007 deposition, DeRouen had denied that he had ever deleted files from any CPI computer. (DeRouen Dep. 42:17-19.) Moreover, in rebuttal to DeRouen's February affidavit, Plaintiff's ESI consultant, Spruill, testified that the deleted files could not have been a set of copies because, if that were the case, the files would have had been created minutes or seconds apart, whereas in reality, the files were created years apart. (April 26, 2010 Hr'g Tr. 133:16 – 134:13.) Additionally, Spruill testified that those deletions were not done by someone who logged in remotely (Dec. 1, 2009 Hr'g Tr. 166:2 – 168:21), meaning that Pappas or someone at CPI deleted the data. In this regard, Pappas admitted he was present at the CPI offices on January 31, 2007. (Oct. 29, 2009 Hr'g Tr. 122:2-11 (Pappas Test.).) And, emails were sent from Pappas's email account using that computer (not via remote access) just prior to and just after these deletions. (Ninth Slaughenhaupt Aff. ¶¶ 31-32; Dec. 1, 2009 Hr'g Tr. 167:8-25 (Sпруill Test.).) Once again, the only rational conclusion to

be drawn is that Pappas himself deleted the nearly ten thousand files during the discovery stay. He did so with full awareness that I had issued a preservation order and that there was to be a hearing to address, *inter alia*, Plaintiff's complaints regarding the sufficiency of Defendants' compliance with their discovery obligations. Thus, Pappas not only deleted the files, but did so intentionally and willfully. That he was willing to do so in defiance of a Court preservation order compels the conclusion that he viewed the files as both relevant and prejudicial to his position in the litigation. Their unavailability for Plaintiff's use is prejudicial to Plaintiff's case.

Incredulously, Defendants again contend that these deleted files were "preserved" because they had been copied to the server. (Oct. 28, 2009 Rothschild Ltr.) Spruill testified that "some" of the files deleted on January 31, 2007 "did reappear" in the middle of 2009, in a folder called "Mark Copy" that appeared on the New Server. (April 26, 2010 Hr'g Tr. 142:12-18.) However, according to Spruill, the "Mark Copy" folder did not contain all of the deleted files and, because someone ran the Disk Defragmenter program, as discussed below, he "was unable to recover" the files that did not reappear "in any intelligible form." (July 22, 2009 Spruill Report 4.) Also, as discussed, Spruill could not search the Old Server because it had become corrupted. (Apr. 26, 2010 Hr'g Tr. 153:16-20, 155:11-16 (Spruill Test.)) Thus, I find that Pappas deleted the files, and the timing of the bulk of the deletions immediately prior to the scheduled discovery hearing suggests to me that he deleted the files to prevent their discovery. Given the file names, it is evident that the files were relevant and would have supported Plaintiff's case, and I conclude that Defendants breached their duty to preserve potentially relevant ESI.

*7. The Court Again Admonished Defendants of Their Duty to Preserve and Issued Another Preservation Order, and Pappas Deleted Files and Used Programs to Overwrite the Files*

At the February 1, 2007 discovery hearing, noting that “certain emails have been deleted,” I again admonished the parties of their duty to preserve relevant ESI and instructed counsel to explain to their clients the duty to preserve “all information that may . . . be relevant to the claims and defenses.” (Feb. 1, 2007 Conf. Tr. 18:18-24- 19:1-3, 23:8, 24:3-5, Pl.’s Mot. Ex. 15, ECF No. 341-15.) I reminded counsel that the parties had a “duty to intervene and to suspend any operations as part of an electronic records management system that might need to override [sic] or cause the loss and destruction [of ESI] that might be relevant.” (*Id.* at 18:18-23, 25:19 – 26:3.) Christopher Mohr, defense counsel at the time, stated on the record that he understood the Court’s admonitions and orders given during the discovery conference. (*Id.* at 25:11, 25:14.) Further, Pappas admitted that Mohr spoke with him regarding my instructions. (Oct. 29, 2009 Hr’g Tr. 130:14 – 133:20 (Pappas Test.).)

Additionally, on February 1, 2007, I issued a written Preservation Order that required the parties to “meet and confer . . . to narrow the range of information sought” and stated that the parties had been admonished at the hearing of their “substantive duty to preserve evidence potentially relevant to the case, and . . . ordered to do so by the Court.” (Feb. 1, 2007 Order 2, ECF No. 56.) Pappas later acknowledged learning of that Order, and he admitted that there was nothing about the Order that he did not understand, and that the Court’s statement regarding the duty to preserve “was very clear.” (Oct. 29, 2009 Hr’g Tr. 139:10 – 140:19 (Pappas Test.).) He stated that he “understood this Order to mean that [he] had to maintain a version/copy of [his] files that were related to the case.” (Feb. 16, 2010 Pappas Aff. ¶ 8.)

During a February 2, 2007 conference, Defense counsel agreed that Defendants would follow “the two tier approach” outlined in this Court’s Suggested Protocol for Discovery of Electronically Stored Information (ECF No. 56-1) (“Suggested ESI Protocol”),<sup>22</sup> and that “accessible files should be searched and produced first.” (Feb. 2, 2007 Mohr Ltr. 3, Pl.’s Mot. Ex. 22, ECF No. 341-22.) Defendants further agreed that the ESI would be produced in its native format, an agreement that counsel confirmed on several occasions. (Apr. 3, 2007 Mohr Ltr. 2, Pl.’s Mot. Ex. 23, ECF No. 341-23; Apr. 19, 2007 Mohr Ltr. 1, Pl.’s Mot. Ex. 24, ECF No. 341-24.) ESI in its native format would include metadata, which would assist in establishing who at CPI downloaded or altered the files at issue, and when and how they were altered.

Despite the discussion of preservation obligations during the discovery hearing and conference and in the February 1, 2007 Order, in the weeks that followed, as described in further detail below, a user logged into Pappas’s work computer as Pappas, ran a Disk Cleanup program on it, deleted files, accessed the Registry Editor, and ran the system’s Disk Defragmenter program on the computer. The Disk Cleanup program empties the Recycle Bin and deletes temporary internet files, i.e., records of web sites visited. (Dec. 1, 2009 Hr’g Tr. 52:20-25, 53:16 – 55:15, 57:1-3 (Spruill Test.)) Once deleted, a file can be overwritten by Disk Defragmenter, such that the data is “lost.” (*Id.*) Indeed, defragmentation is sometimes used as “a method to cover up deletions of data by eliminating all traces of deleted data.” *RKI, Inc. v. Grimes*, 177 F. Supp. 2d 859, 870 (N.D. Ill. 2001). Additionally, through the Registry Editor, a user may “modify [and/or] delete . . . any of the settings within the registry . . . to remove or obfuscate data.” (Dec. 1, 2009 Hr’g Tr. 58:1-20 (Spruill Test.)) For this reason, Microsoft highly

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<sup>22</sup> Suggested Protocol for Discovery of Electronically Stored Information (“ESI”), [www.mdd.uscourts.gov/news/news/ESIProtocol.pdf](http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf).

discourages use of the Registry Editor. (*Id.* at 57:8-10, 58:8-9.) Thus, the net effect of accessing the Registry Editor and running the Disk Defragmenter program after deleting files and running the Disk Cleanup program was to ensure that deleted files could not be recovered.

The person who signed in as “Pappas” ran the Disk Cleanup program on Defendant Pappas’s work computer on February 7, 2007; CPI had not used this program in the past. (Dec. 1, 2009 Hr’g Tr. 52:20-25, 53:16 – 55:15, 57:1-3 (Spruill Test.)) Between February 2, 2007 and February 23, 2007, this user deleted 4,316 user-content files from Pappas’s work computer. (July 22, 2009 Spruill Report 3-4.) Almost all (3,969) of the deletions occurred between noon on Friday, February 16, 2007, and early morning on Saturday, February 17, 2007. (*Id.*; Feb. 16, 2010 Pappas Aff. ¶ 9) Additionally, on the night of February 16, 2007, the user accessed the computer’s Registry Editor. (Dec. 1, 2009 Hr’g Tr. 58:1-20 (Spruill Test.)) Thereafter, during the late morning of Saturday, February 17, 2007, this user successfully initiated an execution of the system’s Disk Defragmenter program. (July 22, 2009 Spruill Report 4.) Over 200 files were deleted on February 17, 2007, and as of that date, Pappas had permanently deleted over 1,000 files from the Recycle Bin. (*Id.* at 3-4.) On July 1, 2009, Spruill provided Defense counsel and Defense ESI litigation consultant Turner with a list of the files that Pappas had deleted from his work computer and proof that the Disk Defragmenter program had been executed. (*Id.*) The relevance of at least some of the deleted files is evident from the file names, which included victor.zip, victordoor.zip, victordoorall.zip, victorhinge.jpg, victorlatch.jpg, and similar file names. (Ninth Slaughenhaupt Aff. ¶ 55.)

This was the first and only user-executed defragmentation on Pappas’s work computer. (July 22, 2009 Spruill Report 4.) Importantly, the defragmentation was done just ahead of the scheduled imaging of Pappas’s work computer during the week of February 21, 2007. (Oct. 29,

2009 Hr'g Tr. 153:12-17, 161:8-11 (Pappas Test.)) Following the defragmentation, Plaintiff's ESI experts at Guidance Software were unable to recover any of the deleted files from Pappas's work computer "in any intelligible form." (July 22, 2009 Spruill Report 4.) Also, because the files were purged through the use of the Disk Cleanup and Disk Defragmenter programs, they were not preserved on the server, despite Defendants' contentions to the contrary.

DeRouen, CPI's computer consultant, testified that he probably ran the programs and deleted the files as part of the system "maintenance" he ran while working on Defendants' computers from a remote location. (Apr. 26, 2010 Hr'g Tr. 31:13-25.) Yet, when questioned, DeRouen agreed with Plaintiff's counsel that he would not have selectively opened, examined, and deleted files as part of routine maintenance, as Plaintiff's evidence demonstrates happened in this case. (*Id.* at 32:1-5.) Nonetheless, DeRouen claimed that any files that were deleted "were backed up on the server in two places." (*Id.*)

Not so, according to Spruill, whose testimony was far more credible than DeRouen's. Spruill testified that the person who ran the Disk Defragmenter program was not working remotely (Dec. 1, 2009 Hr'g Tr. 166:8-25), and Pappas admitted he was the only person present at CPI's offices at the time the Disk Defragmenter program was run. (Oct. 29, 2009 Hr'g Tr. 167:1 – 168:21 (Pappas Test.); *see* Ninth Slaughenhaupt Aff. ¶ 39.) The evidence of record convinces me that Pappas was the person who deleted the files and executed the Disk Defragmenter program, but if he did not, then it was DeRouen, the computer consultant Pappas retained and whose wife is a longstanding CPI office manager.

As the above factual summary amply demonstrates, much of what was deleted took place after I admonished Defense counsel of the duty to preserve relevant evidence and after I had



issued a written Preservation Order. Further, the occurrence of these deletions immediately before the scheduled imaging of Pappas's computer evidences purposeful violation of this Court's preservation orders, and a knowing violation of the duty to preserve potentially relevant evidence. These circumstances, combined with the purposeful destruction by Pappas of ESI that included files with names that make their relevance manifest, convince me that, as with other deletions already discussed, this was prejudicial to Plaintiff.

8. *Pappas Failed to Preserve ESI When CPI Switched from the Old Server to the New Server*

Defendants ordered a new server on October 30, 2006, two weeks after this action began, and installed it in April, 2007. (Apr. 26, 2010 Hr'g Tr. 92:22 – 93:2 (DeRouen Test.)) DeRouen transferred the data on the "Old Server" to the "New Server" on April 21, 2007. (*Id.* at 96:24 – 97:9.) It is unclear why Defendants replaced the Old Server. According to Pappas, the Old Server "got corrupted." (Oct. 29, 2009 Hr'g Tr. 178:10-14, 181:11-15.) According to DeRouen's June 2007 testimony, the Old Server was nearing its capacity when it was replaced. (DeRouen Dep. 16:15-16.) Spruill stated in a sworn affidavit, based on his examination of the Old Server, that that there was no apparent operational reason for exchanging servers in the middle of the ESI collection process that was taking place as part of the discovery in this case. (Third Spruill Aff. ¶ 9.)

More fundamentally, Spruill stated that exchanging servers and failing to preserve the data on the Old Server would "cause the irretrievable loss of some content and records of user activities that would otherwise be available for recovery and analysis." (*Id.* ¶¶ 4-5.) Spruill specified that if a user moved deleted emails from the deleted items folder to the "Trash Bin,"

as “Mr. Pappas testified that he repeatedly did,” those items would not be moved to the New Server. (*Id.* ¶ 5.) Spruill stated that, to preserve ESI that would be lost in the transfer, the Old Server should have been—but was not—backed up before the data transfer. (*Id.* ¶ 6.)

DeRouen acknowledged that he had not transferred any deleted ESI. (Apr. 26, 2010 Hr’g Tr. 101:5-20 (DeRouen Test.)) Nonetheless, he testified that the deleted ESI was preserved because it still existed on the Old Server, which was sent to Plaintiff. (*Id.* at 101:5-20.) However, VSI did not receive the Old Server immediately; VSI and the ESI litigation consultants, Turner and Spruill, did not even learn that there had been a server exchange until June 29, 2007, when DeRouen was deposed. (Def.’s Resp. to Pl.’s Second Set of Interrog. #11, Pl.’s Mot. Ex. 92, ECF No. 341-92; Dec. 2, 2009 Hr’g Tr. 29:21-25, 83:10-25, 142:18-24 (Turner Test.)) By the time VSI received the Old Server, it had become corrupted and could not be searched, and Spruill had to rely instead on an image that Turner made of the Old Server on July 13, 2007. (Apr. 26, 2010 Hr’g Tr. 153:16-20, 155:11-16 (Spruill Test.); Dec. 2, 2009 Hr’g Tr. 85:3 – 86:4, 105:15 – 107:22 (Turner Test.))

The completeness of Turner’s image of the Old Server, like the completeness of her image of the New Server, is questionable. In her February 9, 2009 report, Turner stated that the Old Server “was not responsive to the imaging process,” so she created a targeted collection instead of imaging it in its entirety, and the targeted collection did not include the unallocated spaces where deleted files would be stored. (Feb. 9, 2009 Turner Report 3.) Notably, Pappas testified that he stored files in a deleted state; all files in a deleted state when Turner imaged the Older Server would have been excluded. And, according to Spruill, the Old Server had been purged before Turner had the opportunity to image it, such that she could not have captured the deleted files if she had tried. (Apr. 26, 2010 Hr’g Tr. 153:24 – 154:20.) Although, as noted, a

folder containing some—but not all—of the files deleted on January 31, 2007, inexplicably “reappeared” on the New Server, and ESI deleted on January 17, 2007 was recovered from a backup tape and produced for Plaintiff, that backup tape was the most recent backup tape produced for the Old Server. Therefore, other than those files in the folder that “reappeared,” Defendants failed to preserve any ESI deleted between January 18, 2007 and April 21, 2007, when the Old Server was replaced. The relevance of some of the files—those that were deleted permanently on January 31, 2007—is evident from their names, which include “bollardcad8.doc,” “China-6.zip,” “nancadsamples.zip,” “UBBENCHCAD.doc,” and “victor.zip,” as discussed above. (Ninth Slaughenhaupt Aff. ¶ 33.) Although the contents, quantity, and relevance of the other lost files are unknown, Defendants have failed to demonstrate that what was not preserved was irrelevant, or its loss benign. The events surrounding the switch from the Old to New Server, viewed in the context of everything else that occurred, convince me that what was lost included relevant evidence, the absence of which prejudices Plaintiff.

*9. The Court Repeatedly Ordered the Production of ESI, and Pappas Used Programs Called Easy Cleaner and CCleaner to Delete It*

On August 1, 2007, August 30, 2007, September 21, 2007, and October 3, 2007, I ordered Defendants to “produce all relevant, non-privileged ESI” to Plaintiff’s counsel. (ECF Nos. 131, 145, 149, and 164.) Nonetheless, at the December 1, 2009 hearing, Plaintiff offered evidence that someone at CPI used a program called Easy Cleaner to “scrub” or delete data from Defendants’ computers and another called CCleaner “to clear up file content in specific areas, and . . . to go through the registry . . . and clear out . . . dead registry entries” from the New Server in July 2008 and August 2009, months after my series of orders, and over a year after my two

initial preservation orders. (Dec. 1, 2009 Hr'g Tr. 118:6 – 119:14, 120:18-22 (Spruill Test.); Dec. 2, 2009 Hr'g Tr. 63:13-20 (Turner Test.)) DeRouen, Defendants' computer consultant over the past six years, admitted that he used the programs "for maintenance with all [of his] clients," and he acknowledged that he had "installed CCleaner and Easy Cleaner on the New CPI server," even though he knew that litigation was ongoing and that both programs would eliminate files like internet history files and temporary internet files. (DeRouen Aff. ¶ 14; April 26, 2010 Hr'g Tr. 112:2-25 (DeRouen Test.))

Spruill testified that the only purpose for using the Easy Cleaner was "to permanently destroy data," and that "[t]here's absolutely no reason whatsoever" for a business under a preservation order to run a "scrubbing program" such as Easy Cleaner. (April 26, 2010 Hr'g Tr. 119:1 – 121:14.) Spruill added that it was extremely difficult to perform a forensic examination of any computer system after Easy Cleaner had been used on it. (*Id.* at 120:5-6.) DeRouen testified that CCleaner may have run "automatically" in July and that he did not "know why" it was run in August. (Apr. 26, 2010 Hr'g Tr. 107:20 – 110:6, 111:20-23.) Pappas stated that CCleaner was run in August "without any instruction from [him] and without [his] knowledge." (Feb. 16, 2010 Pappas Aff. ¶ 13.) However, neither Pappas nor DeRouen provided credible testimony. Instead, I accept as credible Spruill's version of the events. Regardless of the "spin" Defendants attempt to put on it, following a series of ESI preservation and production orders by the Court, Defendants allowed their computer consultant to run programs that eliminated temporary internet files. (Apr. 26, 2010 Hr'g Tr. 113:1-24 (DeRouen Test.)) It cannot be ignored that this occurred in a case the essence of which involves surreptitious entry to Plaintiff's website for the purposes of downloading design drawings that Defendants then pirated and misrepresented to be their own in order to compete with Plaintiff. It is no coincidence that the

deleted files included those showing the internet site that Defendants had accessed. I am persuaded that these files were relevant, and that their loss caused prejudice to Plaintiff.

*10. Plaintiff Moves for Spoliation Sanctions*

Plaintiff filed its fourth motion for sanctions, the subject of this Memorandum, Order and Recommendation, alleging “CPI and Pappas’ destruction of the key evidence and other forms of misconduct” and seeking a default judgment as “the only effective method to punish such egregious conduct, deter others, and fully mitigate the prejudice to VSI and the judicial process.” (Pl.’s Mot. 45.) Plaintiff also seeks a civil fine and a “referral for criminal prosecution against Pappas”; and attorney’s fees and costs, including costs related to all of Plaintiff’s ESI motions and efforts to “uncover[] Defendants’ discovery abuses.” (*Id.* at 97-98.) Alternatively, Plaintiff seeks leave to amend its Rule 26 disclosures and reports, and asks the court to reopen discovery and “to enter a permanent injunction against Pappas and CPI as requested in the Verified Complaint.” (*Id.* at 98.)

In their Opposition, Defendants admit that “certain CPI ESI was deleted by Pappas and CPI’s Computer Engineer Evan DeRouen and/or others after CPI was served with the lawsuit and after a preservation order was issued,” although they “deny that the deletions were done for the purpose of withholding ESI from VSI.” (Defs.’ Opp’n 2.) Defendants also admit that fifteen CPI products were based on VSI designs. (Defs.’ Surreply 5.) Defendants state that they “are willing to accept as a sanction . . . a consent judgment on liability for copyright infringement and a consent injunction on Plaintiff’s copyright claim.” (Defs.’ Opp’n 29.) In their view, “[c]opyright infringement has always been the heart of [VSI’s] case.” (Defs.’ Surreply 1.)

As will be discussed in greater detail below, assessing appropriate sanctions for proven failure to preserve evidence, whether ESI or not, is a complex task, made so in large part by the need to evaluate the relevance of the evidence lost and the prejudice to the party claiming injury because of the spoliation. In the sections above I have described eight ways in which Defendants willfully and permanently destroyed evidence related to this lawsuit, as well as their failed attempts to destroy evidence that later was recovered. In each section I have explained the relevance of the evidence lost and why the loss caused prejudice to Plaintiff in prosecuting its case. Taken individually, each section demonstrates intentional misconduct done with the purpose of concealing or destroying evidence. Collectively, they constitute the single most egregious example of spoliation that I have encountered in any case that I have handled or in any case described in the legion of spoliation cases I have read in nearly fourteen years on the bench. When reading other spoliation cases, it appears that frequently the Court finds culpable conduct, often gross negligence or intentional wrongdoing, but there is really no convincing showing that what was lost was harmful or that, despite the obvious frustration and considerable expense of chasing down the facts to prove the spoliation, the party that proved the spoliation was actually handicapped in proving its case in any significant way. In *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607-08 (S.D. Tex. 2010), for example, the defendants were found to have committed intentional destruction of ESI, but what was lost included evidence helpful to the spoliators, as well as harmful. Faced with bad conduct but minimal prejudice, courts are understandably reluctant to impose the most severe sanctions, especially case-dispositive ones.

But this case is in an entirely different posture. Plaintiff has proved grave misconduct that was undertaken for the purpose of thwarting Plaintiff's ability to prove its case and for the

express purpose of hamstringing this Court's ability to effect a just, speedy, and inexpensive resolution of a serious commercial tort. The prejudice to Plaintiff is clear and has been described in each of the sections above. It is helpful, but of little comfort, that Defendants themselves agree with my assessment that the lost or destroyed ESI was relevant, and its absence as evidence prejudicial to Plaintiff. At the hearing held on June 25, 2010, counsel for Defendants stated:

[W]e've given up on prejudice . . . . [with regard to Plaintiff's copyright claim] which I think was the appropriate thing to do. We gave up on the issue of relevance, and so I would think that the Court would decide what the profits should be from those 15 products, and then the Court . . . would determine what would be the appropriate attorneys' fees . . . .

(June 25, 2010 Hr'g Tr. 3:16-22.) Having chronicled what happened and the effect that it had on Plaintiff's ability to prosecute its claims and the Court's ability to ensure a fair trial, I will turn now to a discussion of the law governing where we go from here, given what we know.

## II. DISCUSSION

Plaintiff asks the Court to sanction Defendants for their<sup>23</sup> spoliation of evidence, which is "the destruction or material alteration of evidence or . . . the failure to preserve property for

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<sup>23</sup> VSI alleges that "Defendants' misconduct and their three year evasion of their [prior] discovery obligations have been further aided and abetted by questionable conduct by their [former] counsel at various times and by DeRouen." Pl.'s Mot. 73. Insofar as Plaintiff alleges spoliation by the attorneys who represented Defendants earlier in this litigation, Defendants' previous attorneys acted as Defendants' agents. *See Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962) (stating that attorney is a "freely selected agent" such that there was "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client"); *Rouse v. Lee*, 339 F.3d 238, 249 (4th Cir. 2003) ("Former counsel's errors are attributable to [plaintiff] not because he participated in, ratified, or condoned their decisions, but because they were his agents, and their actions were attributable to him under standard principles of agency."). Therefore, any such spoliation is attributable to Defendants. *See Goodman v. Praxair Servs., LLC*, 632 F. Supp. 2d 494, 522 n.16 (D. Md. 2009) ("A party may be held responsible for the spoliation of relevant evidence done by its agents. *See N.J. Mfrs. Ins. Co. v. Hearth & Home Techs., Inc.*, No. 3:06-CV-2234, 2008 WL 2571227, at \*7

another's use as evidence in pending or reasonably foreseeable litigation.” *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); *see Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 505 (D. Md. 2009); *Sampson v. City of Cambridge*, 251 F.R.D. 172, 179 (D. Md. 2008); *Broccoli v. Echostar Commc’ns Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005); *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003); THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 48 (2d ed. 2007), available at [http://www.thesedonaconference.org/content/miscFiles/TSCGlossary\\_12\\_07.pdf](http://www.thesedonaconference.org/content/miscFiles/TSCGlossary_12_07.pdf) (“SEDONA CONFERENCE GLOSSARY”) (“Spoliation is the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit.”).

Motions seeking sanctions for spoliation stem from alleged destruction of or failure to preserve potentially relevant evidence. When the spoliation involves ESI, the related issues of whether a party properly preserved relevant ESI and, if not, what spoliation sanctions are appropriate, have proven to be one of the most challenging tasks for judges, lawyers, and clients. Recent decisions, discussed below, have generated concern throughout the country among lawyers and institutional clients regarding the lack of a uniform national standard governing

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(M.D. Pa. June 25, 2008) (‘A party to a law suit, and its agents, have an affirmative responsibility to preserve relevant evidence. A [party] ... is not relieved of this responsibility merely because the [party] did not itself act in bad faith and a third party to whom [the party] entrusted the evidence was the one who discarded or lost it.’) (citations omitted). Thus, agency law is directly applicable to a spoliation motion, and the level of culpability of the agent can be imputed to the master. *See, e.g., Nucor Corp. v. Bell*, 251 F.R.D. 191, 198-99 (D.S.C. 2008) (agent's willful ‘alteration or destruction of relevant data’ on laptop was directly attributable to defendant); *Connor v. Sun Trust Bank*, 546 F. Supp. 2d 1360 (N.D. Ga. 2008) (agent's bad faith destruction of email was attributable to defendant.”); *accord Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 592 (4th Cir. 2001) (concluding that later-discharged attorney’s actions could be imputed to plaintiff). Because Defendants’ previous attorneys and DeRouen, Defendants’ computer consultant, are not parties to this action, any claims against them as individuals, rather than agents of Defendants, would have to be brought as a separate action.



when the duty to preserve potentially relevant evidence commences, the level of culpability required to justify sanctions, the nature and severity of appropriate sanctions, and the scope of the duty to preserve evidence and whether it is tempered by the same principles of proportionality that Fed. R. Civ. P. 26(b)(2)(C) applies to all discovery in civil cases.<sup>24</sup> Moreover, concern has been expressed by some commentators that court decisions finding spoliation and imposing sanctions have, in some instances, imposed standards approaching strict liability for loss of evidence, without adequately taking into account the difficulty—if not impossibility—of preserving all ESI that may be relevant to a lawsuit, the reasonableness of the measures that were taken to try to preserve relevant ESI, or whether the costs that would be incurred by more complete preservation would be disproportionately great when compared to what is at issue in the case.<sup>25</sup> The lack of a national standard, or even a consensus among courts in different jurisdictions about what standards should govern preservation/spoliation issues, appears to have exacerbated this problem. It is not an exaggeration to say that many lawyers, as well as institutional, organizational, or governmental litigants, view preservation obligations as

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<sup>24</sup> See Lawyers for Civil Justice, et al., *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure* (2010 Conf. on Civil Litig., May 2, 2010); Dan H. Willoughby, Jr. & Rose Hunter Jones, *Sanctions for E-Discovery Violations: By the Numbers* (2010 Conf. on Civil Litig., May 2010); Thomas Y. Allman, *Amending the Federal Rules: The Path to an Effective Duty To Preserve* 5 (2010 Conf. on Civil Litig., June 15, 2010); Paul W. Grimm, Michael D. Berman, Conor R. Crowley, Leslie Wharton, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. Balt. L. Rev. 381, 388 (2008). The 2010 Conference on Civil Litigation papers are available on the Conference's website at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h\\_RoomHome/4df38292d748069d0525670800167212/?OpenDocument](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_RoomHome/4df38292d748069d0525670800167212/?OpenDocument), under the links for Papers and Empirical Research.

<sup>25</sup> See Robert E. Shapiro, *Conclusion Assumed*, 36 LITIG. 59 (ABA Spring 2010).

one of the greatest contributors to the cost of litigation being disproportionately expensive in cases where ESI will play an evidentiary role.<sup>26</sup>

Nothing in this memorandum should add to this collective anxiety. Defendants do not dispute that spoliation took place, relevant evidence was lost, and Plaintiff was prejudiced accordingly; that Defendants' misconduct was sufficiently egregious to warrant sanctions; and that the sanctions warranted are serious. Nor is this a case where Defendants have claimed or demonstrated that what they did was reasonable and involved effort and expense that were proportionate to what is at stake in the litigation. In such an instance, the Court could be excused for simply acknowledging Defendants' concessions and applying the applicable law of the Fourth Circuit without considering the broader legal context in which preservation/spoliation issues are playing out in litigation across the country. While justified, such a narrow analysis would be of little use to lawyers and their clients who are forced, on a daily basis, to make important decisions in their cases regarding preservation/spoliation issues, and for whom a more expansive examination of the broader issue might be of some assistance. Accordingly, I will attempt to synthesize not only the law of this District and Circuit, but also to put it within the context of the state of the law in other circuits as well. I hope that this analysis will provide counsel with an analytical framework that may enable them to resolve preservation/spoliation issues with a greater level of comfort that their actions will not expose them to disproportionate costs or unpredictable outcomes of spoliation motions.<sup>27</sup>

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<sup>26</sup> See articles cited at note 24, *supra*.

<sup>27</sup> In this regard, I have attached as an appendix to this memorandum a chart that contains citations to cases discussing preservation and spoliation in each of the circuits and attempts to break them down into discrete sub-issues to facilitate comparison of the positions taken by the circuits, and where applicable, districts within a particular circuit.

### A. The Court's Authority to Impose Spoliation Sanctions

To resolve the issue of appropriate sanctions for spoliation, the court must consider the source and nature of its authority to impose such sanctions. Two “main” sources supply the court with authority to impose sanctions against a party for spoliation of evidence. *Goodman*, 632 F. Supp. 2d at 505.

First, there is the “court's inherent power to control the judicial process and litigation, a power that is necessary to redress conduct ‘which abuses the judicial process.’” *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 263-64 (2007) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)); accord *Thompson*, 219 F.R.D. at 100 (quoting *Silvestri*, 271 F.3d at 590); see also *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009); *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006); *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005); *In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 191 (S.D.N.Y. 2007). Second, if the spoliation violates a specific court order or disrupts the court's discovery plan, sanctions also may be imposed under Fed. R. Civ. P. 37. *United Med. Supply Co.*, 77 Fed. Cl. at 264, cited in *Sampson*, 251 F.R.D. at 178.

*Id.* at 505-06 (some citations omitted).

The court's inherent authority arises “when a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process.” *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993). For almost two centuries, it has been established that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . because they are necessary to the exercise of all others” and they enable courts “to preserve [their] own existence and promote the end and object of [their] creation.” *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33-34 (1812); see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Hudson*, 7 Cranch at 34); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980) (same), *superseded on other grounds by statute as stated in Morris v. Adams-Millis Corp.*, 758 F.2d 1352, 1357 n.7 (10th Cir. 1985); *Shaffer Equip. Co.*, 11 F.3d at 462 (“This power is organic, without need of a statute or

rule for its definition, and it is necessary to the exercise of all other powers.”). Thus, undergirding this authority “is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.” *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010).

Pursuant to their inherent authority, courts may impose fines or prison sentences for contempt and enforce “the observance of order.” *Hudson*, 7 Cranch at 34. Additionally, they may “prevent undue delays in the disposition of pending cases and . . . avoid congestion in the calendars of the District Courts,” such as by dismissing a case. *Roadway Exp.*, 447 U.S. at 765 (discussing inherent authority of court to dismiss case for failure to prosecute); see *Link v. Wabash R.R.*, 370 U.S. 626, 629-30 (1962) (same); see also *Shaffer Equip. Co.*, 11 F.3d at 462 (noting court’s authority to dismiss for abuse of judicial process). And, the courts may “impose order, respect, decorum, silence, and compliance with lawful mandates.” *Shaffer Equip. Co.*, 11 F.3d at 461.

However, the court’s inherent authority only may be exercised to sanction “bad-faith conduct,” *Chambers*, 501 U.S. at 50, and “must be exercised with restraint and discretion,” *id.* at 44; see *Shaffer Equip. Co.*, 11 F.3d at 461-62 (the court’s inherent power “must be exercised with the greatest restraint and caution, and then only to the extent necessary”). “[I]ts reach is limited by its ultimate source—the court’s need to orderly and expeditiously perform its duties.” *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 611 (S.D. Tex. 2010) (quoting *Newby v. Enron Corp.*, 302 F.3d 295, 302 (5th Cir. 2002)). Thus, the court relies instead on statutory authority or rules when applicable. *Id.* at 611-12.

Rule 37(b)(2), pertaining to sanctions for failure to comply with a court order, provides:

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

....

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

In this case, I issued a series of orders to preserve evidence, including ESI, and another series of orders to produce ESI evidence, all of which were violated. As discussed above, after each of them, Pappas and CPI destroyed ESI evidence:

1. On December 22, 2006, I issued an order staying discovery until after a discovery hearing scheduled for January 18, 2007, and included in it an admonition that the parties had a duty to preserve evidence, including ESI. ECF No. 41. Pappas had actual knowledge of the order and understood its import. Between the issuance of my order and

the hearing, Pappas deleted 9,282 files from his work computer, most of them on the eve of the discovery hearing.<sup>28</sup>

2. On February 1, 2007, I orally admonished counsel of their clients' duty to preserve relevant ESI, and ordered counsel to explain this duty to their clients. I followed this up the same day with a written preservation order, ECF No. 56, which Pappas knew had been issued. Between February 2 and 23, 2007, Pappas ran or caused to be run a Disk Cleanup program on his work computer, deleted files, entered his computer's Registry Editor, and ran the system's Disk Defragmenter program on the computer. This occurred shortly before the scheduled imaging of Pappas's work computer.<sup>29</sup>
3. I issued orders on the following dates to produce or permit discovery: August 1 and 30, September 21, and October 3, 2007. ECF Nos. 131, 145, 149, and 164. After those orders were issued, between July 2008 and August 2009, Pappas or DeRouen ran the CCleaner and Easy Cleaner programs on CPI's New Server and scrubbed (deleted) ESI.<sup>30</sup>

While it is clear that I have authority pursuant to Rule 37(b)(2)(A) to impose sanctions for the violation of my four orders to produce discovery, it must be determined whether I have authority to do so for violation of my three preservation orders, in which I ordered that ESI be preserved, but did not at that time order its actual production. For the reasons that follow, I conclude that I do.

On its face, Rule 37(b)(2) permits sanctions for disobedience of "an order to *provide or permit discovery*, including an order under Rule 26(f), 35, or 37(a)." (Emphasis added.) The

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<sup>28</sup> See discussion, *supra*, in Section I.6, at pages 21-24.

<sup>29</sup> See discussion, *supra*, in Section I.7, at pages 24-28.

<sup>30</sup> See discussion, *supra*, in Section I.9, at pages 31-32.

rule does not define what is meant by “provide or permit” discovery, but the advisory committee’s notes to Rule 37 reflect that subsection (b) was amended in 1970 to broaden the ability of a court to sanction for a violation of discovery. Fed. R. Civ. P. 37 advisory committee’s note to the 1970 amendment to subdiv. (b). The Advisory Committee observed that “[v]arious rules authorize orders for discovery—*e.g.*, Rule 35(b)(1), Rule 26(c) as revised, Rule 37(d). Rule 37(b)(2) should provide comprehensively for enforcement of all these orders.” *Id.* The advisory committee’s note following the 1980 amendment to Rule 37 refers to newly-enacted Rule 26(f), which governs discovery conferences, and states that Rule 26(f) requires “an order respecting the subsequent conduct of discovery” following such a meeting. Fed. R. Civ. P. 37 advisory committee’s note to the 1980 amendment to subdiv. (b)(2). This reference is particularly important because, as amended in 2006, Rule 26(f) specifically contemplates that when the parties meet and confer to discuss discovery, they *must, inter alia*, “discuss any issues about preserving discoverable information.” Thus, it cannot seriously be questioned that a court order to preserve information, including ESI, has as its core purpose the objective of ensuring that the ESI can be “provided” during discovery, and is intended to “permit” that discovery. It would clearly violate the purpose of Rule 37(b) if a court were unable to sanction a party for violating the court’s order to *preserve* evidence simply because that order did not also order the production of the evidence. As will be discussed below, the duty to preserve relevant evidence is a common law duty, not a rule-based duty. It therefore is no surprise that Rule 37(b)(2) does not specifically refer to court orders to “preserve” evidence. The reference to Rule 26(f), however, which does specifically refer to preservation obligations, makes it clear that court orders issued to enforce discovery plans agreed to by the parties, which include preservation obligations, would be enforceable by Rule 37(b)(2) sanctions. If so, then it is equally compelling that a

preservation order issued by the court *sua sponte*, and designed to govern the discovery process by ensuring that the evidence to be preserved, if within the scope of discoverable information, may be provided in response to an appropriate discovery request, also is an order to “permit discovery.” To reach a contrary conclusion would be to exalt form over substance.

Moreover, it is clear that courts have broadly interpreted the authority granted by Rule 37(b)(2) to permit sanctions for failures to obey a wide variety of orders intended to “permit discovery.” *See, e.g., Hathcock v. Navistar Int’l Transp. Co.*, 53 F.3d 36, 40 (4th Cir. 1995) (holding that a trial court had the authority to impose a default judgment as a sanction for violating a Rule 16 scheduling order, pursuant to Rule 37(b)(2); stating “we agree with the basic premise that a default sanction can, under certain circumstances, be an appropriate response to a violation of a Rule 16 order. After all, the express terms of Rule 37 permit a trial court to impose sanctions when a party fails to obey an order to provide or permit discovery”); *Quela v. Payco-Gen. Am. Credits, Inc.*, No. 99-C-1904, 2000 WL 656681, at \*6 (N.D. Ill. May 18, 2000) (“Although the language of Rule 37 requires violation of a judicial order in order to impose sanctions, a formal, written order to comply with discovery is not required. Courts can broadly interpret what constitutes an order for purposes of imposing sanctions.”) (citing *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 n.7 (7th Cir. 1994) (“While courts have only applied Rule 37(b)(2) where parties have violated a court order, courts have broadly interpreted what constitutes an “order” for purposes of imposing sanctions.”)); *REP MCR Realty, L.L.C. v. Lynch*, 363 F. Supp. 2d 984, 998 (N.D. Ill. 2005) (quoting *Quela*, 2000 WL 656681, at \*6), *aff’d*, 200 Fed. App’x 592 (7th Cir. 2006). Indeed, courts have stated summarily that Rule 37(b)(2) sanctions may stem from failure to comply with a preservation order, or operated under that assumption. *See Pitney Bowes Gov’t Solutions, Inc. v. United States*, 93 Fed. Cl. 327, 336 (2010)



(“Spoliation may result in sanctions . . . grounded in contravention of specific discovery or document-preservation orders.”) (emphasis added); *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 271 (2007) (ordering sanctions for spoliation pursuant to court’s inherent authority, for spoliation predating court’s first preservation order, and Rule 37(b), for spoliation following the date on which “the court ordered defendant to be prepared to specify the steps that would be taken to prevent further spoliation, or, at the latest, December 5, 2005, when, as described in greater detail below, the court warned defendant that any further document destruction would lead to sanctions”); *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 119-20 (S.D.N.Y. 2008) (“Where a party violates an order to preserve evidence or fails to comply with an order compelling discovery because it has destroyed the evidence in question, it is subject to sanctions under Rule 37(b) of the Federal Rules of Civil Procedure for failure to comply with a court order.”) (quoting *In re WRT Energy Sec. Litig.*, 246 F.R.D. 185, 194 (S.D.N.Y. 2007); *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 104 F.R.D. 119, 121 (C.D. Cal. 1985) (concluding that “oral document preservation order” that later “was reduced to writing and filed” was an order “to provide or permit discovery . . . upon which monetary sanctions may be awarded under Rule 37(b)”). For these reasons, I conclude that this Court has the authority to impose Rule 37(b)(2) sanctions, if otherwise appropriate, for violations of a Court-issued preservation order, even if that order does not actually order the actual production of the evidence to be preserved. Additionally, of course, the Court’s authority to impose Rule 37(b)(2) sanctions for violation of its serial orders to actually produce ESI, is equally clear.

## B. Proof of Sanction-Worthy Spoliation

In the Fourth Circuit, to prove spoliation that warrants a sanction, a party must show:

“(1) [T]he party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a “culpable state of mind;” and (3) the evidence that was destroyed or altered was “relevant” to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.”

*Goodman*, 632 F. Supp. 2d at 509 (quoting *Thompson*, 219 F.R.D. at 101). District courts in the Second, Fifth, Sixth, Seventh, and Ninth Circuits have identified the same factors for sanction-worthy spoliation.<sup>31</sup> See *Jones v. Bremen High Sch. Dist.* 228, No. 08-C-3548, 2010 WL 2106640, at \*5 (N.D. Ill. May 25, 2010); *In re Global Technovations, Inc.*, 431 B.R. 739, 778 (Bankr. E.D. Mich. 2010); *Pension Comm.*, 685 F. Supp. 2d at 467; *Rimkus*, 688 F. Supp. 2d at 615-16; *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2010 WL 582189, at \*4 (D. Ariz. Feb. 12, 2010). The first element involves both the duty to preserve and the breach of that duty through the destruction or alteration of the evidence. See *Jones*, 2010 WL 2106640, at \*5 (“To

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<sup>31</sup> The same factors can be culled from the case law in most other circuits. See, e.g., *D’Onofrio v. SFX Sports Grp., Inc.*, No. 06-687 (JDB/JMF), 2010 WL 3324964, at \*5 (D.D.C. Aug. 24, 2010) (stating the same factors in the context of an adverse inference specifically); *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, No. 09-60351-CIV, 2010 WL 3368654, at \*4 (S.D. Fla. Aug. 23, 2010) (also requiring that lost evidence have been “crucial to the movant being able to prove its prima facie case or defense”). However, some courts address the factors in the context of two separate issues: was there spoliation, and if so, what sanctions are appropriate, with state of mind only figuring into the second issue. See, e.g., *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009); *Wright v. City of Salisbury*, No. 2:07CV0056 AGF, 2010 WL 126011, at \*2 (E.D. Mo. Jan. 7, 2010); *Bensel v. Allied Pilots Ass’n*, 263 F.R.D. 150, 152 (D.N.J. 2009); *Velez v. Marriott PR Mgmt., Inc.*, 590 F. Supp. 2d 235, 258 (D.P.R. 2008); *Hofer v. Gap, Inc.*, 516, F. Supp. 2d 161, 170 (D. Mass. 2007). The Federal Circuit “applies the law of the regional circuit from which the case arose” when reviewing sanction orders. *Monsanto Co. v. Ralph*, 382 F.3d 1374, 1380 (Fed. Cir. 2004).

find that sanctions for spoliation are appropriate, the Court must find the following: 1) *that there was a duty to preserve the specific documents and/or evidence*, 2) *that the duty was breached*, 3) that the other party was harmed by the breach, and 4) that the breach was caused by the breaching party's wilfulness, bad faith, or fault.”) (emphasis added).

1. *Duty to Preserve Evidence and Breach of that Duty*

The first consideration is whether the alleged spoliator had a duty to preserve the lost evidence and breached that duty. “Absent some countervailing factor, there is no general duty to preserve documents, things, or information, whether electronically stored or otherwise.” Paul W. Grimm, Michael D. Berman, Conor R. Crowley, Leslie Wharton, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 388 (2008). Yet, it is well established that “[a] formal discovery request is not necessary to trigger the duty to preserve evidence.” *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05-C-3003, 2006 WL 1308629, at \*8 (N.D. Ill. May 8, 2006). Rather, the duty “may arise from statutes, regulations, ethical rules, court orders, or the common law. . . ., a contract, or another special circumstance.” Grimm, 37 U. BALT. L. REV. at 390. Thus, any preservation order that the Court may issue obligates the parties to preserve evidence, and the Court has the authority to enforce that obligation under Rule 37, as discussed *supra*. But, the obligation existed prior to the order; only its mechanism of enforcement changes with the Court order.

The common law imposes the obligation to preserve evidence from the moment that litigation is reasonably anticipated. *See Silvestri*, 271 F.3d at 591 (“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”); *Goodman*, 632 F. Supp. 2d at 509 (same); *Pension Comm.*, 685 F. Supp. 2d at 466

(same); Grimm, U. BALT. L. REV. at 390 n.38 (“All circuits recognize the duty to preserve information relevant to anticipated or existing litigation.”) (citation omitted); *see also Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (duty to preserve exists when party had “some notice that the documents were potentially relevant to the litigation before they were destroyed”) (citation omitted). Moreover, “this duty arises at the point in time when litigation is reasonably anticipated whether the organization is the initiator or the target of litigation.” THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER AND THE PROCESS 3 (public cmt. ed. Aug. 2007), *available at* [http://www.thesedonaconference.org/content/miscFiles/Legal\\_holds.pdf](http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf) (“Legal Holds”). For example, in *Sampson*, 251 F.R.D. at 181, the defendant’s duty arose no later than the date when plaintiff’s counsel, prior to filing the complaint, asked the defendant by letter to preserve relevant evidence. However, a future litigant is not required to make such a request, “and a failure to do so does not vitiate the independent obligation of an adverse party to preserve such information” if the adverse party knows or should know of impending litigation. *Thompson*, 219 F.R.D. at 100. Thus, the duty exists, for a defendant, at the latest, when the defendant is served with the complaint. *See Nucor Corp. v. Bell*, 251 F.R.D. 191, 197 (D.S.C. 2009) (stating that “defendants each had a duty to preserve the data beginning no later than those dates” on which plaintiff served the complaint on each defendant); *see also Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007) (“In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit.”); *Krumwiede*, 2006 WL 1308629, at \*8 (“The filing of a complaint may alert a party that certain information is relevant and likely to be sought in discovery.”).

The duty to preserve evidence “includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation.” Legal Holds, *supra*, at 3. It is well established that the duty pertains only to relevant documents. *See Pension Comm.*, 685 F. Supp. 2d at 464. Relevant documents include:

[A]ny documents or tangible things (as defined by [Fed. R. Civ. P. 34(a)]) made by individuals “likely to have discoverable information that the disclosing party may use to support its claims or defenses.” The duty also includes documents prepared for those individuals, to the extent those documents can be readily identified (e.g., from the “to” field in e-mails). The duty also extends to information that is relevant to the claims or defenses of any party, or which is “relevant to the subject matter involved in the action.” Thus, the duty to preserve extends to those employees likely to have relevant information—the “key players” in the case.

*Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 217-18 (S.D.N.Y. 2003) (footnotes omitted); *see Broccoli*, 229 F.R.D. at 510 (“The duty to preserve encompasses any documents or tangible items authored or made by individuals likely to have discoverable information that the disclosing party may use to support its claim or defenses.”).

Beyond these basics, the duty to preserve evidence should not be analyzed in absolute terms; it requires nuance, because the duty “cannot be defined with precision.” Grimm, 37 U. BALT. L. REV. at 393 (quoting SHIRA A. SCHEINDLIN, MOORE’S FEDERAL PRACTICE E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 7 n.28 (2006)). Proper analysis requires the Court to determine reasonableness under the circumstances—“reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation.” THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION ii (2d ed. 2007), available at <http://www.thesedonaconference.org/content/miscFiles/> (follow link); *see Jones*, 2010 WL 2106640, at \*5. It “is neither absolute, nor intended to cripple organizations.”

Grimm, 37 U. BALT. L. REV. at 385. Thus, “[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards.” *Rimkus*, 688 F. Supp. 2d at 613 (emphasis in *Rimkus*); see Legal Holds, *supra*, at 3 (“In determining the scope of information that should be preserved, the nature of the issues raised in the matter, experience in similar circumstances and the amount in controversy are factors that may be considered.”). Put another way, “the scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation.” Grimm, 37 U. BALT. L. REV. at 405. Although, with few exceptions, such as the recent and highly instructive *Rimkus* decision,<sup>32</sup> courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case, this should not be the case because Fed. R. Civ. P. 26(b)(2)(C) cautions that all permissible discovery must be measured against the yardstick of proportionality. See *Procter & Gamble Co. v. Haugen*, 427 F.3d 727, 739 n.8 (10th Cir. 2005) (requiring district court to consider Rule 26(b)(2)(C)(iii) before ordering spoliation sanctions to ensure against “the burden or expense of the proposed discovery outweigh[ing] its likely benefit”) (quoting Rule). Moreover, the permissible scope of discovery as set forth in Rule 26(b) includes a proportionality component of sorts with respect to discovery of ESI, because Rule 26(b)(2)(B) permits a party to refuse to produce ESI if it is not reasonably accessible without undue burden and expense. Similarly, Rule 26(g)(1)(B)(iii) requires all parties seeking discovery to certify that

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<sup>32</sup> See also *Canton v. Kmart Corp.*, No. 1:05-cv-143, 2009 WL 2058908, at \*3 (D.V.I. July 13, 2009) (Conduct is culpable if a “party [with] notice that evidence is relevant to an action . . . either proceeds to destroy that evidence or allows it to be destroyed by failing to take *reasonable* precautions” (quoting *Mosaid Techs., Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 338 (D.N.J. 2004)) (emphasis added).

the request is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the action.” Thus, assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence. *Jones*, 2010 WL 2106640, at \*6-7 (“[R]easonableness is the key to determining whether or not a party breached its duty to preserve evidence.”).

Case law has developed guidelines for what the preservation duty entails. Unfortunately, in terms of what a party must do to preserve potentially relevant evidence, case law is not consistent across the circuits, or even within individual districts. This is what causes such concern and anxiety, particularly to institutional clients such as corporations, businesses or governments, because their activities—and vulnerability to being sued—often extend to multiple jurisdictions, yet they cannot look to any single standard to measure the appropriateness of their preservation activities, or their exposure or potential liability for failure to fulfill their preservation duties. A national corporation cannot have a different preservation policy for each federal circuit and state in which it operates. How then do such corporations develop preservation policies? The only “safe” way to do so is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.

For example, as noted, parties must preserve potentially relevant evidence under their “control,” and in the Fourth Circuit and the Second Circuit, “documents are considered to be under a party’s control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.” *Goodman*, 632 F. Supp. 2d at 515 (quoting *In re*

*NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007)). And, in this circuit, as well as the First and Sixth Circuits, the preservation duty applies not only when the evidence is in the party's control; there is also a duty to notify the opposing party of evidence in the hands of third parties. See *Silvestri*, 271 F.3d at 590; *Velez v. Marriott PR Mgmt., Inc.*, 590 F. Supp. 2d 235, 258 (D.P.R. 2008); *Jain v. Memphis Shelby Airport Auth.*, No. 08-2119-STA-dkv, 2010 WL 711328, at \*2 (W.D. Tenn. Feb. 25, 2010). In contrast, district courts in the Third, Fifth, and Ninth Circuits have held that the preservation duty exists only when the party controls the evidence, without extending that duty to evidence controlled by third parties. *Bensel v. Allied Pilots Ass'n*, 263 F.R.D. 150, 152 (D.N.J. 2009); *Rimkus*, 688 F. Supp. 2d at 615-16; *Melendres*, 2010 WL 582189, at \*4. So, what should a company that conducts business in the First, Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits do to develop a preservation policy that complies with the inconsistent obligations imposed by these circuits? This is the question for which a suitable answer has proven elusive.

It generally is recognized that when a company or organization has a document retention or destruction policy, it "is obligated to suspend" that policy and "implement a 'litigation hold' to ensure the preservation of relevant documents" once the preservation duty has been triggered. *Goodman*, 632 F. Supp. 2d at 511 (quoting *Thompson*, 219 F.R.D. at 100 (quoting *Zubulake IV*, 220 F.R.D. at 218)); see *Pension Comm.*, 685 F. Supp. 2d at 466 (same); *School-Link Tech., Inc. v. Applied Res., Inc.*, No. 05-2088-JWL, 2007 WL 677647, at \*3 (D. Kan. Feb. 28, 2007) (same). But, a litigation hold might not be necessary under certain circumstances, and reasonableness is still a consideration. *Jones*, 2010 WL 2106640, at \*7; see Thomas Y. Allman, *Amending the Federal Rules: The Path to an Effective Duty To Preserve* 5 (2010 Conf. on Civil Litig., June 15, 2010), [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h\\_Toc/47B91A2AC603](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Toc/47B91A2AC603)



E0340525670800167201/?OpenDocument (“Allman, *Amending the Rules*”) (suggesting that “if a litigation hold process *is* employed, that fact should be treated as prima facie evidence that reasonable steps were undertaken to notify relevant custodians of preservation obligations” and that “intervention in routine operations [should be] unnecessary unless the failure to do so [was] intended to deprive another of the use of relevant evidence”) (emphasis added); Legal Holds, *supra*, Guidelines 2-3 (stating that conduct that “demonstrates reasonableness and good faith in meeting preservation obligations” includes “adoption and consistent implementation of a policy defining a document retention decision-making process” and the “use of established procedures for the reporting of information relating to a potential threat of litigation to a responsible decision maker”). However, as discussed in detail below, courts differ in the fault they assign when a party fails to implement a litigation hold. *Compare Pension Comm.*, 685 F. Supp. 2d at 466 (stating that failure to implement a written litigation hold is gross negligence *per se*) with *Haynes v. Dart*, No. 08 C 4834, 2010 WL 140387, at \*4 (N.D. Ill. Jan. 11, 2010) (“The failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court’s consideration, but it is not *per se* evidence of sanctionable conduct.”) (citation omitted).

Although it is well established that there is no obligation to “preserve every shred of paper, every e-mail or electronic document, and every backup tape,” *Consol. Edison Co. of N.Y., Inc. v. United States*, 90 Fed. Cl. 228, 256 (Fed. Cl. 2009) (quoting *Zubulake IV*, 220 F.R.D. at 217), in some circumstances, “[t]he general duty to preserve *may* also include deleted data, data in slack spaces, backup tapes, legacy systems, and metadata.” Grimm, 37 U. BAL. L. REV. at 410 (emphasis added). Unlike most courts, which have not addressed directly retention requirements for multiple copies or backup tapes specifically, the United States District Court for the Southern District of New York has provided an in-depth discussion of the topic. *See*

*Zubulake IV*, 220 F.R.D. 220. In *Zubulake IV*, the court explained that the duty is to preserve “unique, relevant evidence that might be useful to an adversary.” *Id.* at 217. It stated that although “[a] party or anticipated party must retain all relevant documents,” it need not “preserve all backup tapes even when it reasonably anticipates litigation” or retain “multiple identical copies.” *Id.* at 217-18. The parties may decide how to select among multiple identical copies, *id.* at 218:

[A] litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to preserve attaches (to preserve documents in the state they existed at that time), creates a complete set of relevant documents.

District courts in the Fifth and Sixth Circuits have relied on *Zubulake IV*'s discussion of backup tape preservation. See *Maggette v. BL Devel. Corp.*, Nos. 2:07CV181-M-A, 2:07CV182-M-A, 2009 WL 4346062, at \*2 (N.D. Miss. Nov. 24, 2009); *Forest Labs., Inc. v. Caraco Pharm.*, No. 06-CV-13143, 2009 WL 998402, at \*4-5 (E.D. Mich. April 14, 2009); *Toth v. Calcasieu Parish*, No. 06-998, 2009 WL 528245, at \*2 (W.D. La. Mar. 2, 2009). However, because such discrepancies exist among circuits on other topics, it is not clear for litigants how uniformly the *Zubulake IV* opinion will be applied.

Breach of the preservation duty, also, is premised on reasonableness: A party breaches its duty to preserve relevant evidence if it fails to act reasonably by taking “positive action to preserve material evidence.” See *Jones*, 2010 WL 2106640, at \*6. The action must be “‘reasonably calculated to ensure that relevant materials will be preserved,’ such as giving out specific criteria on what should or should not be saved for litigation.” *Id.* (quoting *Danis v. USN Commc'ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at \*38 (N.D. Ill. 2000)).

Before turning to the remaining elements of a spoliation claim, it is helpful in analyzing the existence of the duty to preserve evidence and its breach to keep in mind the entity to whom that duty is owed, because this is important in determining an appropriate sanction when spoliation is found. What heretofore usually has been implicit—but seldom stated—in opinions concerning spoliation is that, with the exception of a few jurisdictions that consider spoliation to be an actionable tort,<sup>33</sup> the duty to preserve evidence relevant to litigation of a claim is a duty owed to the *court*, not to a party's adversary. *E.g.*, *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556 (N.D. Cal. 1987) (ordering, in addition to costs and fees, defendant's payment of "\$15,000.00 to the clerk of this court for the unnecessary consumption of the court's time and resources," after noting that "the defendant employed an unconscionably careless procedure to handle discovery matters, suggesting a callous disregard for its *obligations as a litigant*" and that defendant had a "profound disrespect for its *responsibilities in this litigation*") (emphasis added); *see also, e.g.*, *Metro. Opera Ass'n v. Local 100, Hotel Employees & Rest. Employees Int'l Union*, 212 F.R.D. 178, 228 (S.D.N.Y. 2003) (quoting *Turnage*, 115 F.R.D. at 556); *Krumwiede*, 2006 WL 1308629, at \*11 (concluding that default judgment on

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<sup>33</sup> *See Foster v. Lawrence Mem'l Hosp.*, 809 F. Supp. 831, 836 (D. Kan. 1992) (stating the Kansas recognizes torts of negligent and intentional spoliation); *Hazen v. Municipality of Anchorage*, 718 P.2d 456, 463 (Alaska 1986) (In Alaska, there exists "a common-law cause of action in tort for intentional interference with prospective civil action by spoliation [sic] of evidence."); *Rodgers v. St. Mary's Hosp. of Decatur*, 597 N.E.2d 616, 620 (Ill. 1992) (concluding that private cause of action existed in Illinois for spoliation under statute requiring preservation of x-rays when hospital was notified of relevant pending litigation); *Thompson ex rel. Thompson v. Owensby*, 704 N.E.2d 134, 139 (Ind. Ct. App. 1998) (stating that cause of action existed in Indiana for "negligent failure to maintain evidence"); *Hirsch v. Gen. Motors Corp.*, 628 A.2d 1108, 1115 (N.J. Law Div. 1993) (stating that "New Jersey recognizes a tort analogous to intentional spoliation of evidence" called "fraudulent concealment of evidence") (modified on other grounds by *Rosenblit v. Zimmerman*, 766 A.2d 749 (N.J. 2001)); *Henry v. Deen*, 310 S.E.2d 326, 334-35 (N.C. 1984) (stating that there is a cause of action for spoliation of evidence in North Carolina); *Smith v. Howard Johnson Co., Inc.*, 615 N.E.2d 1037, 1038 (Ohio 1993) (In Ohio, "[a] cause of action exists in tort for interference with or destruction of evidence.").

defendant's counterclaims was the only remedy for plaintiff's spoliation and perjury, which showed "blatant contempt for th[e] Court and a fundamental disregard for the judicial process"). *See generally Quela*, 2000 WL 656681, at \*7 ("[P]arties who wish to use the judicial system to settle disputes have certain obligations and responsibilities.") (quoting *Rodriguez v. M & M/Mars*, No. 96 C 1231, 1997 WL 349989, at \*2 (N.D. Ill. June 23, 1997)). For the judicial process to function properly, the court must rely "in large part on the good faith and diligence of counsel *and the parties* in abiding by these rules [of discovery] and conducting themselves and their judicial business honestly." *Metro. Opera Ass'n*, 212 F.R.D. at 181 (emphasis added). The court's inherent authority to impose sanctions for spoliation of evidence is a means of preserving "the integrity of the judicial process" so that litigants do not lose "confidence that the process works to uncover the truth." *Silvestri*, 271 F.3d at 590.

The civil justice system is designed for courts to decide cases on their merits, and to do so, the fact-finder must review the facts to discern the truth. *See Barnhill v. United States*, 11 F.3d 1360, 1367 (7th Cir. 1993) ("In the normal course of events, justice is dispensed by the hearing of cases on their merits."); *Metro. Opera Ass'n*, 212 F.R.D. at 181 ("A lawsuit is supposed to be a search for the truth.") (quoting *Miller v. Time-Warner Commc'ns, Inc.*, No. 97 Civ. 7286, 1999 WL 739528, at \*1 (S.D.N.Y. Sept. 22, 1999)). While the fact-finder can review only the documents that the parties produce, and production and preservation are not synonymous, production is possible only if documents are preserved. *See generally* Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-discovery*, 73 *FORDHAM L. REV.* 1, 14 (2004) (noting that the duty to preserve does not mean that all preserved information must be produced, but it "ensure[s] that a judge will be able to make that determination" about what should be produced). Thus, the truth cannot be uncovered if information is not preserved.

That the duty is owed to the court, and not to the party's adversary is a subtle, but consequential, distinction. A proper appreciation of the distinction informs the Court's decision regarding appropriate spoliation sanctions. Where intentionally egregious conduct leads to spoliation of evidence but causes no prejudice because the evidence destroyed was not relevant, or was merely cumulative to readily available evidence, or because the same evidence could be obtained from other sources, then the integrity of the judicial system has been injured far less than if simple negligence results in the total loss of evidence essential for an adversary to prosecute or defend against a claim. In the former instance, the appropriateness of a case-dispositive sanction is questionable despite the magnitude of the culpability, because the harm to the truth-finding process is slight, and lesser sanctions such as monetary ones will suffice. In contrast, a sympathetic though negligent party whose want of diligence eliminates the ability of an adversary to prove its case may warrant case-dispositive sanctions, because the damage to the truth-seeking process is absolute. Similarly, certain sanctions make no logical sense when applied to particular breaches of the duty to preserve. For example, an adverse inference instruction makes little logical sense if given as a sanction for negligent breach of the duty to preserve, because the inference that a party failed to preserve evidence because it believed that the evidence was harmful to its case does not flow from mere negligence—particularly if the destruction was of ESI and was caused by the automatic deletion function of a program that the party negligently failed to disable once the duty to preserve was triggered. The more logical inference is that the party was disorganized, or distracted, or technically challenged, or overextended, not that it failed to preserve evidence because of an awareness that it was harmful. In short, matching the appropriate sanction to the spoliating conduct is aided by remembering to whom the duty to preserve is owed.

Failures to preserve evidence also cause another, less widely discussed, injury to the civil justice system. “When spoliation issues are litigated, ‘more attention is focused on e-discovery than on the merits, with a motion for sanctions an increasingly common filing.’” Allman, *Amending the Rules* 1) (quoting Dan H. Willoughby, Jr. & Rose Hunter Jones, *Sanctions for E-Discovery Violations: By the Numbers* (2010 Conf. on Civil Litig., May 2010), available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h\\_RoomHome/4df38292d748069d0525670800167212/?OpenDocument](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_RoomHome/4df38292d748069d0525670800167212/?OpenDocument), under the links for Papers and Empirical Research); see *Rimkus*, 688 F. Supp. 2d at 607 (“Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution.”). Allegations of spoliation and the motions practice that ensues interfere with the court’s administration of justice in general by crowding its docket and delaying the resolution of cases. See, e.g., *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 n.5 (9th Cir. 2006) (noting that plaintiff’s “destruction of 2,200 files on his employer-issued computer ‘greatly impeded resolution of the case’ by obscuring the factual predicate of the case and consuming months of sanction-related litigation” and concluding that “there was ample evidence of the time and resources spent in investigating and resolving the spoliation issues,” which supported dismissal of the case); *Pension Comm.*, 685 F. Supp. 2d at 471 n.56 (“I, together with two of my law clerks, have spent an inordinate amount of time on this motion. We estimate that collectively we have spent close to three hundred hours resolving this motion. I note, in passing, that our blended hourly rate is approximately thirty dollars per hour (!) well below that of the most inexperienced paralegal, let alone lawyer, appearing in this case. My point is only that sanctions motions, and the behavior that caused them to be made, divert court time from other important duties—namely deciding cases on the merits.”); *State Farm Fire & Cas. Co. v. Broan Mfg. Co.*, 523 F. Supp. 2d 992, 997 (D. Ariz. 2007) (noting that the fact that

“the Court has spent significant resources investigating and resolving the spoliation issues” supported dismissal); *Gutman v. Klein*, No. 03 Civ. 1570 (BMC), 2009 WL 3296072, at \*8 (E.D.N.Y. Oct. 13, 2009) (noting that, with regard to spoliation sanctions, “defendants have raised pettifogging objections at nearly every stage of the litigation, trying the court’s patience . . .”); *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 440 (S.D.N.Y. 2004) (stating that “[t]he tedious and difficult fact finding encompassed in this opinion [regarding the duty to preserve ESI] and others like it is a great burden on a court’s limited resources”). Interestingly, this burden is the same regardless of whether the culpability underlying the spoliation was negligent, grossly negligent, or intentional.

What frustrates courts is the inability to fashion an effective sanction to address the drain on their resources caused by having to wade through voluminous filings, hold lengthy hearings, and then spend dozens, if not hundreds, of hours painstakingly setting forth the underlying facts before turning to a legal analysis that is multi-factored and involved. Adverse inference instructions do not compensate for the expenditure of court resources to resolve a spoliation dispute, nor do awards of attorney’s fees and costs to the prevailing party in the dispute. Further, dispositive sanctions, the appellate courts tell us, are only appropriate where lesser sanctions will not suffice. *Silvestri*, 271 F.3d at 590 (4th Cir. 2001); *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Indeed, it is questionable whether the interests of justice truly are served if a court imposes case-dispositive sanctions for clearly culpable conduct resulting in spoliation of evidence absent a finding that the failure to preserve evidence resulted in the loss of evidence that was relevant, or caused prejudice to the spoliating party’s adversary, notwithstanding the amount of time it took the court to resolve the spoliation issue, or the

concomitant “opportunity cost” to the court occasioned by its inability to work on other pressing matters because of the need to resolve the spoliation motion.

While some trial courts have ordered the payment of money to the clerk of the court as a sanction for unnecessarily prolonging and increasing litigation expense, or as a fine for unnecessarily consuming court resources, *e.g.*, *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-cv-620-GKF-PJC, 2009 WL 2252131, at \*4 (N.D. Okla. July 29, 2009); *Claredi v. Seebeyond Tech. Corp.*, No. 4:04CV1304 RWS, 2007 WL 735018, at \*4 (E.D. Mo. Mar. 8, 2007); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 111 (D.N.J. 2006); *Turnage*, 115 F.R.D. at 559, those rulings were from trial courts and were not appealed. It is far from clear that, had they been appealed, they would have been affirmed. *See Bradley v. Am. Household, Inc.*, 378 F.3d 373, 377-79 (4th Cir. 2004) (vacating and remanding district court order that imposed substantial monetary fine against defendant (\$200,000) and attorney (\$100,000) for discovery violations including failure to preserve and produce evidence; concluding that the fines were criminal because (a) they were payable to the court rather than to the complaining party; (b) they were not conditioned on compliance with a court order; (c) they were not tailored to compensate the complaining party; and (d) they were imposed for punitive purposes); *Buffington v. Baltimore Cnty., Md.*, 913 F.2d 113, 133 (4th Cir. 1990) (vacating sanctions imposed by trial court as “civil contempt” for violation of discovery obligations; observing that fines were ordered payable to the court, rather than to the complaining party; concluding that the fines were a form of criminal contempt, which could not be imposed without compliance with due process procedures required for criminal contempt proceedings); *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1438, 1442-44 (10th Cir. 1998) (holding that 25% surcharge added to fees that otherwise would be compensatory was a criminal contempt sanction, even though it was payable to the adverse party and not to the



court; reversing order for sanctions because court did not follow procedural requirements for criminal contempt).

The bottom line is that resolution of spoliation motions takes a toll on the court, separate from that extracted from the litigants, for which there is no satisfactory remedy short of criminal contempt proceedings, which are unlikely to be initiated absent extraordinary circumstances. In fact, research has revealed only one instance to date in which a court has initiated criminal contempt proceedings against a party for spoliation of ESI in a civil case. *See SonoMedica, Inc. v. Mohler*, No. 1:08-cv-230 (GBL), 2009 WL 2371507, at \*1 (E.D. Va. July 28, 2009) (“The Court further holds that this case will be referred to the United States Attorney to investigate criminal contempt proceedings because the Court finds that the [third party witnesses] willfully violated a court order by failing to produce documents in accordance with the court order, [one of the third party witnesses] failed to tell the truth during [a] deposition and for spoliation of certain files on their computer which were subject to production under the [court’s] Order to Compel.”). Courts should not shy away from their authority to initiate criminal contempt proceedings when the circumstances warrant such measures. However, in reaching this decision, they cannot ignore the fact that doing so involves compliance with Fed. R. Crim. P. 42, which requires various procedural safeguards, such as referral to the United States Attorney, notice, and a hearing, as discussed below. It seems clear that courts, even those faced with cases involving serious spoliation of evidence, will be reluctant to proceed with criminal contempt proceedings in most instances.

In this case, as the discussions above on pages 7 and 46-48 shows, Defendants clearly were under a duty to preserve ESI relevant to Plaintiff’s claims on October 14, 2006, if not earlier, and that, in an unabated destruction continuing for years, failed to comply with that duty.

While I have acknowledged that courts must consider issues of proportionality and reasonableness of the alleged spoliator's conduct in determining whether there has been a breach of the preservation duty, neither is at issue in this case.

Proportionality and reasonableness are not at issue because Defendants have never alleged that it would have been an undue burden for them to preserve the ESI they destroyed. Neither is this a case where a hapless party took objectively reasonable steps to preserve ESI, but it nonetheless was destroyed or lost. Defendants candidly admit that "certain CPI ESI was deleted by Pappas and CPI's Computer Engineer Evan DeRouen and/or others after CPI was served with the lawsuit and after a preservation order was issued," and they "take responsibility" for those deletions. Defs.' Opp'n 2. Defendants admit that "between October 14, 2006 and February 17, 2007 thousands of files were deleted from Pappas' laptop computer," *id.* at 5; that "Pappas made deletions on his laptop" on February 16 and 17, 2007, *id.* at 2, 7; and that, consistent with Pappas's testimony, "he would put e-mails into a 'Deleted Items' folder on his laptop" for what Defendants characterized as "storage purposes," *id.* at 8 (citation omitted). Acknowledging that the EHD "should not have been disposed of since it was in existence after the lawsuit had been filed," *id.* at 5, they "take responsibility for . . . the failure to preserve files on the SimpleDrive [EHD]," *id.* at 2. Defendants also "recognize[]" that there has been . . . contradictory testimony about its computer stores, and contradictory testimony about the use of the name Fred Bass." Defs.' Surreply 19. Thus, in this case, the issue is not whether the preservation duty was triggered, or whether Defendants took reasonable and proportional steps to preserve it, or whether the duty was breached. The issue is what sanctions are appropriate, given the nature of Defendants' conduct, the relevance of the ESI that was lost or destroyed, and the prejudice suffered by Plaintiff. *See Goodman*, 632 F. Supp. 2d at 509.

## 2. *Culpable State of Mind*

The second consideration for resolving a spoliation motion is to determine whether the alleged spoliator acted culpably. “Each case will turn on its own facts and the varieties of efforts and failures is infinite.” *Pension Comm.*, 685 F. Supp. 2d at 465. The information may have been lost or destroyed inadvertently, “for reasons unrelated to the litigation,” or the loss may result from intentional acts, calculated to prevent the other party from accessing the evidence. *Rimkus*, 688 F. Supp. 2d at 613. Therefore, it has been suggested that the court must rely on its “gut reaction based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply.” *Pension Comm.*, 685 F. Supp. 2d at 471. As with the elements of duty and breach, the variety of standards employed by courts throughout the United States and the lack of a uniform or consistent approach have caused considerable concern among lawyers and clients regarding what is required, and the risks and consequences of noncompliance.

“Courts differ in their interpretation of the level of intent required before sanctions may be warranted.” SEDONA CONFERENCE GLOSSARY, *supra*, at 48. In *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257, 266 (Fed. Cl. 2007), the court noted that a “distinct minority” of courts “require a showing of bad faith before any form of sanction is applied”; some courts require a showing of bad faith, but only “for the imposition of certain more serious sanctions”; some do not require bad faith for sanctions, but require more than negligence; and others “require merely that there be a showing of fault.” In the Fourth Circuit, for a court to impose some form of sanctions for spoliation, any fault—be it bad faith, willfulness, gross negligence, or ordinary negligence—is a sufficiently culpable mindset. *Goodman*, 632 F. Supp. 2d at 518, 520; *Thompson*, F.R.D. at 101; *see Pandora Jewelry, LLC v. Chamilia, LLC*, No. CCB-06-3041, 2008

WL 4533902, at \*9 (D. Md. Sept. 30, 2008). Under existing case law, the nuanced, fact-specific differences among these states of mind become significant in determining what sanctions are appropriate, as discussed *infra*. See *Sampson*, 251 F.R.D. at 179 (“Although, some courts require a showing of bad faith before imposing sanctions, the Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of sanctions.”) (citing *Silvestri*, 271 F.3d at 590).

Negligence, or “culpable carelessness,” is “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation[.]” *Black’s Law Dictionary* 846 (Bryan A. Garner ed., abridged 7th ed., West 2000). Negligence is contrasted with “conduct that is intentionally, wantonly, or willfully disregarding of others’ rights.” *Id.* With regard to preservation of evidence, if either the failure to collect or preserve evidence or the sloppiness of the review of evidence causes the loss or destruction of relevant information, the spoliator’s actions may amount to negligence, gross negligence, or even intentional misconduct. See *Pension Comm.*, 685 F. Supp. 2d at 464 (stating that such acts are “surely” negligence, if not more); *Jones*, 2010 WL 2106640, at \*6 (stating that failure to implement a litigation hold is not negligence *per se*; reasonableness must be considered). Failure “to assess the accuracy and validity of selected search terms” also could be negligence. See *Pension Comm.*, 685 F. Supp. 2d at 465 (citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259-62 (D. Md. 2008), in which the Court discussed reasonableness of a search to identify and withhold privileged documents).

Gross negligence, which is something more than carelessness, “differs from ordinary negligence only in degree, and not in kind.” *Pension Comm.*, 685 F. Supp. 2d at 464 (quoting *Prosser & Keeton on Torts* § 34 at 212 (citations omitted)). In *Jones*, 2010 WL 2106640, at \*9,

the defendant “did not reasonably prevent employees from destroying [relevant] documents” and “failed to adequately supervise those employees who were asked to preserve documents, such that documents were “probably” lost. The United States District Court for the Northern District of Illinois, emphasizing reasonableness in its analysis in *Jones*, concluded that the defendant was grossly negligent. *Id.* The court said that its conclusion did not rise above gross negligence because there was no evidence of “deliberate attempts to ‘wipe’ hard drives or to destroy relevant evidence by other technological or manual means.” *Id.* In *Pandora Jewelry*, 2008 WL 4533902, at \*8-9, this Court concluded that it was grossly negligent of the defendants to exchange servers during litigation and to fail to institute a litigation hold even though their emails were automatically archived or deleted after ninety days. This Court in *Sampson*, 251 F.R.D. at 181-82, concluded that the defendant was negligent, but not grossly negligent, when it failed to implement a litigation hold, because it instructed the employees most involved in the litigation to retain documents. In marked contrast, the United States District Court for the Southern District of New York has concluded that conduct such as the failure to issue a written litigation hold amounts to gross negligence *per se*. *Pension Comm.*, 685 F. Supp. 2d at 471 (stating that “the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources”).

Willfulness is equivalent to intentional, purposeful, or deliberate conduct. *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008). In *Goodman*, 632 F. Supp. 2d at 523, this Court held that the defendant “willfully destroyed evidence that it knew to be relevant” because its chief executive officer deleted her emails, and the defendant destroyed the officer’s computer. Conduct that is in bad faith must be willful, but conduct that is willful need not rise to bad faith actions. See *Buckley*, 538 F.3d at 323; *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Goodman*, 632 F. Supp. 2d at 520. While bad faith requires “destruction for the purpose of depriving the adversary of the evidence,” *Powell v. Town of Sharpsburg*, 591 F. Supp. 2d 814, 820 (E.D.N.C. 2008), for willfulness, it is sufficient that the actor intended to destroy the evidence. See *Goodman*, 632 F. Supp. 2d at 520; see also *United Med. Supply Co.*, 77 Fed. Cl. at 268 (distinguishing bad faith and willfulness).

Nevertheless, courts often combine their analysis of willfulness and bad faith. *E.g.*, *Metro. Opera Ass’n*, 212 F.R.D. at 224-25; *Rimkus*, 688 F. Supp. 2d at 644; *Krumwiede*, 2006 WL 1308629, at \*9-10. Thus, the following factors supported a finding of intentionality and bad faith in the Fifth Circuit:

[t]he evidence that the defendants knew about the litigation with Rimkus when they deleted the emails; the inconsistencies in the explanations for deleting the emails; the failure to disclose information about personal email accounts that were later revealed as having been used to obtain and disseminate information from Rimkus; and the fact that some of the emails reveal what the defendants had previously denied.

*Rimkus*, 688 F. Supp. 2d at 644. And, in the Second Circuit, the following facts lead the district court to the same conclusion: defendants “failed to comply with several court orders”; destroyed evidence; failed to search for and produce documents; and lied about “simple but material factual matters.” *Metro. Opera Ass’n*, 212 F.R.D. at 224-25.

In *Krumwiede*, 2006 WL 1308629, at \*9-10, the United States District Court for the Northern District of Illinois found “willful and bad faith spoliation of evidence.” Notably, immediately after the defendant in that case sent a preservation letter to Krumwiede’s attorney, referring in particular to a laptop in Krumwiede’s possession, and again after the court ordered Krumwiede to return the laptop, the laptop “experienced a spike in activity . . . that resulted in the alteration, modification, or destruction of thousands of potentially relevant files and their metadata.” *Id.* at \*9. Also, “Krumwiede lied to th[e] Court when he testified that he did not receive notice of the September 15, 2005 order until September 16, 2005,” and “continued [to] obstruct[] discovery even after relinquishing control of [the] laptop.” *Id.* at \*9-10. The court reached its conclusion based on “the volume and timing of Krumwiede’s activities.” *Id.*

Here, the parties disagree about Defendants’ level of culpability. Plaintiff characterizes Pappas’ behavior as “egregious” and perjurious, and it insists that “Pappas has exhibited a pattern of litigation abuse and a persistent disrespect for the judicial process.” Pl.’s Mot. 56, 69. According to Plaintiff, “the record is replete with multiple conscious and affirmative acts by Pappas that led to the deliberate destruction of relevant evidence. Pl.’s Reply 1. Defendants acknowledge wrongdoing but insist that their “culpable state of mind was negligence.” Defs.’ Opp’n 25. Moreover, according to Defendants, Pappas’s September 27, 2007 Rule 37 certification was not false because he was not aware that his production was incomplete. *Id.* at 9-10. They insist that Plaintiff’s allegations that Defendants “manufactured evidence” and removed data instead of producing all ESI are “unfounded.” *Id.* at 14-16. I disagree.

I find the circumstances of this case to be indistinguishable from other cases in which the spoliating party was found to have acted in bad faith. The discussion *supra* at Sections I.1–I.9 convincingly demonstrates that Pappas, and through him CPI, directly and with the aid of

DeRouen and “Federico,” set out to delete, destroy, or hide thousands of files containing highly relevant ESI pertaining to Plaintiff’s claims. Suffice it also to say that in both *Krumwiede*, 2006 WL 1308629, at \*9-10, and *Rimkus*, 688 F. Supp. 2d at 607, 629, 644, as well as in this case, the spoliating parties lied about their ESI production; obstructed the discovery process; and intentionally destroyed evidence when they were aware of the lawsuit. As in *Rimkus*, 688 F. Supp. 2d 598, Pappas disposed of an entire hard drive, despite his knowledge of the lawsuit, and provided wildly inconsistent explanations of his ESI deletions. *Id.* at 607, 644. As in *Krumwiede*, 2006 WL 1308629, at \*9-10, “the volume and timing” of Defendants’ spoliation is telling: Defendants deleted thousands of files and ran programs to ensure their permanent loss immediately following preservation requests and orders, and immediately before scheduled discovery efforts. And, as in *Metropolitan Opera Ass’n*, 212 F.R.D. at 224-25, Defendants’ destruction of evidence was compounded by their failure to comply with numerous court orders. In sum, Defendants took repeated, deliberate measures to prevent the discovery of relevant ESI, clearly acting in bad faith, and in affidavits, depositions, and in open court, Pappas nonchalantly lied about what he had done.

### 3. *Relevance of Lost Evidence and Resulting Prejudice*

The third consideration is the relevance of the lost evidence. In the context of spoliation, lost or destroyed evidence is “relevant” if “a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.” *Thompson*, 219 F.R.D. at 101; *see Goodman*, 632 F. Supp. 2d at 509 (same). It is not enough for the evidence to have been “sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence,” i.e., to have ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the



evidence.” *Pension Comm.*, 685 F. Supp. 2d at 467 (quoting Fed. R. Evid. 401). Moreover, for the court to issue sanctions, the absence of the evidence must be prejudicial to the party alleging spoliation of evidence. *Id.*; see *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 346 (M.D. La. 2006) (noting that, in determining whether an adverse inference is warranted, the “‘relevance’ factor” involves not only relevance but also “whether the non-destroying party has suffered prejudice from the destruction of the evidence”); see also *Rimkus*, 688 F. Supp. 2d at 616 (quoting *Consol. Aluminum Corp.*, 244 F.R.D. at 346). Put another way, a finding of “relevance” for purposes of spoliation sanctions is a two-pronged finding of relevance and prejudice.

Spoliation of evidence causes prejudice when, as a result of the spoliation, the party claiming spoliation cannot present “evidence essential to its underlying claim.” *Krumwiede*, 2006 WL 1308629, at \*10 (noting that even if the files were only modified and not deleted, “the changes to the file metadata call the authenticity of the files and their content into question and make it impossible for [the defendant] to rely on them”). “Prejudice can range along a continuum from an inability to prove claims or defenses to little or no impact on the presentation of proof.” *Rimkus*, 688 F. Supp. 2d at 613. Generally, courts find prejudice where a party’s ability to present its case or to defend is compromised. *E.g.*, *Silvestri*, 271 F.3d at 593-94 (significant prejudice resulted when plaintiff’s failure to preserve vehicle after accident giving rise to litigation “substantially denied the defendant the ability to defend the claim”). However, at least one court has found that the delayed production of evidence causes prejudice. See *Jones*, 2010 WL 2106640, at \*8-9 (noting that the defendant’s one-year delay in producing documents caused prejudice to the plaintiff). The court considers prejudice to the party and “prejudice to the judicial system.” *Krumwiede*, 2006 WL 1308629, at \*11.

When the party alleging spoliation shows that the other party acted willfully in failing to preserve evidence, the relevance of that evidence is presumed in the Fourth Circuit. *Sampson*, 251 F.R.D. at 179; *Thompson*, 219 F.R.D. at 101. Negligent or even grossly negligent conduct is not sufficient to give rise to the presumption; in the absence of intentional loss or destruction of evidence, the party “must establish that the lost documents were relevant to her case.” *Sampson*, 251 F.R.D. at 179; *see Thompson*, 219 F.R.D. at 101. Similarly, in the Seventh Circuit, unintentional conduct is insufficient for a presumption of relevance. *In re Kmart Corp.*, 371 B.R. 823, 853-54 (Bankr. N.D. Ill. 2007). However, in the Second Circuit, in the court’s discretion, “[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.”<sup>34</sup> *Pension Comm.*, 685 F. Supp. 2d at 467 (emphasis added). Also, “[t]he Fifth Circuit has not explicitly addressed whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial.” *Rimkus*, 688 F. Supp. 2d at 617-18. Where there is a presumption, the spoliating party may rebut this presumption by showing “that the innocent party has not been prejudiced by the absence of the missing information.” *Pension Comm.*, 685 F. Supp. 2d at 468. If the spoliating party makes such a showing, “the innocent party, of course, may offer evidence to counter that proof.” *Id.* As with the other elements, the lack of a uniform standard regarding the level of culpability required to warrant spoliation sanctions has created uncertainty and added to the concern that institutional and organizational entities have expressed regarding how to conduct themselves in a way that will comply with multiple, inconsistent standards.

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<sup>34</sup> This distinction is all the more significant because, as noted, in the Second Circuit, certain conduct is considered gross negligence *per se*. *Pension Comm.*, 685 F. Supp. 2d at 471. Thus, for example, if a party fails to issue a written litigation hold, the court finds that it is grossly negligent, in which case relevance and prejudice are presumed. *Point. Game. Match.*

Here, Plaintiff alleges that “Defendants’ massive and intentional destruction of emails and documents has substantially prejudiced, to various degrees, its ability to prove all of its claims, both in terms of liability and the extent of damages.” Pl.’s Reply 43. According to Plaintiff, Defendants’ actions caused prejudice because the ESI that Defendants “irretrievably deleted, destroyed and spoliated . . . contained the very information and ‘fingerprints’ that would establish all or most of the elements of Counts I, II, VII, and VIII.” Pl.’s Mot. 76. Although Plaintiff concedes that “many of the known deletions . . . were eventually recovered in whole or in part,” *id.*, significant numbers of files were permanently destroyed. On the record before me, the evidence of prejudice to Plaintiff is manifest.

Defendants’ willful, bad faith conduct allows this Court to presume relevance and prejudice. Defendants utterly fail to rebut this presumption through their inconsistent and incredible explanations for their destruction of ESI. Moreover, as painstakingly discussed in Sections I.2–I.9, *supra*, it is obvious that the permanent loss of thousands of relevant files that proved that Defendants improperly accessed and used Plaintiff’s proprietary information is prejudicial, because, even if the files were cumulative to some extent, Plaintiff’s case against Defendants is weaker when it cannot present the overwhelming quantity of evidence it otherwise would have had to support its case. Defendants themselves cannot seriously believe that their willful misconduct did not cause prejudice, because they acquiesced to the entry of a default judgment on Count I, Plaintiff’s core claim, a clear concession that the spoliated documents were relevant to that claim and their destruction caused prejudice. And, lest there be any doubt, Defendants affirmatively stated with regard to the copyright claim: “[W]e’ve given up on prejudice . . . which I think was the appropriate thing to do. We gave up on the issue of

relevance . . . .” June 25, 2010 Hr’g Tr. 3:16-22. Thus, the loss of ESI deprived Plaintiff of relevant evidence, and this loss was prejudicial.

### C. Sanctions

In determining what sanctions are appropriate, the Court must consider the extent of prejudice, if any, along with the degree of culpability, and, as with the other elements, possible sanctions vary by jurisdiction. *See Nucor Corp. v. Bell*, 251 F.R.D. 191, 201 (D.S.C. 2009); *Rimkus*, 688 F. Supp. 2d at 613-15. The harshest sanctions may apply not only when both severe prejudice and bad faith are present, but also when, for example, culpability is minimally present, if there is a considerable showing of prejudice, or, alternatively, the prejudice is minimal but the culpability is great, as discussed *infra*. For example, in some, but not all, circuits, conduct that does not rise above ordinary negligence may be sanctioned by dismissal if the resulting prejudice is great. *Silvestri*, 271 F.3d at 593 (stating that dismissal may be an appropriate sanction for negligent conduct “if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case” and dismissing case without concluding whether plaintiff’s conduct rose above negligence); *see Rimkus*, 688 F. Supp. 2d at 614-15 (“The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith. In the Third Circuit, the courts balance the degree of fault and prejudice.”) (footnotes omitted). Conversely, absence of either intentional conduct or significant prejudice may lessen the potential appropriate sanctions. In the Fifth and Eleventh Circuits, for example, courts may not impose severe sanctions absent evidence of bad faith. *See Rimkus*, 688 F. Supp. 2d at 614; *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, No. 09-60351-CIV, 2010 WL 3368654, at \*12-13 (S.D. Fla. Aug. 23, 2010). The different approaches among the Circuits regarding the level of culpability that must

be shown to warrant imposition of severe sanctions for spoliation is another reason why commentators have expressed such concern about the lack of a consensus standard and the uncertainty it causes.

Sanctions that a federal court may impose for spoliation include assessing attorney's fees and costs, giving the jury an adverse inference instruction, precluding evidence, or imposing the harsh, case-dispositive sanctions of dismissal or judgment by default. *Goodman*, 632 F. Supp. 2d at 506; *In re NTL, Inc. Secs. Litig.*, 244 F.R.D. at 191. The court may also "treat[] as contempt of court the failure to obey" a court order to provide or permit discovery of ESI evidence. *See* Fed. R. Civ. P. 37(b)(2)(A)(vii). "While a district court has broad discretion in choosing an appropriate sanction for spoliation, 'the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.'" *Silvestri*, 271 F.3d at 590 (quoting *West*, 167 F.3d at 779). Put another way, appropriate sanctions should "(1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore 'the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'" Thus, the range of available sanctions serve both normative—designed to punish culpable conduct and deter it in others—and compensatory—designed to put the party adversely affected by the spoliation in a position that is as close to what it would have been in had the spoliation not occurred—functions. Because, as noted above, the duty to preserve relevant evidence is owed to the court, it is also appropriate for a court to consider whether the sanctions it imposes will "prevent abuses of the judicial system" and "promote the efficient administration of justice." *Jones*, 2010 WL 2106640, at \*5. The court must "impose the least harsh sanction that can

provide an adequate remedy.” *Pension Comm.*, 685 F. Supp. 2d at 469; *see Rimkus*, 688 F. Supp. 2d at 618.

In this case, Plaintiff has urged this Court to impose the most severe of sanctions, including entry of a default judgment as to all remaining counts—Counts I (copyright infringement), II (unfair competition), VII (Lanham Act violations, namely false advertising and reverse palming off), and VIII (patent violations)—for both liability and damages; assessment of attorney’s fees and costs for what likely will amount to most of the litigation costs that Plaintiff has incurred; assessment of a civil fine; and referral of the matter to the United States Attorney for initiation of criminal proceedings against Pappas for “criminal contempt of Court, obstruction of justice, and perjury.” Pl.’s Mot. 97, 98, 99. On the record before me, Plaintiff hardly can be blamed for taking such an extreme position. Indeed, as exhaustively inventoried above, Defendants’ willful misconduct has had a considerable adverse impact on the Court’s pretrial schedule, imposed substantial burden on two judges of this Court and their staffs, and Pappas has essentially thumbed his nose at the Court’s efforts to oversee a pretrial process that would facilitate a fair and timely resolution of this case on its merits. Nonetheless, in fashioning spoliation sanctions, Courts must strive to issue orders that generate light, rather than heat, and without ignoring the magnitude of willful misconduct and prejudice, must fashion remedies that strike the appropriate balance between those that are normative and those that are compensatory. With this in mind, I will turn to what sanctions are appropriate in this case.

1. *Dismissal or Default Judgment*<sup>35</sup>

Courts may order a default judgment or dismissal to “send a strong message to other litigants, who scheme to abuse the discovery process and lie to the Court, that this behavior will not be tolerated and will be severely sanctioned.” *Krumwiede*, 2006 WL 1308629, at \*11. In the Fourth Circuit, to order these harshest sanctions, the court must ““be able to conclude either (1) that the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.”” *Goodman*, 632 F. Supp. 2d at 519 (quoting *Sampson*, 251 F.R.D. at 180 (quoting *Silvestri*, 271 F.3d at 593)) (emphasis in *Goodman*). To conclude that the second prong was met, i.e., that there was sufficient prejudice to warrant dismissal or a default judgment, “the Court must examine the record that remains to determine whether it contain[ed] enough data” for the aggrieved party to build its case or defense, and “the Court must decide whether a lesser sanction than dismissal [or default judgment] would level the playing field.” *Erie Ins. Exch. v. Davenport Insulation, Inc.*, 659 F. Supp. 2d 701, 707 (D. Md. 2009); see *Sampson*, 251 F.R.D. at 180 (stating that second prong requires proof that “plaintiff was highly prejudiced and denied the only means to establish her case.”).

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<sup>35</sup> As this Court noted in *Sampson*, 251 F.R.D. at 180 n.11:

Most of the Fourth Circuit cases involving sanctions for spoliation of evidence arise in the context of a defendant asking for dismissal of a plaintiff’s claims because of destruction of evidence by the plaintiff. As the Fifth Circuit has noted, “[b]ecause ... rendering default judgment is equally as harsh a sanction as dismissing the case of a plaintiff with prejudice, we cite cases involving these sanctions interchangeably.” *Pressey v. Patterson*, 898 F.2d 1018, 1021 n.2 (5th Cir. 1990)]. The court here cites cases involving requests for default judgment and for dismissal interchangeably.

Although “*Silvestri* posits an either/or test,” *Erie Ins. Exch.*, 659 F. Supp. 2d at 707, indicating two distinct means of justifying severe sanctions, this Court has not terminated a case where a spoliator acted in bad faith, absent a showing of substantial prejudice.<sup>36</sup> Elsewhere, dispositive or potentially dispositive sanctions are impermissible without bad faith, even if there is considerable prejudice. *See Rimkus*, 688 F. Supp. 2d at 614 (In the Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits, “the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of ‘bad faith.’”); *see also* the Appendix to this Memorandum, Order and Recommendation

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<sup>36</sup> VSI cites various cases in which the Fourth Circuit has affirmed default or dismissal as a sanction for spoliation, but in many cases the court found irreparable prejudice. *See* Pl.’s Mot. 53 (citing *King v. Am. Power Conversion Corp.*, 181 Fed. App’x 373, 374 (4th Cir. 2006) (affirming dismissal as sanction when plaintiff’s negligence caused irreparable prejudice); *Silvestri*, 271 F.3d 583 (same); *PVD Plast. Mould Indus., Ltd. v. Polymer Grp.*, 31 Fed. App’x 210, 211 (4th Cir. 2002) (same)). In other cases, the issue concerned a party’s failure to produce discovery (not its failure to preserve ESI) and, in any event, there was substantial prejudice. *See* Pl.’s Mot. 53 (citing *Anderson v. Found. for Advancement, Educ. & Emp’t of Am. Indians*, 155 F.3d 500, 504-05 (4th Cir. 1998) (affirming default judgment “as a last-resort sanction” where defendant in bad faith “stonewalled on discovery from the inception of the lawsuit,” failing to comply with court orders to produce documents, and the delayed production caused prejudice because plaintiff’s “claim became junior to that of another claimant suing the Foundation”); *Zornes v. Specialty Indus., Inc.*, No. 97-2337, 1998 WL 886997 (4th Cir. Dec. 21, 1998) (affirming dismissal where plaintiffs in bad faith failed to comply with court orders to answer interrogatories, and the delayed production caused “substantial prejudice”). In *Zaczek v. Fauquier County*, 764 F. Supp. 1071 (E.D. Va. 1991), *aff’d*, 16 F.3d 414 (4th Cir. 1993), the district court dismissed a prisoner’s case for failure to comply with rules of procedure.

In its own research, which has been considerable, the Court has identified only one case—in a different circuit—that was terminated based solely on a party’s bad faith spoliation of evidence. In *Miller v. Time-Warner Communications, Inc.*, No. 97 Civ. 7286, 1999 WL 739528, at \*2 (S.D.N.Y. Sept. 22, 1999), the plaintiff tried unsuccessfully to erase handwritten notes on documents produced and then lied about it. Reasoning that the plaintiff’s spoliation of evidence was willful and in bad faith and, significantly, she committed “repeated instances of perjury,” the court concluded that although there was no prejudice whatsoever, “the only appropriate sanction [was] to dismiss the complaint.” *Id.* It noted that, had the plaintiff not committed perjury, the “lesser sanction of requiring plaintiff to pay all the defendant’s attorneys fees incurred as a result of the spoliation might [have] be[en] appropriate.” *Id.* Accordingly, lofty discussions about the truth-seeking purpose of a lawsuit and the need to deter conduct that interferes with it aside, it does not appear that courts have imposed ultimate case-ending sanctions in many cases where there has not also been a showing of extreme prejudice.



(identifying requirements by jurisdiction). And, in the Fifth Circuit, “[a] severe sanction such as a default judgment or an adverse inference instruction requires bad faith *and* prejudice.” *Id.* at 642 (emphasis added). The sheer variety of formulae used by various courts to determine whether case-dispositive sanctions are appropriate also contributes to the difficulty that lawyers and clients experience in attempting to evaluate the risks and consequences of failing to preserve evidence.

## 2. *Adverse Inference and Other Adverse Jury Instructions*

In its discretion, the court may order an adverse inference instruction, which informs a jury that it may “draw adverse inferences from . . . the loss of evidence, or the destruction of evidence,” by assuming that failure to preserve was because the spoliator was aware that the evidence would have been detrimental. *Vodusek*, 71 F.3d at 156. Because such a definitive inference is not always warranted, courts have crafted various levels of adverse inference jury instructions: The court may instruct the jury that “certain facts are deemed admitted and must be accepted as true”; impose a mandatory, yet rebuttable, presumption; or “permit[] (but . . . not require) a jury to presume that the lost evidence is both relevant and favorable to the innocent party.” *Pension Comm.*, 685 F. Supp. 2d at 470-71; *see* examples cited in the Appendix to this Memorandum, Order and Recommendation. In this Circuit, to impose an adverse jury instruction, the court “must only find that the spoliator acted willfully in the destruction of evidence.” *Goodman*, 632 F. Supp. 2d at 519 (citing *Vodusek*, 71 F.3d 148, and noting at footnote 15 that “in the Fourth Circuit, the *Vodusek* standard detailing the requirements for an adverse jury instruction remains applicable,” rather than the oft-cited *Zubulake IV* standard from the Southern District of New York, because although it “remains insightful,” the *Zubulake IV* standard “could be read to limit the availability of sanctions” in this Circuit); *see Sampson*, 251

F.R.D. at 181. *But see Pension Comm.*, 685 F. Supp. 2d at 478-79 (stating that an adverse jury instruction was warranted for the grossly negligent, but unintentional, conduct).<sup>37</sup> While negligence or even gross negligence is not sufficient in this Circuit, the conduct need not rise to the level of bad faith. *Goodman*, 632 F. Supp. 2d at 519. *But see Rimkus*, 688 F. Supp. 2d at 617 (stating that “the severe sanctions of . . . giving adverse inference instructions may not be imposed unless there is evidence of ‘bad faith.’”); *see also Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) (same); *Johnson v. Avco Corp.*, 702 F. Supp. 2d 1093, 1110 (E.D. Mo. 2010) (same); *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 745, 747 (8th Cir. 2004) (stating that if spoliation occurs before litigation commences, there must be evidence of bad faith for the court to impose an adverse inference instruction, but if spoliation occurs during litigation, the court may impose an adverse inference instruction “even absent an explicit bad faith finding”). The court must also consider relevance and prejudice. *Pension Comm.*, 685 F. Supp. 2d at 467; *see Vodusek*, 71 F.3d at 156 (“To draw an adverse inference from the absence, loss or destruction of evidence, it would have to appear that the evidence would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence.”). Once again, the approaches taken by courts vary widely, making predictability difficult for parties who are trying to determine what they must preserve, and what can happen if they do not.

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<sup>37</sup> Again, the significance of this departure comes to light when it is viewed in the context of the chain reaction spurred by considering certain conduct gross negligence *per se*. If, for example, a court adopts the position of *Pension Committee*, 685 F. Supp. 2d at 471, that a failure to institute a written litigation hold is gross negligence *per se*, and therefore presumes relevance and prejudice, it is inexorably poised to give an adverse jury instruction without further analysis. This approach is not consistent with Fourth Circuit precedent.

### 3. *Attorney's Fees, Costs, and Fines*

Less severe sanctions include costs, attorney's fees, and fines, which not only compensate the prejudiced party but also "punish the offending party for its actions" and "deter the litigant's conduct, sending the message that egregious conduct will not be tolerated." *See Pension Comm.*, 685 F. Supp. 2d at 467, 471; *Goodman*, 632 F. Supp. 2d at 506. (citations and quotation marks omitted). The court's "inquiry focuses more on the conduct of the spoliating party than on whether documents were lost, and, if so, whether those documents were relevant and resulted in prejudice to the innocent party." *Pension Comm.*, 685 F. Supp. 2d at 467. This Court will award costs or fees in conjunction with a spoliation motion as an alternative to a harsher sanction; if further discovery is necessary due to the spoliation; or in addition to another sanction, in which case the award may be for "reasonable expenses incurred in making the motion, including attorney's fees," or also for the cost of investigating the spoliator's conduct. *Goodman*, 632 F. Supp. 2d at 524. Additionally, a few courts have ordered the spoliating party to pay a fine to the clerk of court or a bar association for prolonging litigation and wasting the court's time and resources. *E.g.*, *Pinstripe, Inc. v. Manpower, Inc.*, No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at \*4 (N.D. Okla. July 29, 2009); *Claredi v. Seebeyond Tech. Corp.*, No. 4:04CV1304 RWS, 2007 WL 735018, at \*4 (E.D. Mo. Mar. 8, 2007); *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 111 (D.N.J. 2006); *Turnage*, 115 F.R.D. at 559. However, as stated *supra* at page 59, it is unclear whether these unappealed trial court holdings would withstand appellate review, because in similar cases the Fourth and Tenth Circuits have vacated discovery sanctions ordering the payment of money to the Clerk of the Court, deeming them to be criminal contempt sanctions, which are unavailable without the enhanced due process procedure requirements criminal contempt proceedings require. *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 377-79

(4th Cir. 2004); *Buffington v. Baltimore Cnty., Md.*, 913 F.2d 113, 133 (4th Cir. 1990); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1438, 1442-44 (10th Cir. 1998).

#### 4. Contempt of Court

Fed. R. Civ. P. 37(b)(2)(A)(vii) provides that the court may “treat[] as contempt of court the failure to obey” a court order to provide or permit discovery of ESI evidence. Similarly, pursuant to its inherent authority, the court may impose fines or prison sentences for contempt and enforce “the observance of order.” *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Contempt sanctions may be civil or criminal. *Buffington*, 913 F.2d at 133-34.

When the nature of the relief and the purpose for which the contempt sanction is imposed is remedial and intended to coerce the contemnor into compliance with court orders or to compensate the complainant for losses sustained, the contempt is civil; if, on the other hand, the relief seeks to vindicate the authority of the court by punishing the contemnor and deterring future litigants' misconduct, the contempt is criminal. . . .

If the relief provided is a sentence of imprisonment, it is remedial if “the defendant stands committed unless and until he performs the affirmative act required by the court's order,” and is punitive if “the sentence is limited to imprisonment for a definite period.” If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.

*Id.* (quoting *Hicks v. Feiock*, 485 U.S. 624, 631-32 (1988) (citations omitted)); *see also Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828, (1994) (“The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order ‘to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance.’” (quoting *Gompers v. Bucks Cnty. Stove & Range Co.*, 221 U.S. 418 (1911))); *Bradley*, 378 F.3d at 378 (discussing the

“basic difference between civil and criminal contempt sanctions” and quoting *Buffington*, 913 F.2d at 133).

“Criminal contempt is a crime in the ordinary sense,” *Bloom v. Illinois*, 391 U.S. 194, 201 (1968), requiring the procedural protections of notice and a hearing. *Bradley*, 378 F.3d at 379. Therefore, to treat a party’s failure to comply with a court order as criminal contempt, the court must refer the matter to the United States Attorney for prosecution. Fed. R. Crim. P. 42(a)(2). If that office declines to accept the case (a highly probable outcome in most instances), then the court must appoint a private prosecutor to bring the criminal contempt case. Fed. R. Crim. P. 42(a)(2); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (concluding that federal courts possess inherent authority to initiate “contempt proceedings for disobedience of their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt”); *Buffington*, 913 F.2d at 132 (vacating order imposing criminal contempt sanctions without required procedural protections; noting that district court, “following the procedure outlined in *Young* [481 U.S. at 801] initially referred the matter to the United States Attorney” and “[a]fter the U.S. Attorney declined to prosecute, the court, citing *Young*, appointed a private prosecutor,” but ultimately improperly imposed fines payable to the clerk of the court as civil contempt sanctions). If brought, the burden of proof is beyond a reasonable doubt. *Gompers*, 221 U.S. at 444; *Bradley*, 378 F.3d at 379. Additionally, the defendant is entitled to a jury trial if the sentence will be longer than six months. Fed. R. Crim. P. 42(a)(3); *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (“[S]entences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof.”). Recently, another court in the Fourth Circuit referred a case to the United States Attorney for criminal contempt proceedings against a party for spoliation of ESI in a civil case.

*See SonoMedica, Inc. v. Mohler*, No. 1:08-cv-230 (GBL), 2009 WL 2371507, at \*1 (E.D. Va. July 28, 2009).

To hold a party in civil contempt, the court must find that four elements have been established by clear and convincing evidence:

“(1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) that the decree was in the movant's ‘favor’; (3) that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violation; and (4) that [the] movant suffered harm as a result.”

*Id.* at \*3 (quoting *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000)).

#### 5. *Appropriate Sanctions for Defendants*

##### a. *Default judgment as to liability on copyright claim only*

Plaintiff argues that “only the severest forms of sanctions” would be “effective” against Defendants. Pl.’s Mot. 90-91. As Plaintiff sees it, “[i]f this Court finds that Defendants’ misconduct was egregious enough to have justified a forfeiture of their defenses, then it need not also determine whether Defendants’ misconduct denied VSI the ability to prove all its claims.” Pl.’s Reply 5-6. *See Erie Ins. Exch.*, 659 F. Supp. 2d at 707. Defendants contend that here, unlike in the cases in which courts have sanctioned the spoliating party through a default judgment or dismissal, “the lost evidence is not the *sole evidence* at issue on liability,” such that a default judgment on the copyright claim, the unfair competition claim, the alleged Lanham Act violations, and the alleged patent violation, i.e., all remaining counts, is not appropriate. Defs.’ Opp’n 45. Moreover, as Defendants see it, a court may impose a default judgment “on only those claims that make a cause of action and not on those to which the defendant possessed a viable legal defense.” Defs.’ Surreply 3.

As noted, Defendants admit spoliation, relevance, and prejudice, and consent to a default judgment on liability for Count I, the copyright claim. Further, the facts amply demonstrate the intentional, bad faith permanent destruction of a significant quantity of relevant evidence, to the Plaintiff's detriment. Thus, it is clearly appropriate that the spoliation consequences include a judgment finding CPI and Pappas liable on Count I.<sup>38</sup>

It is far less certain, however, whether Plaintiff has demonstrated that a default judgment as to all the remaining counts alleged against Defendants is required, or that a default judgment as to damages for all counts, including Count I, is warranted. The copyright claim always has been Plaintiff's primary claim, and it is easy to see how the evidence that was destroyed prejudiced Plaintiff's efforts to prove it. The same cannot be said about the remaining counts for unfair competition (Count II), Lanham Act violations, namely false advertising and reverse palming off (Count VII), and patent violations (Count VIII)—for both liability and damages; at least not at this time and on this record. While it may be correct that evidence that would be relevant to prove the copyright claim might also be relevant to proving the others, Plaintiff has not yet made the necessary showing of irreparable or substantial prejudice. Therefore,

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<sup>38</sup> Defendants indulge in a little verbal legerdemain in characterizing their position regarding Count I. They acquiesce to the entry of a "consent" judgment, rather than the entry by the Court of a default judgment. While the end result is the same under either characterization, the latter makes it unambiguous that the outcome is as a severe sanction for egregious misconduct; the former implies a form of agreement without the pejorative classification, similar to settling a claim without admitting liability. It would be inappropriate for the Court to indulge Defendants in this face-saving effort. Defendants cannot have their cake and eat it too. They cannot admit to breach of the duty to preserve and acknowledge (or, more accurately, capitulate) on the issues of prejudice and relevance, but attempt to sanitize the result by labeling it something other than what it is—a sanction. Accordingly, the appropriate sanction is the entry of a default judgment as to liability for Count I, copyright infringement, pursuant to Fed. R. Civ. P. 37(b)(2)(A)(vi). Because this is a dispositive outcome, I am recommending that Judge Garbis impose it, rather than doing so myself, although there can be no doubt that this result is warranted on this record.

dispositive sanctions are inappropriate with regard to those counts. *See Silvestri*, 271 F.3d at 593; *Goodman*, 632 F. Supp. 2d at 519; *Sampson*, 251 F.R.D. at 180.

Similarly, with the exception of the remedy of the entry of a permanent injunction as to the copyright claim, which Defendants do not oppose, Defs.' Opp'n 29 & Ex. 11, it is not clear that Plaintiff has demonstrated an inability to prove monetary damages for any of the counts alleged. The debate all these years has focused on liability, not damages. While Plaintiff ultimately may be able to make this showing, it has not done so yet. Accordingly, entry of a default judgment as to monetary damages is denied, without prejudice. Rather, it is appropriate for the court to schedule a trial on the issues of liability for Counts II (unfair competition), VII (Lanham Act violations), and VIII (Patent Act violations), and money damages for all counts. Counsel have informed the Court that they do not seek a jury trial on these issues. (June 25, 2010 Hr'g Tr. 5:19 – 6:11.) Accordingly, these issues will be tried to the Court. I recommend that Plaintiff be permitted to proceed, but that if in the future of this litigation Plaintiff is able to demonstrate with greater particularity than it has to date that it cannot meet its burden of proof as to liability for Counts II (unfair competition), VII (Lanham Act violations), and VIII (Patent Act violations), or money damages as to all counts, because of Defendants' spoliation, then the Court should revisit at that time whether additional sanctions, such as the entry of an order pursuant to Fed. R. Civ. P. 37(b)(2)(A)(ii) prohibiting Defendants from supporting their defenses to liability on Counts II, VII, and VIII, or money damages; or prohibiting them from opposing Plaintiff's proof of money damages; or finding Defendants liable for the counts other than copyright.



*b. Permanent injunction on the copyright claim*

As for the permanent injunction on the copyright count, which Plaintiff requests and Defendants do not oppose, Defs.' Opp'n 29 & Ex. 11, I am recommending that Judge Garbis grant this as a sanction.

*c. Attorney's fees, costs, and civil, but not criminal, contempt*

As the prevailing party, Plaintiff is entitled to reasonable attorney's fees and costs. See Fed. R. Civ. P. 37(b)(2)(C) (For failure to comply with a court order to provide or permit discovery, "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust."). Here, the failure was not substantially justified, and there are no circumstances making such an award unjust. Indeed, Defendants conceded that a fee award would be appropriate when Defense counsel stated that "the Court . . . would determine what would be the appropriate attorneys' fees." (June 25, 2010 Hr'g Tr. 3:16-22.) Thus, spoliation sanctions shall include costs and legal fees allocable to spoliation. Specifically, as Plaintiff requested, the Court shall award attorney's fees and costs, including costs related to uncovering Defendants' discovery abuses; preparing, filing, and arguing all of Plaintiff's ESI motions; and retaining Guidance Software and Andreas Spruill. To that end, Plaintiff shall submit a bill of costs within thirty (30) days of this Memorandum, Order and Recommendation, with Defendants' response, if any, to be submitted within thirty (30) days thereafter.

Plaintiff also has asked the Court to refer this case to the United States Attorney to evaluate whether perjury or other criminal charges should be brought against Pappas. Pl.'s Mot.

98. Such action is unusual and extreme for spoliation cases, but not unheard of. *See, e.g., SonoMedica Inc.*, 2009 WL 2371507. I have given serious thought to doing this, because I have concluded that Pappas, and through him, CPI, engaged in multiple willful acts of destruction of evidence and lied under oath in affidavits, deposition testimony, and before the Court during the hearings it held. Knowing, however, the existing demands on the U.S. Attorney's office to prosecute very serious crimes, as well as their available resources, I do not think it probable that they would agree to initiate a criminal case arising out of a factually-complicated civil case involving an inordinately voluminous record, and concerning highly technical issues that will necessitate expert testimony.

It is true that, if the U.S. Attorney declined to initiate a criminal prosecution against Pappas for contempt of court, this court could appoint a private prosecutor to do so, pursuant to Fed. R. Crim. P. 42(a)(2). *See Young*, 481 U.S. at 793 (describing process for appointing a private attorney for contempt proceedings). However, commencement of a new proceeding would require proof beyond a reasonable doubt, and Pappas would be entitled to a jury trial, involving considerable expenses and time. I seriously question whether this would be the best manner of dealing with Pappas's misconduct. This dispute has been pending for far too long, been far too expensive, and, quite frankly, consumed far too much of this Court's resources to warrant initiating a criminal proceeding that unavoidably will go over the same ground, and likely involve yet another judge.

This is not to say, however, that referral for criminal contempt proceedings is the extent of what this Court can do to address Pappas's egregious behavior. After all, Rule 37(b)(2)(A)(vii) permits the Court to treat "as contempt of court the failure to obey any order except an order to submit to a physical or mental examination." This sanction has the obvious

benefit of being warranted on the existing record, without need for initiating new proceedings. As noted, there must exist “valid decrees of which the alleged contemnor [i.e., Pappas] had actual or constructive knowledge”; those decrees must have been in Plaintiff’s favor; Pappas, by his conduct, must have “violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violation”; and VSI must have suffered harm as a result of Pappas’s conduct. *See SonoMedica, Inc.*, 2009 WL 2371507, at \*3 (quoting *Ashcraft*, 218 F.3d at 301). As detailed above at Sections I.2-9, I have found that Pappas violated both preservation orders and production orders that this Court issued in Plaintiff’s favor, and the above discussion manifestly establishes the factual record to show that he knew of the orders and acted willfully to thwart those orders, thereby causing harm to Plaintiff.<sup>39</sup> Therefore, Pappas’s civil contempt is established by clear and convincing evidence.

For such clearly contemptuous behavior, a very serious sanction is required. Accordingly, I order that Pappas’s acts of spoliation be treated as contempt of this court, and that as a sanction, he be imprisoned for a period not to exceed two years, unless and until he pays to

---

<sup>39</sup> To summarize briefly, on December 22, 2006, I stated: “[B]oth parties are reminded of their substantive duty to preserve evidence, including electronic evidence, that is relevant to the case.” ECF No. 41. On February 1, 2007, I issued a written Preservation Order that stated that the parties had been admonished at the February 1, 2007 hearing of their “substantive duty to preserve evidence potentially relevant to the case, and . . . ordered to do so by the Court.” (Feb. 1, 2007 Order 2, ECF No. 56.) The language of the Court’s preservation orders was crystal clear. Pappas testified that he understood both orders. (Oct. 29, 2009 Hr’g Tr. 117:18 – 118:2, 139:10 – 140:19.) Even if the language of the first order and the Court’s oral order on February 1, 2007 left anything to doubt, the clarity of the February 1, 2007 order is undeniable. Indeed, in Pappas’s own words, the Court’s February 1, 2007 preservation order “was very clear.” (*Id.* 139:10 – 140:19.) Pappas deleted thousands of files following these orders. Separate and apart from these preservation orders, civil contempt sanctions are warranted for Defendants’ violations of the Court’s August 1 and 30, September 21, and October 3, 2007 production orders, which stated clearly that Defendants were to “produce all relevant, non-privileged ESI” to Plaintiff’s counsel. (ECF Nos. 131, 145, 149, and 164.) Pappas stated in a sworn affidavit that he produced all such ESI, demonstrating that he had knowledge of the orders, yet his ESI production was not complete.

Plaintiff the attorney's fees and costs that will be awarded after Plaintiff has submitted an itemized accounting of the attorney's fees and costs associated not only with filing this motion, but also with respect to all efforts expended throughout this case to demonstrate the nature and effect of Pappas's spoliation. These costs and fees likely will amount to a significant figure, and that will properly vindicate this Court's ability to enforce its discovery orders. The commencement of Pappas's confinement will be determined at the conclusion of the proceedings to quantify the amount of attorney's fees and costs.

Despite the fact that, if Pappas refuses to pay the attorney's fees and costs ordered by the Court, he will be imprisoned for two years, it is quite clear that this is a civil—not a criminal—contempt sanction, because the relief is compensatory and the sanction will be imposed to coerce Pappas's compliance with this Court's order to pay attorney's fees and costs to Plaintiff; Pappas can avoid imprisonment by promptly paying the fees and costs. *See Hicks v. Feiock*, 485 U.S. at 631-32; *Int'l Union, United Mine Workers of Am.*, 512 U.S. at 828; *Bradley*, 378 F.3d at 378 (4th Cir. 2004); *Buffington*, 913 F.2d at 133-34. This result is absolutely essential as a civil contempt sanction because, without it, I am convinced that Pappas will do all that he can to avoid paying any money judgment or award of attorney's fees that is in the form of a civil judgment alone. Without the threat of jail time, Pappas's future conduct would be predicted by his past, and Plaintiff will receive a paper judgment that does not enable it to recover its considerable out-of-pocket losses caused by Pappas's spoliation. To avoid jail time, all that is required of Pappas is to pay Plaintiff the attorney's fees and costs that will be awarded to Plaintiff for prevailing on this motion. Because this sanction is not case-dispositive, I have the authority to order it directly, pursuant to Rule 37(b)(2)(A)(vii). Should Judge Garbis disagree, I request that he treat this as a recommendation, pursuant to 28 U.S.C. § 636(b)(1).

A separate Order follows.

Dated: September 9, 2010

\_\_\_\_\_/S/\_\_\_\_\_  
Paul W. Grimm  
Chief United States Magistrate Judge

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(Cite as: 2010 WL 645253 (S.D.Tex.))

Page 1

**H**Only the Westlaw citation is currently available.

United States District Court,  
S.D. Texas,  
Houston Division.  
RIMKUS CONSULTING GROUP, INC., Plaintiff,  
v.  
Nickie G. CAMMARATA, et al., Defendants.  
Civil Action No. H-07-0405.

Feb. 19, 2010.

[David Allen Ward, Jr.](#), The Ward Law Firm, The Woodlands, TX, for Plaintiff.

[Larry E. Demmons](#), Taggart Morton Ogden Staub, New Orleans, LA, for Defendants.

#### MEMORANDUM AND OPINION

[LEE H. ROSENTHAL](#), District Judge.

\*1Spoliation of evidence--particularly of electronically stored information--has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential future sanctions than on reasonable need for information. Much of the recent case law on sanctions for spoliation has focused on failures by litigants and their lawyers to take adequate steps to preserve and collect information in discovery. [\[FN1\]](#) The spoliation allegations in the present case are different. They are allegations of willful misconduct: the intentional destruction of emails and other electronic information at a time when they were known to be relevant to anticipated or pending litigation. The alleged spoliators are the plaintiffs in an earlier-filed, related case and the defendants in this case. The allegations include that these parties--referred to in this opinion as the defendants--concealed and delayed providing information in discovery that would have revealed their spoliation. The case law recognizes that such conduct is harmful in ways that extend beyond the parties' interests and can justify severe sanctions. [\[FN2\]](#)

[FN1](#). See, e.g., [Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC](#), No. 05 Civ. 9016, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

[FN2](#). See, e.g., [Leon v. IDX Sys. Corp.](#), 464 F.3d 951, 958 (9th Cir. 2006) ("Dismissal is an available sanction when 'a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings' because 'courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.' " (quoting [Anheuser-Busch, Inc. v. Natural Beverage Distribs.](#), 69 F.3d 337, 348 (9th Cir. 1995)); [Silvestri v. Gen. Motors Corp.](#), 271 F.3d 583, 590 (4th Cir. 2001) ("The policy underlying this inherent power of the courts [to impose sanctions for spoliation] is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.").

Given the nature of the allegations, it is not surprising that the past year of discovery in this case has focused on spoliation. The extensive record includes evidence that the defendants intentionally deleted some emails and attachments after there was a duty to preserve them. That duty arose because the defendants were about to file the related lawsuit in which they were the plaintiffs. The individuals who deleted the information testified that they did so for reasons unrelated to the litigation. But the individuals gave inconsistent testimony about these reasons and some of the testimony was not supported by other evidence. The record also includes evidence of efforts to conceal or delay revealing that emails and attachments had been deleted. There is sufficient evidence from which a reasonable jury could find that emails and attachments were intentionally deleted to prevent their use in anticipated or pending litigation.

The record also shows that much of what was deleted is no longer available. But some of the deleted emails were recovered from other sources. While

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 2

some of the recovered deleted emails were adverse to the defendants' positions in this litigation, some were favorable to the defendants. The record also shows that despite the deletions of emails subject to a preservation duty, there is extensive evidence available to the plaintiff to prosecute its claims and respond to the defenses. These and other factors discussed in more detail below lead to the conclusion that the most severe sanctions of entering judgment, striking pleadings, or imposing issue preclusion are not warranted. Instead, the appropriate sanction is to allow the jury to hear evidence of the defendants' conduct-including deleting emails and attachments and providing inaccurate or inconsistent testimony about them-and to give the jury a form of adverse inference instruction. The instruction will inform the jury that if it finds that the defendants intentionally deleted evidence to prevent its use in anticipated or pending litigation, the jury may, but is not required to, infer that the lost evidence would have been unfavorable to the defendants. In addition, the plaintiff will be awarded the fees and costs it reasonably incurred in identifying and revealing the spoliation and in litigating the consequences.

\*2 The opinion first sets out the pending motions. Before analyzing the spoliation allegations, related sanctions motions, and the summary judgment motions (which are also impacted by the spoliation allegations), the opinion sets out some of the analytical issues that spoliation sanctions raise. The relevant factual and procedural history is then set out and the evidence on breach of the duty to preserve, the degree of culpability, relevance, and prejudice is examined. The opinion then analyzes the evidence to determine the appropriate response.

The defendants' motion for summary judgment based on claim and issue preclusion arising from the related, earlier-filed, state-law case are then analyzed in detail. That motion is denied in part because of the spoliation and withholding of evidence relevant to that case. Finally, the opinion examines the parties' cross-motions for summary judgment on the defendants' counterclaims for attorneys' fees.

The opinion results in narrowing and defining the issues to be tried. A pretrial conference is set for February 26, 2010, at 10:00 a.m. to set a schedule for completing any remaining pretrial work and a trial date.

## I. The Pending Motions

In November 2006, Rimkus Consulting Group, Inc. ("Rimkus") was sued in Louisiana state court by Nickie G. Cammarata and Gary Bell, who had just resigned from the Rimkus office in Louisiana. Cammarata, Bell, and other ex-Rimkus employees had begun a new company, U.S. Forensic, L.L.C., to compete with Rimkus in offering investigative and forensic engineering services primarily for insurance disputes and litigation. In the Louisiana suit, Cammarata and Bell sought a declaratory judgment that the forum-selection, choice-of-law, noncompetition, and nonsolicitation provisions in agreements they had signed with Rimkus were unenforceable. In January and February 2007, Rimkus sued Cammarata and Bell in separate suits in Texas, alleging that they breached the noncompetition and nonsolicitation covenants in their written employment agreements and that they used Rimkus's trade secrets and proprietary information in setting up and operating U.S. Forensic. U.S. Forensic is a defendant in the *Cammarata* case. The Texas *Cammarata* and *Bell* cases were consolidated in this court. (Docket Entry Nos. 211, 216).

Two sets of motions are pending. [\[FN3\]](#) One set is based on Rimkus's allegations that the defendants spoliated evidence. Rimkus moves for sanctions against the defendants and their counsel and asks that they be held in contempt. (Docket Entry Nos. 313, 314). Rimkus alleges that the defendants and their counsel "conspiratorially engaged" in "wholesale discovery abuse" by destroying evidence, failing to preserve evidence after a duty to do so had arisen, lying under oath, failing to comply with court orders, and significantly delaying or failing to produce requested discovery. (Docket Entry No. 313 at 1). Rimkus asks this court to strike the defendants' pleadings and to enter a default judgment against them or give an adverse inference jury instruction. Rimkus also seeks monetary sanctions in the form of the costs and attorneys' fees it incurred because of the defendants' discovery abuses.

[FN3.](#) Some of the pending motions can be disposed of in short order. The defendants' Motion for Leave to File Replies to Plaintiff's Supplemental Responses to Motion for Summary Judgment, (Docket Entry No.

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 3

375), is granted. Rimkus's Motion for Leave to File Third Amended Complaint, Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, (Docket Entry No. 387), Motion for Leave to File Memorandum of Law in Excess of 25 Pages, (Docket Entry No. 388), Motion to Supplement Response to Defendants' Motion for Summary Judgment, (Docket Entry No. 389), Motion to Supplement Motion for Sanctions and Response to Defendants' Motion for Summary Judgment, (Docket Entry No. 394), Motion for Leave to File Second Supplement to Motion for Sanctions and Response to Motion for Summary Judgment, (Docket Entry No. 412), Motion for Leave to File to Supplement the Record, (Docket Entry No. 413), and Motion for Leave to File Brief in Excess of Page Limitations, (Docket Entry No. 438), are granted.

\*3 In response, the defendants acknowledge that they did not preserve "some arguably relevant emails" but argue that Rimkus cannot show prejudice because the missing emails "would be merely cumulative of the evidence already produced." (Docket Entry No. 345 at 6). Rimkus filed supplements to its motions for contempt and sanctions, (Docket Entry Nos. 342, 343, 410, 414, 429, 431, 439, 445), and the defendants responded, (Docket Entry No. 350, 435). [\[FN4\]](#)

[FN4](#). At a motion hearing held on August 6, 2009, this court addressed several discovery disputes. The parties were instructed to report on the status of recovering additional electronically stored information that the defendants had stated they could not provide in discovery because it had been deleted or was on computers that were no longer available. The court permitted Rimkus to reopen the depositions of Bell and Cammarata and to supplement the summary judgment record. (Docket Entry No. 356). Rimkus filed supplemental responses to the motion for summary judgment, (Docket Entry Nos. 362, 374), and the defendants filed supplemental replies, (Docket Entry Nos. 376, 377). On August 28, 2009, Rimkus submitted information showing that Gary Bell maintained a previously undisclosed personal e-mail ad-

dress to which he forwarded information obtained from Rimkus. At a discovery conference held on September 2, 2009, this court allowed Rimkus to subpoena Google to obtain emails Bell sent and received. (Docket Entry No. 380). Rimkus also notified the court that Cammarata had testified in his recent deposition about electronic files on his personal home computer that he had not produced. Cammarata subsequently produced these files to Rimkus as well as numerous boxes of paper documents that Cammarata asserted could be relevant to this case. Rimkus also notified the court that Cammarata and Bell had testified in their reopened depositions that they used a copyrighted powerpoint presentation on behalf of U.S. Forensic. Based on these developments, this court allowed the parties to supplement the summary judgment record and Rimkus to file an amended complaint to add a copyright infringement claim. (Docket Entry No. 381). Rimkus filed supplemental briefs with attached exhibits on September 23, 2009. (Docket Entry Nos. 389, 393, 394). Rimkus also filed an amended complaint. (Docket Entry Nos. 401, 403). The defendants filed a response to the supplemental filings, (Docket Entry No. 408), and Rimkus replied, (Docket Entry No. 423).

The second set of motions is based on the defendants' assertion that they are entitled to summary judgment on the merits based on the preclusive effects of the judgment and rulings they obtained in the lawsuit they filed in the Louisiana state court before Rimkus sued them in Texas. (Docket Entry No. 309). The defendants argue that the claims in this Texas suit should be dismissed under *res judicata*, or in the alternative, that they are entitled to judgment as a matter of law on Rimkus's claims for misappropriation of trade secrets, tortious interference, unfair competition, civil conspiracy, disparagement, and breach of fiduciary duty. (*Id.*). Cammarata also moved for summary judgment on his counterclaim for attorneys' fees under [Texas Business & Commerce Code § 15.51\(c\)](#). (*Id.*). Rimkus responded, (Docket Entry Nos. 321, 324), the defendants replied, (Docket Entry No. 349), Rimkus filed a surreply, (Docket Entry No. 353), and several supplemental responses, (Docket Entry Nos. 362, 374, 394, 410, 429, 439, 445), and the defendants filed supplemental



Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 4

replies, (Docket Entry Nos. 376, 377). Rimkus argues that preclusion does not apply and that the summary judgment evidence reveals multiple disputed fact issues that preclude summary judgment on the merits of its claims.

Rimkus moved for partial summary judgment on the defendants' counterclaims for attorneys' fees under [Texas Business & Commerce Code § 15.51\(c\)](#). (Docket Entry Nos. 302, 305). The defendants responded, (Docket Entry Nos. 317, 322), and Rimkus replied, (Docket Entry No. 352). Rimkus also moved to extend the pretrial motions deadline, asserting that an extension is warranted because discovery is incomplete. (Docket Entry No. 306). The defendants responded, (Docket Entry No. 323), and Rimkus replied, (Docket Entry No. 351).

Both sets of motions are addressed in this memorandum and opinion. Based on a careful review of the pleadings; the motions, responses, and replies; the parties' submissions; the arguments of counsel; and the applicable law, this court grants in part and denies in part Rimkus's motions for sanctions. An adverse inference instruction on the deletion of emails and attachments will be given to the jury at trial. The motion for contempt is denied as moot because it seeks relief that would be duplicative of the sanctions. Rimkus is also awarded the reasonable attorneys' fees and costs it incurred in investigating the spoliation, including fees and costs for obtaining emails through third-party subpoenas, taking additional depositions, and filing and responding to motions on sanctions.

\*4 As to the summary judgment motions, this court denies Rimkus's motion to extend the motions-filing deadline, grants in part and denies in part the defendants' motion for summary judgment based on preclusion (based in part on spoliation that concealed and delayed producing relevant information in the Louisiana case), and grants Rimkus's motions for partial summary judgment on the defendants' counterclaims for attorneys' fees. Summary judgment is granted dismissing Rimkus's claims for disparagement, tortious interference, and damages for breach of the noncompetition and nonsolicitation provisions. Summary judgment is denied on Rimkus's claims for misappropriation of trade secrets, breach of fiduciary duty to the extent it is based on misappropriation, unfair competition, and civil conspiracy. With respect to the counterclaim for attorneys' fees, Cammarata's

motion for summary judgment is denied and Rimkus's motions for summary judgment are granted.

The reasons for these rulings are explained in detail below.

## II. The Framework for Analyzing Spoliation Allegations

In her recent opinion in [Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC](#), No. 05 Civ. 9016, 2010 WL 184312 (S.D.N.Y. Jan.15, 2010), Judge Scheindlin has again done the courts a great service by laying out a careful analysis of spoliation and sanctions issues in electronic discovery. [FN5] The focus of *Pension Committee* was on when negligent failures to preserve, collect, and produce documents-- including electronically stored information--in discovery may justify the severe sanction of a form of adverse inference instruction. Unlike *Pension Committee*, the present case does not involve allegations of negligence in electronic discovery. Instead, this case involves allegations of intentional destruction of electronically stored evidence. But there are some common analytical issues between this case and *Pension Committee* that deserve brief discussion.

[FN5. See \*Zubulake v. UBS Warburg LLC \(Zubulake IV\)\*, 220 F.R.D. 212 \(S.D.N.Y.2003\); \*Zubulake v. UBS Warburg LLC \(Zubulake III\)\*, 216F.R.D. 280 \(S.D.N.Y.2003\); \*Zubulake v. UBS Warburg LLC \(Zubulake II\)\*, 230 F.R.D. 290 \(S.D.N.Y.2003\); \*Zubulake v. UBS Warburg LLC \(Zubulake I\)\*, 217 F.R.D. 309 \(S.D.N.Y.2003\).](#)

### A. The Source of Authority to Impose Sanctions for Loss of Evidence

Allegations of spoliation, including the destruction of evidence in pending or reasonably foreseeable litigation, are addressed in federal courts through the inherent power to regulate the litigation process if the conduct occurs before a case is filed or if, for another reason, there is no statute or rule that adequately addresses the conduct. [FN6] See [Chambers v. NASCO, Inc.](#), 501 U.S. 32, 43-46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); [Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.](#), 2 F.3d 1397, 1408 (5th

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Slip Copy, 2010 WL 645253 (S.D.Tex.)  
(Cite as: 2010 WL 645253 (S.D.Tex.))

Page 5

[Cir.1993](#)) (summary calendar). If an applicable statute or rule can adequately sanction the conduct, that statute or rule should ordinarily be applied, with its attendant limits, rather than a more flexible or expansive "inherent power." [Chambers, 501 U.S. at 50](#); see [Klein v. Stahl GMBH & Co. Maschinefabrik, 185 F.3d 98, 109 \(3d Cir.1999\)](#) ("[A] trial court should consider invoking its inherent sanctioning powers only where no sanction established by the Federal Rules or a pertinent statute is 'up to the task' of remedying the damage done by a litigant's malfeasance...."); [Natural Gas Pipeline Co. of Am., 2 F.3d at 1410](#) ("When parties or their attorneys engage in bad faith conduct, a court should ordinarily rely on the Federal Rules as the basis for sanctions.").

[FN6](#). In diversity suits, federal courts apply federal evidence rules rather than state spoliation law. [Condrey v. SunTrust Bank of Ga., 431 F.3d 191, 203 \(5th Cir.2005\)](#).

\*5 When inherent power does apply, it is "interpreted narrowly, and its reach is limited by its ultimate source--the court's need to orderly and expeditiously perform its duties." [Newby v. Enron Corp., 302 F.3d 295, 302 \(5th Cir.2002\)](#) (footnote omitted) (citing [Chambers, 501 U.S. at 43](#)). In *Chambers*, the inherent power was linked to the bad-faith conduct that affected the litigation. See [501 U.S. at 49](#). If inherent power, rather than a specific rule or statute, provides the source of the sanctioning authority, under *Chambers*, it may be limited to a degree of culpability greater than negligence.

Rule 37(b) (2)(A) provides:

If a party or a party's officer, director, or managing agent-or a witness designated under Rule 30(b)(6) or 31(a)(4)-fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is

- obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

[Fed. R. Civ. P. 37\(b\)\(2\)\(A\)](#). In addition, a court has statutory authority to impose costs, expenses, and attorneys' fees on "any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously." [28 U.S.C. § 1927](#).

[Rule 37\(e\)](#) applies to electronically stored information lost through "routine good-faith operation" of an electronic information system rather than through intentional acts intended to make evidence unavailable in litigation. [Rule 37\(e\)](#) states: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." [Fed. R. Civ. P. 37\(e\)](#).

The alleged spoliation and proposed sanctions in this case implicate the court's inherent authority, including for spoliation occurring before this case was filed or before discovery orders were entered and [Rule 37](#), for failures to comply with discovery orders.

## B. When Deletion Can Become Spoliation

Spoliation is the destruction or the significant and meaningful alteration of evidence. See generally THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: EDISCOVERY & DIGITAL INFORMATION MANAGEMENT (SECOND EDITION) 48 (2007) ("Spoliation is the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit."). Electronically stored information is routinely deleted or altered and affirmative steps are often required to preserve it. Such deletions, alterations, and losses cannot be spoliation unless there is a duty to preserve the information, a culpable breach of that duty, and resulting prejudice.

\*6 Generally, the duty to preserve arises when a party "has notice that the evidence is relevant to litigation

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 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 6

or ... should have known that the evidence may be relevant to future litigation.' " [FN7] Generally, the duty to preserve extends to documents or tangible things (defined by [Federal Rule of Civil Procedure 34](#)) by or to individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses." See, e.g., [Zubulake IV](#), 220 F.R.D. at 217-18 (footnotes omitted).

[FN7](#). [John B. v. Goetz](#), 531 F.3d 448, 459 (6th Cir.2008) (omission in original) (quoting [Fujitsu Ltd. v. Fed. Express Corp.](#), 247 F.3d 423, 436 (2d Cir.2001)); see [O'Brien v. Ed Donnelly Enters., Inc.](#), 575 F.3d 567, 587-88 (6th Cir.2009) (remanding to the district court to consider whether it was reasonably foreseeable that the missing documents would be needed in future litigation); [Leon v. IDX Sys. Corp.](#), 464 F.3d 951, 959 (9th Cir.2006) ("A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were *potentially* relevant to the litigation before they were destroyed.' " (quoting [United States v. Kitsap Physicians Serv.](#), 314 F.3d 995, 1001 (9th Cir.2002) (emphasis added))); [Zubulake v. UBS Warburg LLC](#) ([Zubulake IV](#)), 220 F.R.D. 212, 216 (S.D.N.Y.2003) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." (quoting [Fujitsu Ltd.](#), 247 F.3d at 436)); THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 70 cmt. 14.a (2007) ("[T]he common law duty of preservation arises when a party, either plaintiff or defendant, reasonably anticipates litigation.").

These general rules are not controversial. But applying them to determine when a duty to preserve arises in a particular case and the extent of that duty requires careful analysis of the specific facts and circumstances. It can be difficult to draw bright-line distinctions between acceptable and unacceptable conduct in preserving information and in conducting discovery, either prospectively or with the benefit

(and distortion) of hindsight. Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done--or not done--was *proportional* to that case and consistent with clearly established applicable standards. [FN8] As Judge Scheindlin pointed out in *Pension Committee*, that analysis depends heavily on the facts and circumstances of each case and cannot be reduced to a generalized checklist of what is acceptable or unacceptable. [FN9]

[FN8](#). See THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 cmt. 2.b. (2007) ("Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation.").

[FN9](#). [Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC](#), No. 05 Civ. 9016, 2010 WL 184312, at \*3 (S.D.N.Y. Jan.15, 2010). For example, the reasonableness of discovery burdens in a \$550 million case arising out of the liquidation of hedge funds, as in *Pension Committee*, will be different than the reasonableness of discovery burdens in a suit to enforce noncompetition agreements and related issues, as in the present case.

Applying a categorical approach to sanctions issues is also difficult, for similar reasons. Determining whether sanctions are warranted and, if so, what they should include, requires a court to consider both the spoliating party's culpability and the level of prejudice to the party seeking discovery. Culpability can range along a continuum from destruction intended to make evidence unavailable in litigation to inadvertent loss of information for reasons unrelated to the litigation. Prejudice can range along a continuum from an inability to prove claims or defenses to little or no impact on the presentation of proof. A court's response to the loss of evidence depends on both the degree of culpability and the extent of prejudice. Even if there is intentional destruction of potentially

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 7

relevant evidence, if there is no prejudice to the opposing party, that influences the sanctions consequence. And even if there is an inadvertent loss of evidence but severe prejudice to the opposing party, that too will influence the appropriate response, recognizing that sanctions (as opposed to other remedial steps) require some degree of culpability.

### C. Culpability

As a general rule, in this circuit, the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of "bad faith." [Condrey v. SunTrust Bank of Ga.](#), 431 F.3d 191, 203 (5th Cir.2005); [King v. Ill. Cent. R.R.](#), 337 F.3d 550, 556 (5th Cir.2003); [United States v. Wise](#), 221 F.3d 140, 156 (5th Cir.2000). " 'Mere negligence is not enough' to warrant an instruction on spoliation." [Russell v. Univ. of Tex. of Permian Basin](#), 234 F. App'x 195, 208 (5th Cir.2007) (unpublished) (quoting [Vick v. Tex. Employment Comm'n](#), 514 F.2d 734, 737 (5th Cir.1975); see also [King](#), 337 F.3d at 556 ("King must show that ICR acted in 'bad faith' to establish that it was entitled to an adverse inference.") [Vick v. Tex. Employment Comm. 'n](#), 514 F.2d at 737 ("The adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant. Moreover, the circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case." (quotation omitted)).

\*7 Other circuits have also held negligence insufficient for an adverse inference instruction. The Eleventh Circuit has held that bad faith is required for an adverse inference instruction. [\[FN10\]](#) The Seventh, Eighth, Tenth, and D.C. Circuits also appear to require bad faith. [\[FN11\]](#) The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith. [\[FN12\]](#) In the Third Circuit, the courts balance the degree of fault and prejudice. [\[FN13\]](#)

[FN10](#), See [Penalty Kick Mgmt. Ltd. v. Coca Cola Co.](#), 318 F.3d 1284, 1294 (11th Cir.2003) ("[A]n adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith." (quoting [Bashir v.](#)

[Amtrak](#), 119 F.3d 929, 931 (11th Cir.1997))).

[FN11](#), See, e.g., [Turner v. Pub. Serv. Co. of Colo.](#), 563 F.3d 1136, 1149 (10th Cir.2009) ("Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case." (quoting [Aramburu v. Boeing Co.](#), 112 F.3d 1398, 1407 (10th Cir.1997))); [Faas v. Sears, Roebuck & Co.](#), 552 F.3d 633, 644 (7th Cir.2008) ("In order to draw an inference that the [destroyed documents] contained information adverse to Sears, we must find that Sears intentionally destroyed the documents in bad faith."); [Greyhound Lines, Inc. v. Wade](#), 485 F.3d 1032, 1035 (8th Cir.2007) ("A spoliation-of-evidence sanction requires 'a finding of intentional destruction indicating a desire to suppress the truth.' " (quoting [Stevenson v. Union Pac. R.R. Co.](#), 354 F.3d 739, 746 (8th Cir.2004))); [Wyler v. Korean Air Lines Co.](#), 928 F.2d 1167, 1174 (D.C.Cir.1991) ("Mere innuendo ... does not justify drawing the adverse inference requested ....").

[FN12](#), See, e.g., [Hodge v. Wal-Mart Stores, Inc.](#), 360 F.3d 446, 450 (4th Cir.2004) (holding that an inference cannot be drawn merely from negligent loss or destruction of evidence but requires a showing that willful conduct resulted in the loss or destruction); [Silvestri v. Gen. Motors Corp.](#), 271 F.3d 583, 593 (4th Cir.2001) (holding that dismissal is "usually justified only in circumstances of bad faith" but "even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case"); [Sacramona v. Bridgestone/Firestone, Inc.](#), 106 F.3d 444, 447 (1st Cir.1997) ("Certainly bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence. But bad faith is not essential. If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions, including exclusion of the evi-

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 8

dence."); [Allen Pen Co. v. Springfield Photo Mount Co.](#), 653 F.2d 17, 23-24 (1st Cir.1981) ("In any event, Allen Pen has not shown that the document destruction was in bad faith or flowed from the consciousness of a weak case. There is no evidence that Springfield believed the lists would have damaged it in a lawsuit. Without some such evidence, ordinarily no adverse inference is drawn from Springfield's failure to preserve them."); [Glover v. BIC Corp.](#), 6 F.3d 1318, 1329 (9th Cir.1993) ("Short of excluding the disputed evidence, a trial court also has the broad discretionary power to permit a jury to draw an adverse inference from the destruction or spoliation against the party or witness responsible for that behavior.").

FN13. See, e.g., [Bensel v. Allied Pilots Ass'n](#), No. 02-2917, 2009 WL 4884052 (D.N.J. Dec.17, 2009) (declining to apply a spoliation inference or other sanction for the loss of information resulting from the defendant's failure to impose litigation holds in a timely manner); [Mosaid Techs. Inc. v. Samsung Elecs. Co.](#), 348 F.Supp.2d 332, 335 (D.N.J.2004) (noting that "[t]hree key considerations that dictate whether such sanctions are warranted are: '(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future' " and holding that bad faith was not required for an adverse inference instruction as long as there was a showing of relevance and prejudice (quoting [Schmid v. Milwaukee Elec. Tool Corp.](#), 13 F.3d 76, 79 (3d Cir.1994))).

The court in *Pension Committee* imposed a form of adverse inference instruction based on a finding of gross negligence in preserving information and in collecting it in discovery. [FN14] The court applied case law in the Second Circuit, including the language in [Residential Funding Corp. v. DeGeorge Financial Corp.](#), 306 F.3d 99, 108 (2d Cir.2002), stating that "[t]he sanction of an adverse inference

may be appropriate in some cases involving the negligent destruction of evidence because each party should bear the risk of its own negligence." That language has been read to allow severe sanctions for negligent destruction of evidence. See, e.g., [Rogers v. T.J. Samson Cmty. Hosp.](#), 276 F.3d 228, 232 (6th Cir.2002); [Lewis v. Ryan](#), 261 F.R.D. 513, 521 (S.D.Cal.2009) (noting that California district courts had followed the Second Circuit's approach in *Residential Funding* ). In the Fifth Circuit and others, negligent as opposed to intentional, "bad faith" destruction of evidence is not sufficient to give an adverse inference instruction and may not relieve the party seeking discovery of the need to show that missing documents are relevant and their loss prejudicial. The circuit differences in the level of culpability necessary for an adverse inference instruction limit the applicability of the *Pension Committee* approach. And to the extent sanctions are based on inherent power, the Supreme Court's decision in *Chambers* may also require a degree of culpability greater than negligence.

FN14. The finding of gross negligence in *Pension Committee* was in part based on the finding that the spoliating party submitted declarations describing discovery efforts that were either lacking in detail or intentionally vague in ways the court characterized as misleading. [Pension Committee](#), No. 05 Civ. 9016, 2010 WL 184312, at \* 10-11. Counsel's misrepresentations to the court can result in severe sanctions. See, e.g., [Coleman \(Parent\) Holdings, Inc. v. Morgan Stanley & Co.](#), 20 So.3d 952, 954 (Fla. Dist. Ct. App. 2009) (trial court entered a partial default judgment and deemed certain allegations as established facts based in part on misrepresentations by counsel to the court about when they learned that emails existed on backup tapes; on appeal, the judgment was set aside on other grounds).

#### D. Relevance and Prejudice: The Burden of Proof

It is well established that a party seeking the sanction of an adverse inference instruction based on spoliation of evidence must establish that: (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed with a culpable state of mind;

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 9

and (3) the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. See Zubulake v. UBS Warburg LLC (Zubulake IV), 220 F.R.D. 212, 220 (S.D.N.Y.2003). The "relevance" and "prejudice" factors of the adverse inference analysis are often broken down into three subparts: "(1) whether the evidence is relevant to the lawsuit; (2) whether the evidence would have supported the inference sought; and (3) whether the nondestroying party has suffered prejudice from the destruction of the evidence." Consol. Aluminum Corp. v. Alcoa, Inc., 244 F.R.D. 335, 346 (M.D.La.2006) (citing Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, 1997 WL 33352759, at \*7 (E.D.Ark. Aug.29, 1997)). Courts recognize that "[t]he burden placed on the moving party to show that the lost evidence would have been favorable to it ought not be too onerous, lest the spoliator be permitted to profit from its destruction." Chan v. Triple 8 Palace, Inc., No. 03CIV6048(GEL)(JCF), 2005 WL 1925579, at \*7 (S.D.N.Y. Aug. 11, 2005).

\*8*Pension Committee* recognized the difficulty and potential for unfairness in requiring an innocent party seeking discovery to show that information lost through spoliation is relevant and prejudicial. Those concerns are acute when the party seeking discovery cannot replace or obtain extrinsic evidence of the content of deleted information. But in many cases--including the present case--there are sources from which at least some of the allegedly spoliated evidence can be obtained. And in many cases--including the present case--the party seeking discovery can also obtain extrinsic evidence of the content of at least some of the deleted information from other documents, deposition testimony, or circumstantial evidence.

Courts recognize that a showing that the lost information is relevant and prejudicial is an important check on spoliation allegations and sanctions motions. Courts have held that speculative or generalized assertions that the missing evidence would have been favorable to the party seeking sanctions are insufficient. [FN15] By contrast, when the evidence in the case as a whole would allow a reasonable fact finder to conclude that the missing evidence would have helped the requesting party support its claims or defenses, that may be a sufficient showing of both

relevance and prejudice to make an adverse inference instruction appropriate. [FN16]

FN15. See Mintel v. Neergheen, No. 08-cv-3939, 2010 WL 145786, at \*8 (N.D.Ill. Jan.12, 2010) (holding that although data on a laptop was destroyed after the filing of the lawsuit, no evidence was presented that the data destroyed was relevant); Pandora Jewelry, LLC v. Chamilia, LLC, No. CCB-06-3041, 2008 WL 4533902, at \*9 (D.Md. Sept.30, 2008) (denying an adverse inference instruction because the plaintiff did not offer proof "that the lost materials would have produced evidence favorable to the required showing of injury"; the plaintiff could not "point to even a single diverted customer or any evidence of damage to its reputation ... stemming from any of the [emails] at issue"); Consol. Aluminum Corp., 244 F.R.D. at 346 ("Although Consolidated has generally asserted that the destroyed information is relevant to this litigation 'based simply on the time frame and the individuals involved,' a court cannot infer that destroyed documents would contradict the destroying party's theory of the case, and corroborate the other's party's theory, simply based upon temporal coincidence. While Consolidated is not held to 'too specific a level of proof' regarding the destroyed documents, it must provide some evidence that the documents would have aided it in the manner alleged in their inferences in order for such sanction to be imposed."); Sovulj v. United States, No. 98 CV 5550, 2005 WL 2290495, at \*5 (E.D.N.Y. Sept. 20, 2005) (denying an adverse inference instruction when there was only "pure speculation" that the missing evidence was relevant); Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162, 176 (S.D.N.Y.2004) (denying an adverse inference instruction when the substance of the deleted communication was only described in the most general terms), *clarified on other grounds*, 2005 WL 1514284 (S.D.N.Y. June 24, 2005).

FN16. See, e.g., Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 155-57 (4th Cir.1995) (holding that an adverse inference instruc-

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 10

tion was appropriate because the plaintiff's expert willfully destroyed parts of a boat at issue in a products-liability action before the defendant and its experts were able to examine it); [Broccoli v. Echostar Commc'ns Corp.](#), 229 F.R.D. 506, 511-12 (D.Md.2005) (noting that the defendant did not preserve vital employment and termination documents, including emails in which plaintiff had made complaints to his supervisors about being sexually harassed and the internal investigative file into those complaints, and imposing an adverse inference instruction); [GE Harris Ry. Elecs., L.L. C. v. Westinghouse Air Brake Co.](#), No. 99-070-GMS, 2004 WL 5702740, at \*4-5 (D.Del. Mar.29.2004) (holding that an adverse inference was warranted when the defendant deleted relevant emails and electronic files and the emails the plaintiff was able to recover from other sources were probative of the defendant's liability).

In *Pension Committee*, the court followed the approach that even for severe sanctions, relevance and prejudice may be presumed when the spoliating party acts in a grossly negligent manner. [Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. §, LLC](#), No. 05 Civ. 9016, 2010 WL 184312, at \*5 (S.D.N.Y. Jan.15, 2010). The presumption of relevance and prejudice is not mandatory. *Id.* at \*5. The spoliating party may rebut the presumption by showing that the innocent party had access to the evidence allegedly destroyed or that the evidence would not have been helpful to the innocent party. *Id.* When the level of culpability is "mere" negligence, the presumption of relevance and prejudice is not available; the *Pension Committee* court imposed a limited burden on the innocent party to present some extrinsic evidence. *Id.*

The Fifth Circuit has not explicitly addressed whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial. Case law in the Fifth Circuit indicates that an adverse inference instruction is not proper unless there is a showing that the spoliated evidence would have been relevant. See [Condrey v. SunTrust Bank of Ga.](#), 431 F.3d 191, 203 & n. 8 (5th Cir.2005) (holding that an adverse inference was not appropriate because there was no evi-

dence of bad faith but also noting that even if bad faith had been shown, an adverse inference would have been improper because relevance was not shown); [Escobar v. City of Houston](#), No. 04-1945, 2007 WL 2900581, at \* 17-18 (S.D.Tex. Sept.29.2007) (denying an adverse inference instruction for destruction of emails in a police department following a shooting because the plaintiffs failed to show bad faith and relevance). One opinion states that bad-faith destruction of evidence "alone is sufficient to demonstrate relevance." See [Consol. Aluminum Corp. v. Alcoa, Inc.](#), 244 F.R.D. 335, 340 n. 6 (M.D.La.2006). But that opinion also went on to state that "before an adverse inference may be drawn, there must be some showing that there is in fact a nexus between the proposed inference and the information contained in the lost evidence" and that "some extrinsic evidence of the content of the emails is necessary for the trier of fact to be able to determine in what respect and to what extent the emails would have been detrimental." *Id.* at 346. In the present case, the party seeking sanctions for deleting emails after a duty to preserve had arisen presented evidence of their contents. The evidence included some recovered deleted emails and circumstantial evidence and deposition testimony relating to the unrecovered records. There is neither a factual nor legal basis, nor need, to rely on a presumption of relevance or prejudice.

#### E. Remedies: Adverse Inference Instructions

\*9 Courts agree that a willful or intentional destruction of evidence to prevent its use in litigation can justify severe sanctions. Courts also agree that the severity of a sanction for failing to preserve when a duty to do so has arisen must be proportionate to the culpability involved and the prejudice that results. Such a sanction should be no harsher than necessary to respond to the need to punish or deter and to address the impact on discovery. [\[FN17\]](#) "[T]he judge [imposing sanctions] should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime." [Anderson v. Beatrice Foods Co.](#), 900 F.2d 388, 395 (1st Cir.1990). A measure of the appropriateness of a sanction is whether it "restore[s] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." [West v. Goodyear Tire & Rubber Co.](#), 167 F.3d 776, 779

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 11

(2d Cir.1999) (quotation omitted); *see also* [Silvestri v. Gen. Motors Corp.](#), 271 F.3d 583, 590 (4th Cir.2001) ("[T]he applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine ." (quoting [West](#), 167 F.3d at 779)).

[FN17](#).*See* [Fed. R. Civ. P. 37\(e\)](#) (sanctions may not be imposed for the inability to produce electronically stored information lost because of the routine, good-faith operation of a party's computer system); [Schmid v. Milwaukee Elec. Tool Corp.](#), 13 F.3d 76, 79 (3d Cir.1994); [Dillon v. Nissan Motor Co., Ltd.](#), 986 F.2d 263, 267 (8th Cir.1993).

Extreme sanctions--dismissal or default--have been upheld when "the spoliator's conduct was so egregious as to amount to a forfeiture of his claim" and "the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim." [Sampson v. City of Cambridge, Maryland](#), 251 F.R.D. 172, 180 (D.Md.2008) (quoting [Silvestri](#), 271 F.3d at 593); *see* [Leon v. IDX Sys. Corp.](#), 464 F.3d 951, 959 (9th Cir.2006) ("The prejudice inquiry 'looks to whether the [spoliling party's] actions impaired [the non-spoliling party's] ability to go to trial or threatened to interfere with the rightful decision of the case.' " (alteration in original) (quoting [United States ex rel. Wiltec Guam, Inc. v. Kahalu Constr. Co.](#), 857 F.2d 600, 604 (9th Cir.1988))).

When a party is prejudiced, but not irreparably, from the loss of evidence that was destroyed with a high degree of culpability, a harsh but less extreme sanction than dismissal or default is to permit the fact finder to presume that the destroyed evidence was prejudicial. [\[FN18\]](#) Such a sanction has been imposed for the intentional destruction of electronic evidence. [\[FN19\]](#) Although adverse inference instructions can take varying forms that range in harshness, and although all such instructions are less harsh than so-called terminating sanctions, they are properly viewed as among the most severe sanctions a court can administer.

[FN18](#).*See* [FDIC v. Hurwitz](#), 384 F.Supp.2d 1039, 1099-1100 (S.D.Tex.2005) (citing [Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.](#), 692 F.2d 214, 217-18 (1st

[Cir.1982](#)).

[FN19](#).*See, e.g., Se. Mech. Servs., Inc. v. Brody*, 657 F.Supp.2d 1293, 2009 WL 2883057 (M.D.Fla.2009) (holding that an adverse inference jury instruction was appropriate when a party wiped several Blackberry devices that may have contained emails, telephone records, text messages, and calendar entries relevant to the case); [Goodman v. Praxair Servs., Inc.](#), 632 F.Supp.2d 494, 523-24 (D.Md.2009) (holding that an adverse jury instruction was proper when a party destroyed a laptop and the party's agent deleted emails after the duty to preserve arose and allowing the opposing side to seek recovery of costs associated with the sanctions motion); [Technical Sales Assocs., Inc. v. Ohio Star Forge Co.](#), Nos. 07- 11745, 08-13365, 2009 WL 728520, at \*9 (E.D.Mich. Mar.19, 2009) (holding that monetary sanctions were appropriate where a party deleted emails and electronic files after the litigation began and after the party became aware that the adverse party would be seeking a forensic examination but deferring until trial the decision of whether adverse inference jury instructions were appropriate); [Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A.](#), No. 3:06-CV-0271-B, 2008 WL 3261095, at \*13-14(N.D.Tex. Aug.8, 2008) (imposing an adverse inference jury instruction and awarding attorneys' fees and costs against a party for, among other things, intentionally wiping a hard drive so that files would be unrecoverable, damaging backup data, and deleting emails and documents from a web site); [Doe v. Norwalk Cmty. Coll.](#), 248 F.R.D. 372, 381-82 (D.Conn.2007) (imposing an adverse inference jury instruction and awarding attorneys' fees and costs against a party that failed to preserve hard drives and emails).

In *Pension Committee*, the court stated that it would give a jury charge for the grossly negligent plaintiffs that: (1) laid out the elements of spoliation; (2) instructed the jury that these plaintiffs were grossly negligent in performing discovery obligations and failed to preserve evidence after a preservation duty



Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 12

arose; (3) told the jury that it could presume that the lost evidence was relevant and would have been favorable to the defendant; (4) told the jury that if they declined to presume that the lost evidence was relevant or favorable, the jury's inquiry into spoliation was over; (5) explained that if the jury did presume relevance or prejudice, it then had to decide if any of the six plaintiffs had rebutted the presumption; and (6) explained the consequences of a rebutted and an un rebutted presumption. [\[FN20\]](#) The court noted that it was "important to explain that the jury is bound by the Court's determination that certain plaintiffs destroyed documents after the duty to preserve arose" but that "the jury is not instructed that the Court has made any finding as to whether that evidence is *relevant* or whether its loss caused any *prejudice* to the [ ] Defendants." [Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. §., LLC, No. 05 Civ. 9016, 2010 WL 184312, at \\*23 n. 251](#). The "jury must make these determinations because, if the jury finds both relevance and prejudice, it then may decide to draw an adverse inference in favor of the [ ] Defendants which could have an impact on the verdict," and "[s]uch a finding is within the province of the jury not the court." *Id.*

[FN20](#). The court provided the text of the charge:

The Citco Defendants have argued that 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation destroyed relevant evidence, or failed to prevent the destruction of relevant evidence. This is known as the "spoliation of evidence."

Spoliation is the destruction of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. To demonstrate that spoliation occurred, the Citco Defendants bear the burden of proving the following two elements by a preponderance of the evidence: *First*, that *relevant* evidence was destroyed after the duty to preserve arose. Evidence is relevant if it would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence; and

*Second*, that if relevant evidence was destroyed after the duty to preserve arose, the evidence lost would have been favorable to the Citco Defendants.

I instruct you, as a matter of law, that each of these plaintiffs failed to preserve evidence after its duty to preserve arose. This failure resulted from their gross negligence in performing their discovery obligations. As a result, you may presume, if you so choose, that such lost evidence was relevant, and that it would have been favorable to the Citco Defendants. In deciding whether to adopt this presumption, you may take into account the egregiousness of the plaintiffs' conduct in failing to preserve the evidence.

However, each of these plaintiffs has offered evidence that (1) no evidence was lost; (2) if evidence was lost, it was not relevant; and (3) if evidence was lost and it was relevant, it would not have been favorable to the Citco Defendants.

If you decline to presume that the lost evidence was relevant or would have been favorable to the Citco Defendants, then your consideration of the lost evidence is at an end, and you will *not* draw any inference arising from the lost evidence.

However, if you decide to presume that the lost evidence was relevant and would have been favorable to the Citco Defendants, you must next decide whether any of the following plaintiffs have rebutted that presumption: 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, or the Bombardier Foundation. If you determine that a plaintiff has *rebutted* the presumption that the lost evidence was either relevant or favorable to the Citco Defendants, you will *not* draw any inference arising from the lost evidence against that plaintiff. If, on the other hand, you determine that a plaintiff has *not rebutted* the presumption that the lost evidence was both relevant and favorable to the Citco Defendants, you may draw an inference against that plaintiff and in favor of the Citco Defendants-- namely that the lost evidence would have been favorable to the Citco Defendants.

Each plaintiff is entitled to your separate consideration. The question as to whether the Citco Defendants have proven spoliation is personal to each plaintiff and must be decided by you as to each plaintiff individually.

[Pension Comm. of the Univ. of Montreal](#)

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 13

[Pension Plan v. Banc of Am. Sec., LLC, No. 05 Civ. 9016, 2010 WL 184312, at \\*23-24 \(S.D.N.Y. Jan.15, 2010\)](#) (footnote omitted).

jury to consider the ultimate question of whether the defendant terminated plaintiff because of his age.").

\*10 As explained in more detail below, based on the record in this case, this court makes the preliminary findings necessary to submit the spoliation evidence and an adverse inference instruction to the jury. But the record also presents conflicting evidence about the reasons the defendants deleted the emails and attachments; evidence that some of the deleted emails and attachments were favorable to the defendants; and an extensive amount of other evidence for the plaintiff to use. As a result, the jury will not be instructed that the defendants engaged in intentional misconduct. Instead, the instruction will ask the jury to decide whether the defendants intentionally deleted emails and attachments to prevent their use in litigation. If the jury finds such misconduct, the jury must then decide, considering all the evidence, whether to infer that the lost information would have been unfavorable to the defendants. Rather than instruct the jury on the rebuttable presumption steps, it is sufficient to present the ultimate issue: whether, if the jury has found bad-faith destruction, the jury will then decide to draw the inference that the lost information would have been unfavorable to the defendants. [\[FN21\]](#)

[FN21.](#) This is similar to the approach courts use in other contexts involving threshold burden-shifting analyses by the judge followed by a trial in which the jury is instructed on the ultimate question. *See, e.g., Kanida v. Gulf Coast Med. Personnel LP*, [363 F.3d 568, 576 \(5th Cir.2004\)](#) ("This Court has consistently held that district courts should not frame jury instructions based upon the intricacies of the *McDonnell Douglas* burden shifting analysis. Instead, we have held that district courts should instruct the jury to consider the ultimate question of whether a defendant took the adverse employment action against a plaintiff because of her protected status." (citations omitted)); *Olitsky v. Spencer Gifts, Inc.*, [964 F.2d 1471, 1478 \(5th Cir.1992\)](#) ("Instructing the jury on the elements of a prima facie [ADEA] case, presumptions, and the shifting burden of proof is unnecessary and confusing. Instead, the court should instruct the

### III. Background

#### A. Factual and Procedural History

Rimkus is a forensic engineering contractor with its principal place of business in Houston, Texas. Founded in 1983, Rimkus has thirty offices in eighteen states and works across the country. Rimkus analyzes unexpected accidents and occurrences that cause damage to people or property, primarily in connection with insurance disputes or litigation, and provides reports and testimony.

In 1995, Rimkus hired Bell, a Louisiana resident, as a marketing representative. In October 1996, Rimkus hired Cammarata, also a Louisiana resident, as a full-time salaried employee, to provide forensic engineering services. Both Bell and Cammarata were hired at Rimkus's office in Houston, Texas, where they signed an Employment Agreement. The Employment Agreement was between the "Company," defined as Rimkus Consulting Group, Inc., and the "Employee," defined as Bell or Cammarata. The Agreement's non-competition provision stated as follows:

a. Employee will not, directly or indirectly, own, manage, finance, control or participate in the ownership, financing or control of, or be connected as a partner, principal, agent, employee, independent contractor, management advisor and/or management consultant with, or use or permit his name or resume to be used in connection with any business or enterprise performing consulting services similar to those which are carried on by the Company in the "Designated Geographic Area". For the purposes of this Agreement "Designated Geographic Area" shall mean any standard metropolitan statistical area (or if a client is not located in a standard metropolitan statistical area, then the city, town or township in which such client is located and the counties or parishes contiguous thereto) in which a client or clients of the Company are located and from which such client or clients have engaged Company on not less than five (5) separate files or engagements during the five (5) calendar years proceeding termination of Employee's employment with Company. If Company has received less than five (5) such assignments or engagements from a

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 14

client in any Designated Geographic Area, then Employee shall be free to compete in such Designated Geographic Area.... This covenant against competition shall be construed as a separate covenant covering competition within the State of Texas, or in any other State where the Company, directly or indirectly, whether through itself or its representative or agents, conducts business; ... [.]

\*11 (Docket Entry No. 1, Ex. A at 4-5). The Agreement also contained a clause prohibiting posttermination solicitation of Rimkus's employees and of Rimkus's customers:

b. Employee agrees that after termination of employment with the Company, he will not, directly or indirectly, solicit, employ or in any other fashion, hire persons who are, or were, employees, officers or agents of the Company, until such person has terminated his employment with the Company for a period of eighteen (18) months;

c. Employee agrees, that for a period lasting until eighteen (18) months after termination of his employment, he will not at any time, directly or indirectly, solicit the Company's customers[.]

(*Id.* at 5). The Agreement stated that "any dispute or other proceeding to enforce the terms of this Agreement shall be adjudicated by a court of competent jurisdiction in Harris County, Texas" and that the "Agreement and all rights, obligations and liabilities arising hereunder shall be governed by, and construed and enforced in accordance with the laws of the State of Texas (excluding its conflicts of law provisions) applicable to contracts made and to be performed therein." (*Id.* at 11).

Bell and Cammarata worked for Rimkus Consulting Group of Louisiana ("RCGL"), a wholly owned subsidiary of Rimkus. Both men worked in RCGL's Metairie, Louisiana office. They received their paychecks and W-2 forms from RCGL but were provided access to Rimkus customer information, Rimkus business plans, Rimkus operations information, and Rimkus work for their clients.

In 2004, Bell became central region property manager and a vice-president of Rimkus. He was responsible for the area from Louisiana to the Canadian border. On July 14, 2005, Rimkus and Bell entered into a "Common Stock Purchase Agreement." Under the Common Stock Purchase Agreement, Bell purchased 2,000 shares of Rimkus stock. The Agreement was between the "Corporation," defined as Rimkus

Consulting Group, Inc., and the "Shareholder," defined as Bell. The Common Stock Purchase Agreement contained a noncompetition clause, which provided as follows:

Each Shareholder, recognizing that a covenant not to compete is required to protect the business interests of the Corporation, agrees that unless the Corporation consents in writing to the contrary, such Shareholder shall not engage directly or indirectly as an employee, agent, shareholder, officer, director, partner, sole proprietor or in any other fashion in a competing business in any of the geographic areas in which the Corporation is then conducting business, during his period of employment by the Corporation and for five (5) years after the Closing of the purchase transaction.... The covenant is in addition to any non-competition agreement contained in any employment agreement between each Shareholder and the Corporation. Each Shareholder has entered into an Employment Agreement with the Corporation which contains such a non-competition agreement. Shareholders and the Corporation agree that, for purposes of this Agreement, the non-competition provisions extending the period to a five-year period commencing with the date of any Terminating event will prevail over the period as specified in the Employment Agreement between each Shareholder and the Corporation.

\*12 (Docket Entry No. 321, Ex. C at 10-11).

The Common Stock Purchase Agreement also addressed confidential information:

[C]onfidential information pertaining to the Corporation's customers and business and marketing methods, including, but not limited to, customer or client lists and trade secrets which may be available to them is valuable, special and unique except as such may be in the public domain. Accordingly, each Shareholder hereby agrees that he will not at any time disclose any of such information to any person, firm, corporation, association or other entity for any reason or purpose whatsoever or make use in any other way to his advantage of such information.

(*Id.* at 11). The Agreement also stated that Rimkus and Bell "each agree[d] to refrain from any conduct, by word or act, that will reflect negatively on the character or conduct of the other." (*Id.* at 10).

On September 27, 2006, Bell resigned from Rimkus effective October 31. Cammarata resigned on No-

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 15

vember 15, 2006. On that date, Bell, Cammarata, and Mike DeHarde, another employee who had also worked at RCGL in Louisiana, formed and immediately began to work for U.S. Forensic. Like Rimkus, U.S. Forensic provides investigative and forensic engineering services, primarily to determine the cause, origin, and extent of losses from failures and accidents. The parties do not dispute that U.S. Forensic competes with Rimkus in providing investigative and forensic engineering services, although U.S. Forensic does not offer as broad a range of services as Rimkus. U.S. Forensic currently has offices in Louisiana, Mississippi, Florida, and Tennessee and employs engineers registered in twenty states.

In this litigation, Rimkus alleges that Bell breached his fiduciary duty as an officer of Rimkus by preparing to form U.S. Forensic before he left Rimkus in October 2006. Rimkus alleges that Bell, Cammarata, and DeHarde planned and made preparations to set up U.S. Forensic and compete against Rimkus long before they resigned. The record shows that Bell registered the domain name "www.usforensic.com" on February 28, 2006. (Docket Entry No. 321, Ex. F). During the summer of 2006, Bell met with a lawyer, contracted with a company to host a web site, filed a trademark application, and prepared a corporate logo for U.S. Forensic. (*Id.*, Exs. G, H, R, S). On October 1, 2006, Bell created U.S. Forensic résumés for himself, Cammarata, and DeHarde. (*Id.*, Ex. I). Corporate formation documents for U.S. Forensic were filed with the Louisiana Secretary of State on October 5, 2006. (*Id.*, Ex. J). On October 13, 2006, Bell's wife filed an application for U.S. Forensic to practice engineering in the State of Louisiana. (*Id.*, Ex. T).

Bell testified in his deposition that he did not agree to form a new company until after he had resigned from Rimkus. (*Id.*, Ex. D, Deposition of Gary Bell, at 423:13-:18). Bell testified that he told DeHarde and Cammarata he was leaving and "they said they were leaving, and--and so we talked about maybe we should do something together. And, I--I think, it was that vague, you know, maybe we should do something together, maybe we talked a little bit about it, you know, after hours or something here, might have a phone call about it, and--but no real--once--once I left, that's when we kind of really kicked it into high gear." (*Id.* at 424:13-:22). On September 30, 2006, Bell emailed Cammarata, DeHarde, and Bill Janowsky, an engineer at another Louisiana firm, to

inform them that Rimkus had made him some lucrative offers to entice him to retract his resignation but that he would go forward with the plan to form U.S. Forensic if they were still committed to doing so. (Docket Entry No. 324, Ex. KK). Bell stated, "Without each of you, it will not be worth leaving. If one guy falls [sic] to come along, the whole thing will be completely different." (*Id.*). He continued:

\*13 We have a dream team. I really believe that Rimkus is making these ridiculous offers more because of who I could possibly recruit than anything I can actually do myself. But fear not. I have committed to each of you and for that reason alone I would not abandon you in our dream. I just wanted to give each of you one last chance to bail with no hard feelings. Tell me now or meet me on Ridge-lake on November 15 with your sleeves rolled up.

(*Id.*). The record does not include emails responding to this message. Rimkus alleges that this email and any responses were not produced in discovery because the defendants intentionally deleted them.

On November 11, 2006, Bell emailed Cammarata, DeHarde, and Janowsky [\[FN22\]](#) asking for their names, addresses, and social security numbers to set up a payroll tax account for U.S. Forensic. (*Id.*, Ex. B). Bell stated in the email that he had received his COBRA package from Rimkus along with a form letter stating that Rimkus expected him to honor his agreements, including his noncompetition covenant. (*Id.*). Bell continued: "However, the designated geographic area is the MSA of any city in which Rimkus has received assignments from in the five years prior. We are in good shape and I'll bet they know it. We need to serve them on Monday to prevent them from filing in Texas. Larry [Demmons] will correct the pleading and get it in--then I call Markham. [\[FN23\]](#) Damn the torpedoes--full speed ahead!" (*Id.*). Rimkus argues that the defendants' plan to file a preemptive lawsuit is evidence of a bad-faith attempt to prevent Rimkus from obtaining relief in Texas under Texas law. The presence of the plan is important to the duty to preserve relevant records.

[\[FN22\]](#). The email does not disclose the recipients, but because the message asked for the "partners' " names, addresses, and social security numbers, the recipients were presumably Cammarata, DeHarde, and Janowsky.

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 16

[FN23](#). This is presumably a reference to Gary W. Markham, Rimkus's former Chief Operating Officer.

Bell responds that none of these actions breached his fiduciary duty to Rimkus. Bell contends that even a fiduciary relationship between an officer and the corporation he serves does not preclude the officer from preparing for a future competing business venture. Rimkus acknowledges that general preparations for future competition do not breach fiduciary duty but argues that Bell's preparatory actions, combined with his misappropriation of trade secrets, solicitation of Rimkus's customers, and luring away Rimkus's employees--all while still employed by Rimkus--breached the fiduciary duty he owed as a Rimkus corporate officer.

Rimkus alleges that both Bell and Cammarata misappropriated client lists, pricing information, and other confidential Rimkus business information to which they had access while working at Rimkus and that they used this information to solicit Rimkus clients for U.S. Forensic. The record shows that Bell and Cammarata emailed some Rimkus clients in November and December 2006. Some of these emails refer to prior work done for the clients while Bell and Cammarata worked for Rimkus. All these emails offer U.S. Forensic as an alternative to Rimkus. It appears that the emails sent to Rimkus clients soliciting business for U.S. Forensic were first produced by an internet service provider pursuant to a third-party subpoena. The defendants either did not produce such emails or delayed doing so until late in the discovery.

\*14 The parties vigorously dispute how Bell and Cammarata obtained the contact information necessary to send these solicitation emails to Rimkus clients. Bell and Cammarata assert that they did not misappropriate confidential client or other information from Rimkus. Cammarata testified at a hearing that he did not download or print any Rimkus client list and did not take any written client list with him when he left. Cammarata submitted an affidavit stating that when he resigned from Rimkus, he did not take any electronic or paper copies of Rimkus client lists or client-contact information and that he has "never used any Rimkus client lists or client contact information in [his] work for U.S. Forensic." (Docket Entry No. 309, Ex. Y, Affidavit of Nick Cammarata

¶¶ 11-12). Bell also submitted an affidavit stating that when he resigned from Rimkus, he did not take any electronic or paper copies of Rimkus pricing information, investigative methods, report formats, operations manual, business plan, client lists, or client-contact information. (*Id.*, Ex. V, Affidavit of Gary Bell ¶¶ 39-49). Bell stated that he has "never used any Rimkus client lists or client contact information in [his] work for U.S. Forensic." (*Id.* ¶ 40). Bell also stated that he did not use his memory of Rimkus client-contact information to solicit business for U.S. Forensic. (*Id.* ¶ 41). Bell stated in his affidavit that he has used only publicly available information, primarily from the Casualty Adjuster's Guides and the internet, to identify people to contact to solicit potential clients for U.S. Forensic. (*Id.*).

The Casualty Adjuster's Guide is a compilation of the names, addresses, phone numbers, and email addresses of insurance and adjusting companies and certain employees. A separate guide is published for different geographical regions in the United States. Each guide is updated annually. Other publicly available guides, including "The Claims Pages," the "Texas Legal Directory," and the "Louisiana Blue Book," contain similar information. Bell stated in his affidavit that when he formed U.S. Forensic, he "used the Casualty Adjusters Guide, the Louisiana Blue Book and other publicly available publications to find the names, addresses, phone numbers and email addresses of potential clients for U.S. Forensic." (*Id.* ¶ 13). Bell also stated in his affidavit that he obtained contact information of potential clients for U.S. Forensic when he attended industry conventions and seminars. (*Id.* ¶ 15). Bell testified in his deposition about his primary sources for new client-contact information: "I would say, primarily, the internet was my--the--the main thing that I used right off the bat. As I got names, or as I called people and got other information, it would grow from there. But you can find all the adjusters available online, you can find them in the Casualty Adjusters book, you can find them wherever. It depends on where I'm trying to get business, maybe. But the internet is the best source, it's the most complete source. You can specify your search to--you know, to insurance adjusters that are working for the company, who are not working for the company, you can get insurance claims office by state, you can adjusters' license by state." (Docket Entry No. 314, Ex. 6, Deposition of Gary Bell, Vol. 1 at 59:5-:21). Bell submitted an example of the sources of client-contact information available on the

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 17

internet. (Docket Entry No. 309, Ex. V-8 pts. 1, 2).

\*15 Rimkus asserts that the testimony by Bell and Cammarata describing how they obtained client-contact information and denying that they took Rimkus confidential information when they resigned is false. Rimkus contends that Bell and Cammarata could not have obtained contact information for the individuals they emailed to solicit business unless they took the information with them when they left Rimkus. Rimkus points to an email Bell sent on December 10, 2006, in which he asked for a copy of the 2006 Louisiana Casualty Adjuster's Guide because he did not yet have one. (Docket Entry No. 324, Ex. E). Rimkus also points to an October 1, 2006 email forwarded to Bell from an employee at Rimkus. This email contained contact information for insurance adjusters at Lexington Insurance, a Rimkus client. (Docket Entry No. 321, Ex. Q). [\[FN24\]](#) And, according to Rimkus, many of the insurance adjusters Bell and Cammarata contacted in November and December 2006 are not listed in the Louisiana Casualty Adjuster's Guide.

[FN24](#). Rimkus alleges that Bell forwarded the October 1 email on October 5, 2006. The copy of the email submitted to the court does not clearly reflect a forward on October 5, 2006, but portions of the screen shot submitted are not legible. (Docket Entry No. 321, Ex. Q).

In late August 2009, Rimkus submitted information showing that Gary Bell maintained a previously undisclosed personal email address to which he forwarded information from Rimkus. In his March 8, 2009 deposition, Bell testified that the only email addresses he used during 2006 were [glb@rimkus.com](mailto:glb@rimkus.com) and [garylbell@bellsouth.net](mailto:garylbell@bellsouth.net). (Docket Entry No. 314, Deposition of Gary Bell, Vol. 2 at 247:10-:19). The deposition continued:

Q: Are there any others?

A: I don't believe so.

Q: You don't have like a Hotmail address?

A: (Shakes head)

Q: A Gmail address?

A: No. I don't believe so.

(*Id.* at 247:20-248:1).

In August 2009, Rimkus completed a forensic analysis of its own computer system and discovered a

"cookie" showing that on September 30, 2006--three days after Bell officially resigned from Rimkus but before his last day of work--Bell accessed his Bell-South email address from his Rimkus work computer to forward documents to the email address [garylbell@gmail.com](mailto:garylbell@gmail.com). Rimkus filed the forwarded documents under seal. These documents are income statements for Rimkus's Pensacola, New Orleans, Lafayette, and Indianapolis offices, as well as an employee break-even analysis. The income statements contain the August 2006 budget for each of those offices, including revenues, administrative costs, sales and marketing costs, and the total net income or loss. Rimkus asserts that these documents are confidential and accessible only by certain executive employees. Rimkus argues that the September 30, 2006 email Bell forwarded to himself is evidence of trade secret misappropriation. At a discovery hearing held on September 2, 2009, this court allowed Rimkus to subpoena Google, an email provider, to obtain emails Bell sent and received using the email address "[garylbell@gmail.com](mailto:garylbell@gmail.com)."

On November 15, 2006--the date Cammarata resigned from Rimkus and U.S. Forensic began operating--Bell and Cammarata sued Rimkus in Louisiana state court, seeking a declaratory judgment that the forum-selection, choice-of-law, noncompetition, and nonsolicitation provisions in the Employment Agreement and the noncompetition provision in the Common Stock Purchase Agreement were unenforceable. In January 2007, Rimkus sued Cammarata in this court, seeking to enjoin Cammarata from competing with Rimkus during the period set out in the Employment Agreement's noncompetition provision, from soliciting Rimkus employees and customers, and from using Rimkus trade secrets. Rimkus also sought damages for Cammarata's alleged breach of the Employment Agreement and misappropriation of trade secrets. (Docket Entry No. 1).

\*16 Rimkus sued Bell in Texas state court in February 2007, alleging breach of the covenants in the Common Stock Purchase Agreement. Bell removed to this court in March 2007. The suit against Bell, *Rimkus Consulting Group, Inc. v. Gary Bell*, Civ. A. No. H-07-910, was consolidated with the suit against Cammarata. (Docket Entry No. 211).

In the Louisiana state court suit Bell and Cammarata filed, the judge issued an order on March 26, 2007,

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 18

stating that Louisiana law applied to their claims. [\[FN25\]](#) (Docket Entry No. 19, Ex. D). On July 26, 2007, the judge issued a final judgment stating that "pursuant to Louisiana law, the covenant not to compete clauses contained in Paragraphs 8(a) and the non-solicitation of customer(s) clauses contained in Paragraphs 8(c) of the respective contracts are invalid and unenforceable." (Docket Entry No. 71, Ex. H). The noncompetition clause in Bell's Common Stock Purchase Agreement was, however, held to be enforceable. Both sides appealed.

[FN25.](#) DeHarde was also a plaintiff in the Louisiana lawsuit.

On January 4, 2008, the Louisiana Fifth Circuit Court of Appeal reversed the trial court's ruling on Bell's Common Stock Purchase Agreement and held that the noncompetition clause in that Agreement was invalid and unenforceable. On March 25, 2008, the Louisiana Fifth Circuit Court of Appeal affirmed the trial court's decision that Louisiana law applied to the parties' agreements and that the Texas forum-selection and choice-of-law clauses and the noncompetition and nonsolicitation covenants in the Employment Agreement were unenforceable. [Bell v. Rimkus Consulting Group, Inc. of La., 07-996 \(La.App. 5 Cir. 3/25/08\);983 So.2d 927](#). In holding that Louisiana law applied to the 1996 Employment Agreement despite the Texas choice-of-law clause, the Louisiana Court of Appeal stated:

Forum selection clauses will be upheld unless they contravene strong public policy of the forum in which the suit is brought. [LA. C.C. art. 3450. LA. R.S. 23:921](#) A(2), a provision which was added by the legislature in 1999, is an expression of strong Louisiana public policy concerning forum selection clauses....

... Louisiana law expressly provides that conventional obligations are governed by the law of the state whose policies would be most seriously impaired if its law were not applied to the issue. Further, issues of conventional obligations may be governed by law chosen by the parties, *except to the extent that law contravenes the public policy of the state whose law would be applicable under* [La. C.C. art 3537](#).

As previously stated herein, Louisiana has a long-standing public policy to prohibit or severely restrict non-competition provisions in employment agreements which curtail an employee's right to [ ]

earn his livelihood. These agreements are in derogation of the common right, and they must be strictly construed against the party seeking their enforcement. Application of Texas law to this dispute would thwart Louisiana's longstanding public policy and interest in this type of matter.

\*17 According to well established Louisiana law and jurisprudence, the forum selection and choice of law provisions contained in the 1995 and 1996 employment contracts are null and void. Thus, the agreements in this case are governed by Louisiana law.

[Id. at pp. 9-10; 983 So.2d at 932-33](#) (citations omitted). [\[FN26\]](#) On March 17, 2008, the Louisiana state trial court declared that the nonsolicitation-of-employees clause in the defendants' Employment Agreements was "ambiguous and unenforceable." (Docket Entry No. 105, Ex. D).

[FN26.Article 3540 of the Louisiana Civil Code](#) states:

All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under [Article 3537](#).

[La. Civ.Code art. 3540.](#)

[Article 3537 of the Louisiana Civil Code](#) states:

Except as otherwise provided in this Title, an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the transaction, including the place of negotiation, formation, and performance of the contract, the location of the object of the contract, and the place of domicile, habitual residence, or business of the parties; (2) the nature, type, and purpose of the contract; and (3) the policies referred to in Article 3515, as well as the policies of facilitating the orderly planning of transactions, of promoting multistate commercial intercourse, and of protecting one party from undue imposition by the other.

[La. Civ.Code art. 3557.](#)

Slip Copy  
Slip Copy, 2010 WL 645253 (S.D.Tex.)  
(Cite as: 2010 WL 645253 (S.D.Tex.))

Page 19

Section 921(A) of the Louisiana Revised Statutes states:

A. (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void.

(2) The provisions of every employment contract or agreement, or provisions thereof, by which any foreign or domestic employer or any other person or entity includes a choice of forum clause or choice of law clause in an employee's contract of employment or collective bargaining agreement, or attempts to enforce either a choice of forum clause or choice of law clause in any civil or administrative action involving an employee, shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.

[La.Rev.Stat. § 23:921\(A\)](#).

In this federal suit, Cammarata filed two motions to dismiss Rimkus's claims for breach of the noncompetition and nonsolicitation provisions in the Employment Agreement. Cammarata based his motions to dismiss on the preclusive effect of the Louisiana state court ruling invalidating the noncompetition, nonsolicitation, forum-selection, and choice-of-law provisions in the Employment Agreement. (Docket Entry Nos. 71, 105). In ruling on Rimkus's application for a preliminary injunction, this court concluded that the Louisiana court's judgment "clearly precludes relitigation of the issue of whether the forum-selection and choice-of-law provision, as well as the noncompetition and nonsolicitation covenants, are unenforceable in Louisiana, under Louisiana law." (Docket Entry No. 159, August 13, 2008 Memorandum and Opinion at 24). This court decided that, even if Texas law applied and the noncompetition and nonsolicitation provisions were enforceable outside Louisiana, Rimkus was not entitled to the preliminary injunctive relief it sought. Under Texas law, the noncompetition covenant was broader in geographical scope than necessary to protect Rimkus's legitimate business interests and the nonsolicitation covenant was broader than necessary because it applied to all Rimkus customers, not merely those

Cammarata had worked with or solicited business from while working for Rimkus.

Cammarata again moved to dismiss based on *res judicata*, asking this court to determine the preclusive effect of the Louisiana court's ruling outside Louisiana. (Docket Entry No. 169). Cammarata's motions to dismiss were granted "insofar as Rimkus seeks damages for Cammarata's postemployment competitive activities inside Louisiana on the basis that those activities breached his Employment Agreement." (Docket Entry No. 260, March 24, 2009 Memorandum and Opinion at 27). The motions to dismiss were denied with respect to Cammarata's activities outside Louisiana. (*Id.*). This court held that the Louisiana state court's rulings that the forum-selection, choice-of-law, noncompetition, and nonsolicitation contract provisions were unenforceable in Louisiana under Louisiana law did not make those provisions invalid in all states. (*Id.* at 25).

In response to the declaratory judgment complaint Bell and Cammarata filed in Louisiana state court on November 15, 2006, Rimkus filed an answer and a "Reconventional Demand." [FN27] Rimkus asserted that "the entirety of this Reconventional Demand should be governed according to the laws of the State of Texas." (Docket Entry No. 309, Ex. B at 6). Rimkus's reconventional demand asserted causes of action for breach of the Employment Agreement's noncompetition, nonsolicitation, and confidentiality provisions, breach of the Common Stock Purchase Agreement, breach of fiduciary duty, and disparagement. (*Id.*). After the Louisiana state court ruled that the noncompetition and nonsolicitation clauses in the Employment Agreements were unenforceable under Louisiana law, Bell, Cammarata, and DeHarde moved for summary judgment on the remaining claims asserted in Rimkus's reconventional demand in the Louisiana lawsuit. The summary judgment motion cited only Texas cases and sought judgment as a matter of Texas law. Rimkus responded to the motion and argued that summary judgment was inappropriate under Texas law. The Louisiana state trial court heard oral argument from the parties on the viability of these claims under Texas law. On May 11, 2009, the Louisiana court issued an order stating that "after reviewing the evidence, the law and arguments of counsel ... IT IS ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment is GRANTED, and the reconventional de-



Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 20

mands of the plaintiffs-in-reconvention, Rimkus Consulting Group, Inc. and Rimkus Consulting Group, Inc. of Louisiana, are DISMISSED WITH PREJUDICE, each party to bear its own costs." (Docket Entry No. 309, Ex. G). The defendants in this case, Bell and Cammarata, argue that the Louisiana state court's ruling dismissing these claims is entitled to preclusive effect.

FN27. Under Louisiana civil procedure, a reconventional demand is similar to a counterclaim.

#### B. Discovery

\*18 In the fall of 2007, Rimkus sought "documents, including emails, related to Cammarata's and Bell's communications with one another and with other U.S. Forensic, L.L.C. members concerning the creation and inception of U.S. Forensic, L.L.C., their roles with the company, and contact with clients." (Docket Entry No. 313 at 4). Rimkus deposed Cammarata in October 2007. In response to a subpoena duces tecum issued for that deposition, Cammarata produced two emails relevant to the formation of U.S. Forensic. In November 2007, Rimkus served the defendants with a request to produce all such documents, including all emails sent among those setting up or working for U.S. Forensic before January 1, 2007. The defendants objected to this request as overbroad because it could include irrelevant personal emails and "day-to-day emails regarding the operation of U.S. Forensic's business," but stated that they "searched several times for any such responsive emails and turned over any responsive emails in their possession." (Docket Entry No. 345 at 47). Rimkus asserts that from November 2007 to June 11, 2009, despite repeated requests, the defendants did not produce any emails. In June 2009, the defendants produced approximately sixty emails sent by the defendants and others involved with U.S. Forensic during the fall of 2006. (Docket Entry No. 313 at 4).

In the spring of 2009, Rimkus noticed the depositions of Gary Bell, William Janowsky, and Michael DeHarde. Each was served with a subpoena duces tecum seeking any email communications about U.S. Forensic's formation. On March 7, 2009, Bell testified in his deposition that he had "printed out the things that [he] thought might be responsive, and sent it to [his attorney], when [he] first received the first

request" for these emails. (Docket Entry No. 314, Ex. 6, Deposition of Gary Bell, Vol. 1 at 16:24-17:2). Bell testified that it was his custom to delete an email after completing the task for which he needed the email but that he might have saved some relevant, responsive emails on his personal computer until the related tasks were completed. (*Id.* at 15:21- 16:4). When asked whether he still had that personal computer, Bell testified that he had donated it to charity in 2007, well after the litigation was underway. (*Id.* at 16:11-:18). When Bell was asked whether, when he sued Rimkus in Louisiana on November 15, 2006, he attempted to preserve emails, documents, calendar entries, or other information relevant to his departure from Rimkus to form a competing business, Bell testified as follows:

A: For my employment at Rimkus, I used the Rimkus E-mail system. They would-- you know, they would have everything there. I didn't use my personal--but, you know, I--I--you know, I don't know what to tell you. I--you know, I don't think I had anything. I certainly wasn't trying to get rid of anything. I think, it wasn't as, you know, planned as-- as it could have been.

Q. At the time you instituted that legal action, did you have an understanding that you should endeavor, as best you could, to try to keep any relevant information?

\*19 A. I--if I thought there was something that-- that, you know, was requested of me, I would--I would turn it over. I didn't try to get rid of anything that I thought I shouldn't.  
 (*Id.* at 17:21-18:13).

Janowsky was deposed on March 9, 2009. He testified that in response to the subpoena duces tecum, he looked in his desk, file cabinet, and computer. (Docket Entry No. 314, Ex. 12, Deposition of William Janowsky at 16:2-:22). Janowsky testified that he "went to Windows Explorer and searched the--the directories where I thought those things might have occurred," but he was unable to find responsive emails. (*Id.* at 17:5-18:3). Janowsky also searched his web-based email account with NetZero and found nothing responsive. (*Id.* at 18:8-:13). Janowsky acknowledged that he exchanged emails with Gary Bell using his NetZero account while they were working on forming U.S. Forensic. (*Id.* at 19:8-:11). Janowsky's deposition testimony continued:

Q. And what did you do with them?

A. I deleted them.

Q. And when did you delete them?

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 21

A. I don't know.

Q. Did you ever print them?

A. No.

Q. What was--what is your routine or your normal practice with respect to either deleting or saving Emails?

A. I get rid of them very frequently. I get a lot of Emails and they fill up my box, so I go through on kind of a weekly basis and--and get rid of anything that's--that's not current, needs to be taken care of.

(*Id.* at 19:12-:25). Janowsky testified that he did not participate in any discussion with Bell, Cammarata, or DeHarde about deleting emails related to forming U.S. Forensic. Janowsky testified that there was no agreement to delete emails on a routine or regular basis. (*Id.* at 40:24-41:10). "I deleted my Emails out of convenience. I'm not sure what the other guys did, if they deleted--but I didn't have any agreement to delete Emails about this interest." (*Id.* at 41:14-:17). Janowsky did not remember whether anyone had ever talked to him about preserving records related to the formation of U.S. Forensic. (*Id.* at 26:1-:4). He acknowledged that he had not tried to save any emails related to the formation of U.S. Forensic or with Bell, Cammarata, and DeHarde about U.S. Forensic. (*Id.* at 26:5-:8).

DeHarde was deposed on April 1, 2009. He testified that he had looked for "the emails that [he] and Mr. Bell exchanged concerning--forming a company to compete with Rimkus" but did not "recall" whether he was able to find those emails. (Docket Entry No. 313, Ex. F, Deposition of Michael DeHarde at 13:10-:16). The following exchange occurred:

Q: What did you do to try to find them?

A: I looked on my computer.

Q: And when did you do that, sir?

A: I don't recall.

Q: Can you give me an estimate of when you did it?

A: About 2007, 2008, something like that.

Q: Why did you do it?

A: Because I was requested to do that.

Q: And did you find any?

\*20 A: I don't recall.

Q: What would you have done with them after you found them?

A: Given them to Larry Demmons [counsel for defendants Bell and Cammarata].

MR. WARD [counsel for Rimkus]:

Larry, do you have any emails from Mr. DeHarde?

MR. DEMMONS:

Nothing other than what's been turned over.

MR. WARD:

I don't believe anything has been turned over from Mr. DeHarde.

MR. DEMMONS:

Then I didn't get anything from Mr. DeHarde.

(*Id.* at 13:17-14:17). DeHarde testified that he deleted emails--including email communications with Bell, Cammarata, and Janowsky--because of concern about the storage capacity of his Yahoo! email account. (*Id.* at 37:14-:20; 38:19-:25). DeHarde testified that he did not delete emails on a regular or systematic basis. (*Id.* at 22:2-:10). [\[FN28\]](#)

[FN28.](#) Pages 22, 37, and 38 of the April 2009 deposition of Mike DeHarde are quoted in Rimkus's motions for contempt and sanctions and are identified in the motion as attached as Exhibit F. (Docket Entry No. 313 at 13-14). Exhibit F, however, contains only sporadic pages from the DeHarde deposition and does not include pages 22, 37, or 38. The content of these passages of DeHarde's deposition have not been disputed.

After this deposition, Rimkus asked this court to compel DeHarde to look for and produce documents and information responsive to the subpoena duces tecum. This court ordered DeHarde to do so and to reappear for one hour of additional deposition questioning. Rimkus then subpoenaed several internet service providers seeking the defendants' emails. At a hearing held on May 1, 2009, this court permitted Rimkus to proceed with those subpoenas with limits based on relevance and privacy protection. [\[FN29\]](#) The May 1, 2009 hearing revealed that the defendants' efforts to locate and retrieve electronically stored information, including emails, had been superficial. The defendants had looked for readily accessible emails that were still on the computers they still had. They had not identified any sources of relevant information that were not reasonably accessible. They had no information about whether any of the emailsthat had been deleted or were otherwise not reasonably accessible could be recovered and how much time and expense might be required. The defendants were ordered to conduct that inquiry and report the results. [\[FN30\]](#)

[FN29.](#) The defendants objected to some of

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 22

the subpoenas on the grounds that they would allow Rimkus to access private, irrelevant information as well as emails covered by attorney--client privilege. This court required the subpoena notices to direct the ISPs to use search terms to avoid production of personal or privileged emails. This court also required the documents from some of the internet service providers to be submitted directly to the court for in camera review before production to Rimkus.

[FN30](#). See [Fed.R.Civ.P. 26\(b\)\(2\)\(b\)](#) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of [Rule 26\(b\)\(2\)\(C\)](#). The court may specify conditions for the discovery.").

Rimkus deposed Allen Bostick, an information technology ("IT") consultant that U.S. Forensic used in the fall of 2006. Bostick's deposition revealed that Homestead Technologies web-hosted U.S. Forensic's email accounts beginning on November 15, 2006. On December 19, 2006, Bostick switched U.S. Forensic to an in-house email host using a small business server. U.S. Forensic used a series of external hard drives for backup storage. The documents on U.S. Forensic's network, including emails, were backed up every night using backup software and the external hard drives. On April 4, 2007, Bostick advised U.S. Forensic that the software for the type of hard drive U.S. Forensic was using was not meant to back up a small business server. According to Bostick, the hard drive was subsequently returned to the manufacturer as defective. On April 5, 2007, U.S. Forensic switched to different backup software. Every night, the software created a local copy on the server and saved a backup copy onto two external hard drives. Near the end of 2007, one of these drives failed. Bostick testified that space on the external hard drives became a concern around late 2007. (Docket Entry

No. 314-9, Deposition of Allen Bostick at 148:1-:4).

\*21 In late 2007, U.S. Forensic began using three external hard drives and subsequently began using different backup software. The new software did not create a backup image on the server. Instead, the backup was directly to the external hard drive. On May 28, 2009, the defendants reported that three backup images had been located. Bostick was able to restore one of these images but two others were corrupted and U.S. Forensic no longer had the software to restore them. According to the defendants, the hard drives had to be sent to the software company for any attempt at restoration.

The defendants reviewed the emails recovered from the restored backup image and determined that none were relevant. The defendants also retained Roddy Orgeron, an IT consultant, to determine the time, cost, and likelihood of obtaining information from the corrupted drives. Orgeron could not open the files because the hard drive was damaged and because he did not have the necessary software. According to Orgeron, there was some possibility that some backup files could be recovered, but it would cost between \$2,000.00 and \$10,000.00 and there was a slim likelihood of success because of the damage to the hard drive.

On May 29, 2009, Rimkus continued with DeHarde's deposition. DeHarde produced several responsive emails that he had found in his Yahoo! mail account. These emails were sent to DeHarde from other Rimkus employees while DeHarde still worked at Rimkus. DeHarde received these emails at his Rimkus email address but forwarded them to his personal Yahoo! account. None of the emails was from Bell or Cammarata. The following exchange occurred:

Q: Is there any reason that you don't have any emails from this same time frame from Mr. Cammarata?

A. Yes.

Q. Why is that?

A. We deleted them. We had a policy that we would delete e-mails during the start-up after two weeks.

(Docket Entry No. 313, Ex. F, Deposition of Michael DeHarde at 18:14-:21). DeHarde testified that he, Bell, Cammarata, and Janowsky had agreed on this email-deletion policy. According to DeHarde, this agreement was made "[s]ometime in the fall of 2006,

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 23

fall or summer, 2006," while he was still working at Rimkus. (*Id.* at 34:24-:25). DeHarde testified that there was no discussion with Bell or Cammarata about suspending or modifying this policy once they decided to file the Louisiana lawsuit or when they did so on November 15, 2006. DeHarde acknowledged that he had deleted all emails that Cammarata sent to his Yahoo! account. The deposition continued:

Q. And those were emails that specifically related to discussions you were having about leaving Rimkus and forming a new business?

A. Yes.

Q. And part of the motivation for that was to make sure that there wasn't evidence of those communications, correct?

A. We had a policy to delete the emails after two weeks, and I followed the policy.

(*Id.* at 35:1-:9). DeHarde testified that the policy remained in effect after the Louisiana state suit was filed. (*Id.* at 34:9-:14).

\*22 On June 11, 2009, the defendants produced approximately 103 pages of emails sent in the fall of 2006. The emails include communications among the defendants clearly responsive to long-standing Rimkus discovery requests. These emails were forwarded from Gary Bell to defense counsel Larry Demmons on May 15, 2009. These emails were only a portion of those sent or received by Bell, Cammarata, and DeHarde beginning in the fall of 2006, relating to U.S. Forensic.

Rimkus was able to obtain numerous additional emails via subpoena from the defendants' internet service providers and email providers. Most were produced by Homestead. These emails show that Bell and Cammarata contacted Rimkus clients in November and December 2006 to solicit business for U.S. Forensic. The following emails were obtained from Homestead:

. On November 9, 2006, Bell emailed Doug Delaune of Southern Farm Bureau Casualty Insurance and attached U.S. Forensic's marketing materials. (Docket Entry No. 324, Ex. F). Bell asked for Delaune's help in getting U.S. Forensic on Farm Bureau's approved list and invited Delaune to meet. (*Id.*)

. On November 15, 2006, Bell emailed Stephanie Jackson of Louisiana Citizens Property Insurance and attached "initial company information on U.S. Forensic." (Docket Entry No. 321, Ex. L-2). Bell

thanked Jackson for "speaking with [him] last week" and asked for a meeting "some time next week" to "go over our capabilities, capacities, the company insurance coverages, and how we plan to improve on services to Citizens." (*Id.*) Bell stated that U.S. Forensic would be "officially open for business tomorrow" and that he "hope[d] we get a chance to continue working with you." (*Id.*)

. On November 15, 2006, Bell emailed Don Livengood, a Fidelity National representative with whom Bell and Cammarata had dealt while employed at Rimkus. (Docket Entry No. 321, Ex. L-1). Bell attached to the email "initial company information on U.S. Forensic" and asked to meet with Livengood to "go over the insurance coverages, the non compete agreement for Orleans Parish and our capacity to do jobs out of state." (*Id.*) Livengood responded that he would "be in touch with you next week about working our jobs." (*Id.*) Bell replied that he and Cammarata were "looking forward to working with you again." (*Id.*)

. On November 27, 2006, Bell emailed Bill Eckert of Ungarino Eckert and Tommy Dupuy of Cunningham Lindsey to introduce U.S. Forensic and solicit business. (Docket Entry No. 324, Exs. L, N). Ungarino Eckert and Cunningham Lindsey had been Rimkus clients and the record shows that Bill Eckert worked with Bell while he was still employed at Rimkus. (*Id.*, Ex. M).

. On December 1, 2006, Bell sent an email to "info@usforensic .com," with blind copies apparently addressed to numerous individuals. (*Id.*, Ex. P at 4). The email introduced U.S. Forensic, "a Louisiana and Mississippi licensed forensic engineering firm which specializes in evaluation of civil, structural and mechanical failures." (*Id.*) Bell highlighted the experience of U.S. Forensic's engineers and attached their resumes and U.S. Forensic brochures. The email included a link to U.S. Forensic's web site and invited recipients to contact Bell for more information. (*Id.*) Two recipients of that email were Cary Soileau of Allstate Insurance and Dianna Drewa of Fidelity National Insurance Company, both Rimkus clients. (Docket Entry No. 324, Exs. P, Q, R). Bell had worked with Soileau while employed by Rimkus. After Bell left Rimkus, he asked Soileau to provide contact information for Allstate employees Claudia Danesi and Julie Kron so that U.S. Forensic could "get on the Allstate approved list locally." (*Id.*, Ex. P).

\*23 . On December 11, 2006, Bell emailed Tim Krueger of Safeco Insurance. (*Id.*, Ex. S). Bell

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 24

stated that he "really had no idea [he] was leaving [Rimkus] the day [he] did" and expressed hope that Krueger had been served well since his departure. (*Id.*). Bell asked Krueger to direct him to "any local claims people that might be looking for some local help" but noted that "*due to contractual obligations we would not be able to accept any assignments in New Orleans until October 2007.*" (*Id.* (emphasis added)).

. On December 12, 2006, Bell emailed Denise Milby of Scottsdale Insurance and D. Powell and Jeff Baker of Boulder Claims to introduce U.S. Forensic and its engineers and services. (*Id.*, Exs. T, V).

. On December 13, 2006, Bell emailed Sandra Carter with Lexington Insurance "to introduce U.S. Forensic, a Louisiana and Mississippi based forensic engineering firm which specializes in evaluation of civil, structural, electrical and mechanical failures." (Docket Entry No. 321, Ex. L-3). Bell continued: "You may remember me from my previous position as Central U.S. Operations Manager at Rimkus Consulting Group and my trip to Boston a couple of months back. I left with a couple of engineers from Rimkus and a couple from a competitor to form a new, leaner firm that focuses on decisive, cost effective reports with no more than a two week turnaround." (*Id.*). Bell stated that U.S. Forensic "would be pleased to work with you and Lexington Insurance." (*Id.*). Rimkus has submitted evidence that Carter's new contact information was contained in an email that Bell received from a co-worker at Rimkus on October 1, 2006. Rimkus alleges that Bell forwarded this email on October 5, 2006, using his Rimkus email account, to an unknown email address. (*Id.*, Ex. Q).[\[FN31\]](#)

[FN31.](#) The copy of the email submitted to the court does not clearly reflect a forward on October 5, 2006, but portions of the screen shot submitted are not legible. (Docket Entry No. 321, Ex. Q).

The belatedly produced emails show that in November and December 2006, Cammarata also contacted individuals he had dealt with while working at Rimkus. On November 30, 2006, Cammarata emailed Ken Mansfield about his new firm. (Docket Entry No. 324, Ex. Z). Cammarata referred to assignments they had worked on together at Rimkus and told Mansfield to let Rimkus know his requirements if he

wanted Rimkus to continue providing forensic engineering services. (*Id.*). Cammarata gave Mansfield the contact information for the Rimkus New Orleans District Manager but also offered "to provide professional engineering services to you and your firm as you may require" and asked Mansfield to contact him. (*Id.*). On December 11, 2006, Cammarata emailed Bill Parsons of Gray Insurance to follow up on a phone conversation they had about an assignment Cammarata had been working on for Parsons before leaving Rimkus. (*Id.*, Ex. AA). Cammarata told Parsons that it would be easier to have the file transferred from Rimkus to U.S. Forensic so that Cammarata could complete the work himself. (*Id.*). Cammarata told Parsons that if he wanted the file transferred, he should contact Rimkus's New Orleans District Manager. (*Id.*).

\*24 The emails Rimkus recovered from the internet service providers were largely from November and December 2006, when Homestead was hosting U.S. Forensic's email. The defendants had deleted these emails in late 2006, despite the fact that they had filed the Louisiana suit against Rimkus and despite the likelihood that Rimkus would sue them. Rimkus argues that because Bell and Cammarata had deleted these emails, and the emails were solicitations of former Rimkus clients, it is clear that Bell and Cammarata sent other similar emails, particularly after December 2006. Rimkus contends that the record supports an inference that the deleted emails would have helped its case and that the pursuit of this case has been impaired by the inability to obtain those emails in discovery.

Rimkus also alleges that the defendants' testimony that they did not delete emails to cover up unfavorable evidence is perjurious. Rimkus alleges that "there are other specific instances of perjury that have occurred in the testimony of Bell, Cammarata, Janowsky, DeHarde, and Darren Balentine that [also] justify the imposition of a severe sanction." (Docket Entry No. 313 at 24). Rimkus argues that Bell's and Cammarata's testimony that they did not take confidential client information from Rimkus is false because the emails obtained from Homestead show that the defendants contacted Rimkus clients shortly after leaving Rimkus. According to Rimkus, there is no way Bell and Cammarata could have obtained that contact information so quickly unless they took it from Rimkus when they left.

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 25

At the August 6, 2009 motion hearing, this court allowed Rimkus to reopen the depositions of Bell and Cammarata and to supplement the summary judgment record. Rimkus filed a supplemental response, (Docket Entry No. 374), and the defendants filed a supplemental reply, (Docket Entry No. 376). At a September 2, 2009 discovery conference, the parties presented arguments on the significance of the recently obtained evidence. The new evidence included emails on Bell's personal email account with Google, reports created by the defendants for U.S. Forensic that Rimkus alleged contain its copyrighted materials, and the presence of Rimkus files on Cammarata's home computer. The court allowed the parties another opportunity to supplement the record to include relevant, recently obtained evidence. Rimkus filed supplements to its summary judgment responses and to its sanctions motions. (Docket Entry No. 389, 393, 394).

The supplemental filings included emails Rimkus subpoenaed from Homestead showing that Cammarata used his personal email address in November and December 2006 to send Rimkus engineering data and reports to his U.S. Forensic email address. (Docket Entry No. 393, Ex. C). Cammarata testified that while he was working at Rimkus, he often transferred work and reports to his home computer. (*Id.*, Ex. E, Deposition of Nickie Cammarata at 45:18-24). Rimkus also obtained an email showing that Cammarata copied part of a Rimkus vibration report that he had used when he worked at Rimkus and sent it to a U.S. Forensic Associates contract engineer to include in a project presentation. (Docket Entry No. 393, Ex. C; Ex. E, Deposition of Nickie Cammarata at 16:13-17:23). Cammarata and Bell both testified that they obtained a copy of a Rimkus wind/hail powerpoint presentation to use at U.S. Forensic. (*Id.* at 15:22- 16:4; Docket Entry No. 389, Ex. I, Deposition of Gary Bell at 69:10-70:13). Rimkus filed an amended complaint alleging that the use of the powerpoint presentation and other Rimkus materials constitutes copyright infringement. (Docket Entry No. 403 at 13-14).

\*25 Cammarata testified that one of his clients at U.S. Forensic gave him photographs taken by Rimkus of a job in the Port Sulphur, Louisiana area because the client wanted Cammarata to continue working on that job at U.S. Forensic. (Docket Entry No.

389, Ex. H, Deposition of Nickie Cammarata at 10:9-15:21). Rimkus argues that Cammarata misappropriated these photographs from Rimkus and used them in preparing U.S. Forensic reports. (Docket Entry No. 389 at 5).

On September 13, 2009, Cammarata produced, for the first time, fifteen disks of electronically stored information and numerous boxes of paper documents. Rimkus reviewed these materials and "determined that [they] contained a significant amount of Rimkus correspondence, job photographs, job files, engagement letters, Terms and Conditions, client contact information, and Rimkus PowerPoint presentations." (Docket Entry No. 389 at 5). Rimkus points to Cammarata's October 4, 2007 deposition testimony that he only retained "some reports" in a box as further evidence of perjury and discovery obstruction. (Docket Entry No. 393, Ex. K, Deposition of Nickie Cammarata at 122:17).

Rimkus also submitted evidence from its own forensic analysis of Bell's Rimkus laptop. The analysis showed that on the day he resigned from Rimkus, Bell downloaded financial information from the Rimkus server to the laptop. This information includes financial spreadsheets for six Rimkus offices, including Chicago, Indianapolis, Jackson, Lafayette, New Orleans, and Pensacola. These offices comprise Rimkus's Central Region, which had been Bell's responsibility. Rimkus argues that there was no reason for Bell to download these documents from the server on the day he resigned other than to misappropriate them for use in his new competing business.

On September 30, 2006, Bell sent an email to his personal Gmail account containing financial data for four Rimkus offices. Bell had downloaded this data from his Rimkus laptop. In an earlier deposition, Bell had testified that he did not have a Gmail account during this period. (Docket Entry No. 394, Ex. A, Deposition of Gary Bell at 450:10-451:11). In his August 2009 deposition, Bell was asked about the belated disclosure that he had sent Rimkus information to a personal Gmail account:

Q: Now, do you remember me asking you in your prior deposition about all of the email accounts you had?

A: I believe you did.

Q: You didn't mention a G-mail account, did you?

A: Not that I recall.

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 26

Q: And I specifically asked you if you had a Gmail account, right?

A: I don't know if you specifically asked me. I don't use the Gmail account. I set it up during the hurricane right after I evacuated to Lafayette. I got an invitation to set one up. I set it up and it's really something I haven't really used.

(*Id.*, Ex. C, Deposition of Gary Bell at 10:9-:22).

Rimkus argues that Bell first tried to conceal, then distance himself from, the Gmail account because he used it to "go under the radar" to download and take confidential Rimkus financial information. Bell testified in his deposition that he sent Rimkus financial documents to his BellSouth email account, not to use for U.S. Forensic but to help with the transition of the branch managers in the Central Region before he left Rimkus. (*Id.* at 17:8- 18:1). But Bell sent this email on September 30, 2006, three days *after* he resigned from Rimkus. Bell testified in his March 2009 deposition that he declined Rimkus's invitation to help with transition work at the branch offices and that he never worked for Rimkus after September 27, 2006. (Docket Entry No. 394, Ex. A, Deposition of Gary Bell at 78:18-79:4; 80:19-:22; 81:16-:20). Rimkus also argues that Bell did not need to email these documents to himself if he was using them for Rimkus work because they were contained on his Rimkus work laptop, which he could take with him until he was finished assisting with the transition. Rimkus also notes that the September 30, 2006 email was not produced by BellSouth in response to a subpoena because Bell had previously deleted it.

\*26 On October 1, 2009, Rimkus filed its second supplemental memorandum of law in support of its motion for sanctions and response to the motion for summary judgment. (Docket Entry No. 410). In the supplemental filing, Rimkus identified an email that had been produced in native format as required in this court's August 17, 2009 order. (Docket Entry No. 411). The defendants had previously produced this email in PDF format. (Docket Entry No. 410, Ex. Supp. T). The email was dated April 6, 2008 and labeled "From: Gary Bell" and "To: Gary Bell," with no indication of the email addresses. (*Id.*). When the email was produced in native format, it showed six attachments not included in the original PDF version. (Docket Entry No. 411). Rimkus filed the attachments under seal. (*Id.*). The attachments contain contact information for Rimkus clients in Florida and for

one client's national catastrophe manager in Minnesota. (Docket Entry No. 410 at 7). Rimkus asserts that the metadata shows that Darren Balentine created the documents at Rimkus on December 14, 2007 and April 2, 2008, while he was working for Rimkus. Balentine subsequently quit Rimkus to become a 50% owner of U.S. Forensic Associates. (*Id.* at 8). The metadata also shows that the documents were converted to PDF on April 2, 2008. (*Id.*).

On May 1, 2008, less than a month after the April 6, 2008 email with the client-contact information attached, Bell had testified in this court that he did not take or use confidential information when he left Rimkus and started U.S. Forensic. (Docket Entry No. 410, Ex. Supp. V at 80:16-:24). On October 6, 2009, Bell testified that he did not remember getting the April 2008 email until it was produced. He did not know whether he had received other Rimkus client information. (Docket Entry No. 430 at 12). Bell testified that he had never used the client-contact information in the email attachments. (*Id.* at 14). Bell also testified that he did not ask Balentine for the information and did not know why Balentine sent it to him. (*Id.* at 16). Bell's counsel, Demmons, stated that he had prepared and printed the emails for production and could not explain why the initial production not only failed to include the attachments but concealed their presence. (*Id.* at 36).

In his April 9, 2009 deposition, Balentine stated that he had not to his knowledge transmitted any information he knew to be confidential Rimkus information. (Docket Entry No. 410, Ex. Supp. W, Deposition of J. Darren Balentine at 60:10-:18). Rimkus took a brief additional deposition on October 27, 2009. In the October deposition, Balentine stated he did not recall sending Bell the client-contact information and that he was unable to find a record of sending Bell an email with the client information in April 2008. (Docket Entry No. 445, Ex. B., Deposition of J. Darren Balentine at 35:7-:10, 39:11-:18, 51:1-:25, 97:6-98:4).

Rimkus filed a motion for a preliminary injunction on October 1, 2009, seeking, among other things, to require Bell and others to return all of Rimkus's confidential information and seeking to enjoin Bell and anyone at U.S. Forensic from using the information contained in the email attachments. (Docket Entry No. 416). At a hearing before this court on October 6,

Slip Copy  
Slip Copy, 2010 WL 645253 (S.D.Tex.)  
(Cite as: 2010 WL 645253 (S.D.Tex.))

Page 27

2009, the parties agreed to certain provisions of the proposed injunction, and this court granted the preliminary injunction in part. (Docket Entry No. 425).

\*27 In addition to the email attachments containing Rimkus customer information, Rimkus also points to a newly discovered email stating that Bell met with a real estate agent in August 2006, while he was still working at Rimkus, and on August 15, 2006 received a Letter of Intent to lease the space. (Docket Entry No. 410, Ex. Supp. Q). The Letter of Intent identified "U.S. Forensics, LLC" as the subtenant and noted that the "LLC [was] to be established in September, 2006." (*Id.*). Rimkus argues that the Letter of Intent naming U.S. Forensic contradicts Bell's earlier deposition testimony that Bell did not plan to leave Rimkus before he did so and that his only steps before leaving Rimkus was speaking to his brother about going to work for him. (Docket Entry No. 410 at 13-23).

Rimkus filed a supplemental memorandum of law, arguing that it had discovered proof that Bell had used the Rimkus client information contained in the April 2008 email attachments. (Docket Entry No. 429). Rimkus submitted an affidavit from Michael Sanchez, a claims vendor manager for American Strategic Insurance Company. (*Id.*, Ex. Supp. Y). Sanchez's affidavit stated that Bell contacted him by email and phone, seeking to provide engineering services through U.S. Forensic. *Id.* at 2. Sanchez also stated that Balentine contacted him on September 9, 2009, seeking to provide engineering services through U.S. Forensic Associates, L.L.C. *Id.* Sanchez did not recall providing his contact information to Bell. *Id.* Rimkus alleges that Sanchez's affidavit establishes that Bell had used Rimkus confidential information, contradicting his statements under oath.

In response, the defendants noted that Sanchez's affidavit did not preclude the possibility that his contact information could have been obtained from a source other than Rimkus's client lists. (Docket Entry No. 435 at 9 n. 3). The defendants offered a roster from a conference Bell attended in 2008 containing Sanchez's phone number and address as a possible source of the contact information. (*Id.* at 9). The defendants also attacked the language in the affidavit as "far from definitive" because Sanchez said "[t]o my knowledge" and "that I recall" when referring to communications from Bell. (*Id.*). The defendants also

objected that Sanchez did not attach his call log showing the phone call from Bell or any emails from Bell. (*Id.*).

Rimkus filed a fourth supplemental memorandum on October 14, 2009. (Docket Entry No. 439). Rimkus argued that Sanchez's email address does not appear in the contact information listed in the conference documents. (*Id.* at 2). Rimkus argued that the evidence of Bell's contact with Sanchez conflicts with Bell's testimony before this court that he had not contacted persons listed on the Rimkus client list. (*Id.*).

On November 5, 2009, the defendants filed a motion to strike Sanchez's affidavit, Rimkus's fourth supplement, and the supplemental responses to the motion for contempt. (Docket Entry No. 446). The defendants argued that Sanchez's testimony in his November 2, 2009 deposition was different from his affidavit. Sanchez testified in his deposition that Bell called him in June 2009; the affidavit states the date as June 2008. Sanchez testified in his deposition that he never received an email from Bell; his affidavit states that Bell emailed him. Sanchez testified in his deposition that his contact information was on lists in Bell's possession and that he believed he gave Bell a business card. Sanchez also testified that he did not read through the whole affidavit after signing it. (*Id.*). The defendants argued that this court should strike Rimkus's fourth supplement because it was filed after this court's October 14, 2009 deadline for filing supplemental pleadings. (*Id.* at 13 n. 21). Rimkus responded and argued that Sanchez's affidavit and deposition testimony both contradict Bell's October 6, 2009 testimony that he had not contacted any client on the Rimkus client list attached to the April 6, 2008 email. (Docket Entry No. 447). [\[FN32\]](#)

[FN32.](#) The defendants' motion to strike, (Docket Entry No. 446), is denied. Although Rimkus filed a supplement after this court's deadline for doing so passed, that supplement was filed to submit evidence from Balentine's October 27, 2009 deposition about the April 6, 2008 email attachments. (Docket Entry No. 445). Rimkus could not have filed the evidence until after Balentine was deposed. Rimkus filed the supplement three days after Balentine's deposition. Given the circumstances, the Rimkus supplement was timely filed and will not be



Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 28

stricken. The defendants' motion to strike the Sanchez affidavit, (Docket Entry No. 446), is also denied. The inconsistencies between Sanchez's affidavit and his deposition testimony are appropriately treated as impeachment evidence but not as a basis for striking the affidavit.

\*28 After the October 6, 2009 hearing, the defendants produced 277 reports and other documents that contain data or language taken from Rimkus materials. (Docket Entry No. 431 at 6-7). Rimkus argued that the reports were further evidence of bad faith and discovery obstruction. (*Id.* at 7). Rimkus argued that in addition to the evidence of spoliation, this court should look to the defendants' delay in responding to discovery, their "formulaic and groundless objections," and their "chaotic production" to support a finding of contumacious conduct. (*Id.* at 10).

The parties' contentions are examined against the extensive evidence in the record, including the supplemental filings, and the applicable law.

#### IV. Rimkus's Motion for Sanctions and Contempt

##### A. The Parties' Contentions

Rimkus argues that the defendants intentionally deleted emails "in direct contravention of their legal duty to preserve electronically stored information when they anticipated they would be engaged in litigation with Rimkus." (Docket Entry No. 313 at 6). Rimkus contends that the duty to preserve arose before November 2006, when Bell, Cammarata, and DeHarde planned to sue Rimkus in Louisiana. Rimkus points to the November 11, 2006 email that Bell sent to Cammarata, DeHarde, and Janowsky stating that they needed to file suit in Louisiana and "serve [Rimkus] on Monday to prevent them from filing in Texas." (*Id.*). Rimkus argues that the defendants understood that their Louisiana suit seeking to invalidate the noncompetition and nonsolicitation clauses would be met with a countersuit seeking to enforce the provisions as well as the contractual and common-law duty not to misappropriate propriety and confidential information. (*Id.* at 7).

Rimkus alleges that the defendants "scheme[d]" to destroy evidence showing the extent to which they took confidential information from Rimkus to use to

set up, operate, and solicit business for U.S. Forensic. (*Id.*). The scheme, and the attempt to conceal it, included deleting emails showing that the defendants took information from Rimkus and used it for U.S. Forensic, donating or throwing away laptop computers from which such emails might be recovered, and lying about personal email accounts. According to Rimkus, the cover-up unraveled when DeHarde testified about the defendants' agreement to delete all emails more than two weeks old. Rimkus also points to the April 2008 email Gary Bell sent himself containing attachments with confidential Rimkus customer-contact information and the reports Cammarata produced containing language and data copied from Rimkus. (Docket Entry No. 431 at 6-7). Rimkus argues that these documents, withheld from production until recently, combined with Cammarata's and Bell's prior testimony, provide evidence of intentional, bad-faith efforts to withhold or destroy relevant information.

As a sanction for spoliation, Rimkus asks this court to strike the defendants' pleadings and enter a default judgment or, in the alternative, to give an adverse inference jury instruction at trial. Rimkus also seeks reimbursement of the costs and fees it incurred in discovering or attempting to discover spoliated evidence and in moving for sanctions.

\*29 The defendants respond that the deleted emails responsive to Rimkus's discovery requests--to produce "Cammarata's and Bell's communications with one another and with other U.S. Forensic, L.L.C. members concerning the creation and inception of U.S. Forensic, L.L.C., their roles with the company, and contact with clients"--"only relate to Plaintiff's claim for breach of fiduciary duty against Mr. Bell, not the myriad of other claims in this litigation." (Docket Entry No. 345 at 13-14). The defendants argue that there was no duty to preserve these emails in November and December 2006 because they only planned to sue Rimkus for a declaratory judgment that the noncompetition and nonsolicitation provisions were unenforceable.

The defendants also argue that there is insufficient prejudice to Rimkus to warrant a default judgment or adverse inference instruction because Rimkus has been able to obtain some of the deleted emails from other sources and has sufficient evidence to argue its claims. The defendants contend that any emails or

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 29

documents they destroyed that could not be obtained from other sources in discovery "would be merely cumulative of evidence already produced." (*Id.* at 15). The defendants assert that there is a "wealth" of evidence on the formation of U.S. Forensic and the defendants' preparations to form a competing business. They point to several documents that were produced earlier in this litigation that "could be deemed relevant to Plaintiff's claim for breach of fiduciary duty and the issue of Defendants' formation of U.S. Forensic." (*Id.* at 16).

The defendants admit that sanctions in the amount of reasonable costs and fees Rimkus incurred to obtain production of the April 2008 email Gary Bell sent himself containing attachments with Rimkus client-contact information and the reports with Rimkus language are appropriate. (Docket Entry No. 408 at 26). The defendants argue that other sanctions are not warranted because the failure to produce earlier was not due to intentional wrongdoing but to "ineptitude" and that Rimkus is not prejudiced because "the vast majority of information requested by Plaintiff, and previously thought to be lost or destroyed, has now been produced." (*Id.* at 28).

## 2. *The Duty to Preserve*

The record shows that no later than November 11, 2006, when the defendants were about to "preemptively" sue Rimkus, they had an obligation to preserve documents and information--including electronically stored information-- relevant to these disputes. The disputes included whether Bell breached the fiduciary duty he owed Rimkus as an officer, whether Bell or Cammarata breached enforceable obligations under the noncompete and nonsolicitation provisions in the parties' contracts, and whether Bell or Cammarata breached contractual or common-law duties not to take or use Rimkus's confidential and proprietary information.

Bell sought the advice of counsel before leaving Rimkus. The November 11, 2006 email from Bell to Cammarata, DeHarde, and Janowsky discussing the final steps of the plan to sue Rimkus in Louisiana to challenge the noncompete and nonsolicitation provisions shows that the defendants knew that they would be suing Rimkus within days. The duty to preserve electronically stored information and documents relevant to that suit and reasonably anticipated related

litigation was triggered no later than November 11, 2006.

\*30 The defendants' argument that their preservation obligation was limited to documents or emails related to breach of fiduciary obligation claims against Bell is unpersuasive. Bell, Cammarata, and DeHarde sued Rimkus in Louisiana seeking a declaratory judgment that the noncompetition and nonsolicitation clauses were unenforceable so that they could operate U.S. Forensic to compete with Rimkus. It was reasonable for Bell and Cammarata to anticipate that Rimkus would seek to enforce those contractual provisions as to all the U.S. Forensic employees who left Rimkus, as well as the contractual and common-law duty not to disclose Rimkus's confidential and proprietary information. Emails and attachments and other documents relating to U.S. Forensic and its related company, to soliciting Rimkus clients or employees, and to obtaining or using Rimkus information were subject to a preservation obligation. Such records were relevant to the claims involved in the Louisiana state court action that Cammarata, Bell, and DeHarde filed and to the reasonably anticipated claims that Rimkus would file, and involved the key players in the parties' litigation.

[Rule 37\(e\)](#), which precludes sanctions if the loss of the information arises from the routine operation of the party's computer system, operated in good faith, does not apply here. The evidence in the record shows that the defendants and other U.S. Forensic founders did not have emails deleted through the routine, good-faith operation of the U.S. Forensic computer system. DeHarde testified that he, Bell, Cammarata, and Janowsky decided on a "policy" of deleting emails more than two weeks old. Putting aside for the moment other evidence in the record inconsistent with this testimony, a policy put into place after a duty to preserve had arisen, that applies almost exclusively to emails subject to that duty to preserve, is not a routine, good-faith operation of a computer system. Moreover, the evidence shows that the founders of U.S. Forensic manually and selectively deleted emails, after the duty to preserve arose. The selective, manual deletions continued well after Rimkus filed suit in January and February 2007.

Despite the fact that the founders of U.S. Forensic had sought and obtained legal advice on many aspects of their departure from Rimkus and their forma-

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 30

tion and operation of the competing business, they made *no* effort to preserve relevant documents, even after the Louisiana and Texas suits had been filed. To the contrary, the evidence shows affirmative steps to delete potentially relevant documents. Even assuming that there was an email destruction policy as DeHarde testified, it was selectively implemented. The deleted documents included emails and attachments relevant to the disputes with Rimkus--the emails and attachments showing what information U.S. Forensic's founders took from Rimkus to use in the competing business, including to solicit business from Rimkus clients, and how they solicited those clients.

\*31 The record shows that the electronically stored information that the defendants deleted or destroyed after the duty to preserve arose was relevant to the issues involving both Bell and Cammarata, not limited to a breach of fiduciary claim against Bell. The deleted emails and attachments related not only to setting up U.S. Forensic but also to obtaining information from Rimkus, including copyrighted materials, financial documents, and customer lists; using at least some of that information to operate U.S. Forensic in competition with Rimkus; and soliciting business for U.S. Forensic. The evidence shows that by deleting emails relating to forming U.S. Forensic and to using information from Rimkus for U.S. Forensic, by failing to preserve such emails, and by giving away or destroying laptops with such emails, the defendants destroyed potentially relevant evidence.

### 3. The Degree of Culpability

Destruction or deletion of information subject to a preservation obligation is not sufficient for sanctions. Bad faith is required. A severe sanction such as a default judgment or an adverse inference instruction requires bad faith and prejudice. See [Condrey v. Sun-Trust Bank of Ga.](#), 431 F.3d 191, 203 (5th Cir.2005); see also [Whitt v. Stephens County](#), 529 F.3d 278, 284 (5th Cir.2008) ("[A] jury may draw an adverse inference 'that party who intentionally destroys important evidence in bad faith did so because the contents of those documents were unfavorable to that party.' " (quoting [Russell v. Univ. of Tex. of the Permian Basin](#), 234 F. App'x 195, 207 (5th Cir.2007) (unpublished))). [\[FN33\]](#)

[FN33](#). Two cases illustrate the range of culpability. In [GE Harris Railway Electronics](#),

[L.L. C. v. Westinghouse Air Brake Co.](#), No. 99-070-GMS, 2004 WL 5702740 (D.Del. Mar.29, 2004), the court concluded that the defendant's employee acted in bad faith by destroying documents that were potentially incriminating, *id.* at \*4. The plaintiff had sued the defendant and its employee for patent infringement and trade secret misappropriation. *Id.* at \* 1. The parties settled the case and a consent order was entered prohibiting the employee for three years from involvement in selling any radio-based distributed power product manufactured by his employer. *Id.* It was undisputed that the employee was aware of this prohibition. *Id.* at \*2. During that three-year period, the employee participated in a proposal to sell the product. *Id.* After the plaintiff learned about this proposal, it moved for a contempt order. *Id.* at \* 1. The parties did not dispute that the employee deleted computer files related to the proposal when he became aware that the plaintiff might have concerns. *Id.* at \*2. The court concluded that the employee's destruction was "clearly motivated by an intent to eliminate evidence that could potentially incriminate [his employer] in a contempt claim." *Id.* at \*4. The court held that dismissal was improper because the prejudice to the innocent party was minimal but adopted an adverse inference against the spoliating party. *Id.* at \*4-5.

By contrast, in [Pandora Jewelry, LLC v. Chamilia, LLC](#), No. CCB-06-3041, 2008 WL 4533902 (D.Md. Sept.30, 2008), there was insufficient evidence that the defendant deliberately deleted emails to find bad faith. After the plaintiff filed suit, the court granted the defendant's motion to quash a subpoena for records. *Id.* at \*1. The defendant then sent a letter to a number of the plaintiff's customers. *Id.* The letter purportedly misrepresented the court's order granting the defendant's motion to quash. *Id.* The defendant also sent this "letter via email to a number of blind copy recipients." *Id.* After the plaintiff filed additional claims, the defendant contended that it no longer possessed the emails because it "changed its electronic server twice during the litigation period or due to its email system forcing users to delete or archive emails every ninety

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 31

days." *Id.* at \*2. The court rejected the plaintiff's motion for sanctions for spoliation. *Id.* at \*6. There was no evidence, "other than [the defendant's] failure to retain the emails, that [the defendant] deliberately deleted or destroyed evidence." *Id.* at \*9. Although the loss of the emails violated the preservation obligation, this did not "necessitate a finding of willful or bad faith destruction." *Id.* The court held that the defendant was merely "grossly negligent in its failure to preserve evidence" but declined to impose an adverse inference instruction or grant summary judgment because the innocent party failed to show that the lost documents were relevant. *Id.*

The defendants' proffered reasons and explanations for deleting or destroying the emails and attachments are inconsistent and lack record support. Bell testified that he deleted emails for "space concerns," Janowsky testified that he deleted emails on a weekly basis because he got a lot of emails and they "fill up [his] box," and DeHarde testified in his first deposition that he deleted emails on an ad hoc basis because he was concerned about storage capacity in his inbox. The defendants also asserted that they deleted emails about preparations to form U.S. Forensic for fear of retaliation by Rimkus if they ended up staying on at Rimkus. Allen Bostick, the IT consultant, testified that lack of space on U.S. Forensic's server and external hard drives did not become an issue until late 2007, well after this litigation began. The fact that DeHarde did not reveal the "policy" of deleting all emails more than two weeks old until after Rimkus was able to subpoena DeHarde's Yahoo! account is another reason for questioning the truthfulness of this explanation. Fear of retaliation by Rimkus might explain the deletions that occurred before the defendants resigned, but not after.

Some of the emails the defendants deleted were obtained from a Rule 45 subpoena issued to one of the internet service providers, Homestead. These emails show the defendants making preparations to form U.S. Forensic in September, October, and November 2006, and soliciting clients with whom they worked while at Rimkus in late November and early December 2006. Other emails, obtained not from the defendants but through forensic analysis of the laptop Bell used at Rimkus, show that Bell downloaded and

transmitted financial spreadsheets for specific Rimkus offices *after* his resignation. Emails obtained from Homestead show that Cammarata forwarded language in Rimkus reports from his home email account to his U.S. Forensic email account; Cammarata admitted giving the language from a Rimkus report to a U.S. Forensic Associates engineer for use on a project. Still another email from Bell to himself, which the defendants did not originally produce with the attachments, shows that Bell was in possession of Rimkus client-contact information in April 2008.

\*32 The evidence that the defendants knew about the litigation with Rimkus when they deleted the emails; the inconsistencies in the explanations for deleting the emails; the failure to disclose information about personal email accounts that were later revealed as having been used to obtain and disseminate information from Rimkus; and the fact that some of the emails reveal what the defendants had previously denied--that they took information from Rimkus and used at least some of it in competing with Rimkus--support the conclusion that there is sufficient evidence for a reasonable jury to find that the defendants intentionally and in bad faith deleted emails relevant to setting up and operating U.S. Forensic, to obtaining information from Rimkus and using it for U.S. Forensic, and to soliciting Rimkus clients, to prevent the use of these emails in litigation in Louisiana or Texas.

#### 4. Relevance and Prejudice

Despite the evidence of spoliation and efforts to conceal it, the record also shows that Rimkus was able to obtain a significant amount of evidence. Rimkus had the laptop Bell used during his employment, although Rimkus delayed in examining it. That laptop revealed useful information about records Bell took from Rimkus. Although they deleted or destroyed the relevant emails, attachments, and documents on other computers, the defendants also produced numerous documents and emails relating to their communications and preparations to form U.S. Forensic. Rimkus was also able to obtain numerous emails from Homestead, which hosted all U.S. Forensic's emails between November 15, 2006 and December 19, 2006. And the defendants have subsequently, if belatedly, produced numerous responsive emails and documents relating to the formation of U.S. Forensic and the solicitation of Rimkus clients.

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 32

Between the records the defendants did produce, the deleted records Rimkus obtained from other sources, and other evidence of the contents of deleted lost records, Rimkus has extensive evidence it can present. The evidence of the contents of the lost records shows that some would have been favorable to Rimkus. There is prejudice to Rimkus, but it is far from irreparable. Rimkus's demand that this court strike the defendants' pleadings and enter a default judgment is not appropriate. The sanction of dismissal or default judgment is appropriate only if the spoliation or destruction of evidence resulted in "irreparable prejudice" and no lesser sanction would suffice. See [Silvestri v. Gen. Motors Corp.](#), 271 F.3d 583, 593-94 (4th Cir.2001) (affirming dismissal as a sanction when the alterations to the plaintiff's vehicle were tantamount to destroying the central piece of evidence in the case, which denied the defendant "access to the only evidence from which it could develop its defenses adequately," causing "irreparable prejudice").

Although a terminating sanction is not appropriate, a lesser sanction of a form of adverse inference instruction is warranted to level the evidentiary playing field and sanction the improper conduct. See [Russell v. Univ. of Tex. of the Permian Basin](#), 234 F. App'x 195, 207 (5th Cir.2007) (unpublished) ("A spoliation instruction entitles the jury to draw an inference that a party who intentionally destroys important documents did so because the contents of those documents were unfavorable to that party."); [Turner v. Pub. Serv. Co. of Colo.](#), 563 F.3d 1136, 1149 (10th Cir.2009) (intentional destruction of records may "support an inference of consciousness of a weak case" (quoting [Aramburu v. Boeing Co.](#), 112 F.3d 1398, 1407 (10th Cir.1997))).

\*33 The evidence of the contents of the deleted emails and attachments shows that deleted and unrecoverable emails and attachments were relevant and that some would have been helpful to Rimkus. Emails that Rimkus was able to obtain from Homestead and other sources show the defendants obtaining and using confidential or copyrighted Rimkus information for the benefit of U.S. Forensic. The confidential information includes Rimkus financial data. The copyrighted information includes portions of engineering reports and powerpoint presentations. Rimkus did not receive from Bell in discovery the

September 30, 2006 email that Bell forwarded from his BellSouth email account to his Gmail account, with confidential Rimkus information attached. Rimkus was able to obtain this information as a result of analyzing its own computer systems; it was not produced in discovery. Rimkus did not receive in discovery the April 6, 2008 email Bell sent to himself with attachments containing Rimkus customer contact information. Rimkus was only able to obtain this information as a result of this court's order to conduct additional review of the information restored from external disk drives and later order to produce the emails in native format.

The marketing emails from U.S. Forensic that Rimkus has recovered from third-party internet service providers show that at least during November and December 2006, Bell and Cammarata were soliciting Rimkus clients for U.S. Forensic. Some of the post-December 2006 emails that Rimkus has recovered from third parties are similar to the Homestead emails and show Bell and Cammarata soliciting business from Rimkus clients. Similar marketing emails sent or received after December 2006 were deleted by the defendants, but the extent of the missing emails remains unknown. DeHarde testified that the founding members of U.S. Forensic deleted emails that were more than two weeks old beginning in the fall of 2006. Bell testified in his deposition that he deleted all U.S. Forensic marketing-related emails. The record supports an inference that emails soliciting Rimkus clients were deleted by the defendants and that some of these emails will never be recovered.

Some deleted emails, later discussed in detail, show that Bell was contacting Rimkus clients whose information was not listed in the 2006 Casualty Adjuster's Guide and that Bell did not have the Guide before December 2006. Even if this contact information was available on the internet in 2008, the record does not show that it was available in 2006. The emails to Rimkus clients whose contact information may not have been available in the Casualty Adjuster's Guide or on the internet is relevant to whether Bell obtained the contact information from Rimkus.

The emails that have been recovered by Rimkus, through great effort and expense, include some that support Rimkus's claims, contradict testimony the defendants gave, and are unfavorable to the defen-

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 33

dants. Rimkus has shown that it has been prejudiced by the inability to obtain the deleted emails for use in the litigation. To level the evidentiary playing field and to sanction the defendants' bad-faith conduct, Rimkus is entitled to a form of adverse inference instruction with respect to deleted emails.

\*34 At the same time, it is important that Rimkus has extensive evidence to use in this case. And some of the emails that the defendants deleted and that were later recovered are *consistent* with their positions in this lawsuit and *helpful* to their defense. For example, the Homestead production revealed emails Bell sent to Rimkus clients soliciting business for U.S. Forensic stating that Bell intended to comply with his contractual obligations not to compete with Rimkus. In a November 15, 2006 email to Don Livengood at Fidelity, Bell stated that he would like to meet with Livengood to "go over the insurance coverages, the non compete agreement for Orleans Parish and [the] capacity to do jobs out of state." (Docket Entry No. 394, Ex. F). Bell emailed Cary Soileau at Allstate on December 4, 2006 asking for the contact information for two other Allstate employees because he "was contractually obligated to leave all client info behind at Rimkus." (*Id.*). In an email to Tim Krueger of Safeco Insurance on December 11, 2006, Bell stated that he was looking for the name of a local claims person, but Bell stated, "[p]lease keep in mind that due to contractual obligations we would not be able to accept any assignments in New Orleans until October 2007." (*Id.*).

Given this record, it is appropriate to allow the jury to hear the evidence about the deletion of emails and attachments and about discovery responses that concealed and delayed revealing the deletions. The jury will receive an instruction that in and after November 2006, the defendants had a duty to preserve emails and other information they knew to be relevant to anticipated and pending litigation. If the jury finds that the defendants deleted emails to prevent their use in litigation with Rimkus, the jury will be instructed that it may, but is not required to, infer that the content of the deleted lost emails would have been unfavorable to the defendants. [\[FN34\]](#) In making this determination, the jury is to consider the evidence about the conduct of the defendants in deleting emails after the duty to preserve had arisen and the evidence about the content of the deleted emails that cannot be recovered.

[FN34](#). Cf. [Stevenson v. Union Pac. R.R. Co.](#), 354 F.3d 739, 746 (8th Cir.2004) (affirming in part an instruction that read that "[y]ou may, but are not required to, assume that the contents of the [destroyed evidence] would have been adverse, or detrimental, to the defendant" but holding that the district court erred in preventing the spoliating party from offering rebuttal evidence (alteration in original)); [Zimmermann v. Assocs. First Capital Corp.](#), 251 F.3d 376, 383 (2d Cir.2001) ("If you find that the defendant could have produced these records, and that the records were within their control, and that these records would have been material in deciding facts in dispute in this case, then you are permitted, but not required, to infer that this evidence would have been unfavorable to the defendant. In deciding whether to draw this inference you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether the defendant had a reason for not producing this evidence, which was explained to your satisfaction."); [Cyntegra, Inc. v. Idexx Labs., Inc.](#), No. CV 06-4170 PSG, 2007 WL 5193736, at \*6 (C.D.Cal. Sept. 21, 2007) (granting a motion for spoliation sanctions in the form of an adverse inference jury instruction, which the defendant proposed should read: "You have heard that in presenting this case, Cyntegra did not preserve certain materials that IDEXX alleges relate to its defense against Cyntegra's claims. Where evidence that would properly be part of a case is within the control of, or available to, the party whose interest it would naturally be to produce it, and that party fails to do so without a satisfactory explanation, the inference may be drawn that, if produced, such evidence would be unfavorable to that party, which it [sic] the case with Cyntegra."), [aff'd](#), 322 F. App'x 569 (9th Cir.2009); [Mosaid Techs. Inc. v. Samsung Elecs. Co.](#), 348 F.Supp.2d 332, 334 (D.N.J.2004) (approving an adverse inference jury instruction that stated, among other things, "[i]f you find that defendants could have produced these e-mails, and that the evidence was within their control, and

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 34

that the e-mails would have been relevant in deciding disputed facts in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to defendants. In deciding whether to draw this inference you may consider whether these e-mails would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that defendants' failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all the facts and circumstances of this case."); 3 KEVIN F. O'MALLEY, JAY E. GRENING & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 104.27 ("If you should find that a party willfully [suppressed] [hid] [destroyed] evidence in order to prevent its being presented at this trial, you may consider such [suppression] [hiding] [destruction] in determining what inferences to draw from the evidence or facts in the case." (alterations in original)).

The record also supports the sanction of requiring the defendants to pay Rimkus the reasonable costs and attorneys' fees required to identify and respond to the spoliation. The defendants agree that this sanction is appropriate. (Docket Entry No. 408 at 26). Rimkus has spent considerable time and money attempting to determine the existence and extent of the spoliation, hampered by the defendants' inconsistent and untruthful answers to questions about internet accounts and retention and destruction practices. The defendants failed to produce documents in compliance with court orders. Rimkus also expended significant time and effort to obtain some of the deleted emails and attachments.

Like an adverse inference instruction, an award of costs and fees deters spoliation and compensates the opposing party for the additional costs incurred. These costs may arise from additional discovery needed after a finding that evidence was spoliated, the discovery necessary to identify alternative sources of information, or the investigation and litigation of the document destruction itself. [FN35] Rimkus is entitled to recover its costs and attorneys' fees reasonably incurred in investigating the spoliation, obtaining emails from third-party subpoenas,

and taking the additional depositions of Bell and Cammarata on the issues of email deletion. No later than March 1, 2010, Rimkus must provide affidavits and supporting bills and related documents showing and supporting the amount of those costs and fees.

FN35, See, e.g., *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, No. 05 Civ. 9016, 2010 WL 184312, at \*24 (S.D.N.Y. Jan.15, 2010) (awarding reasonable costs and attorneys' fees associated with investigating the spoliation and filing the motion for sanctions); *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D.614, 636-37 (D.Colo.2007) (requiring the defendant to pay the costs associated with the plaintiff taking a deposition and filing a motion for relief after defendant "interfered with the judicial process" by wiping clean computer hard drives); *Leon v. IDX Sys. Corp.*, No. C03-1158P, 2004 WL 5571412, at \*5 (W.D.Wash. Sept.30, 2004) (requiring the plaintiff to pay the defendant the reasonable expenses it "incurred investigating and litigating the issue of [the plaintiff's] spoliation"), aff'd, 464 F.3d 951 (9th Cir.2006); *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 222 (S.D.N.Y.2003) (ordering the defendant to "bear [the plaintiff's] costs for re-deposing certain witnesses for the limited purpose of inquiring into issues raised by the destruction of evidence and any newly discovered e-mails"); *Trigon Ins. Co. v. United States*, 234 F.Supp.2d 592, 593-94 (E.D.Va.2002) (ordering the defendant to pay for the plaintiff's "expenses and fees incurred in its efforts to discern the scope, magnitude and direction of the spoliation of evidence, to participate in the recovery process, and to follow up with depositions to help prepare its own case and to meet the defense of the [defendant]"). Courts finding bad-faith spoliation also often award the moving party reasonable expenses incurred in moving for sanctions, including attorneys' fees. See, e.g., *Chan v. Triple 8 Palace, Inc.*, No. 03CIV6048(GEL)(JCF), 2005 WL 1925579, at \*10 (S.D.N.Y. Aug. 11, 2005) ("The plaintiffs are also entitled to an award of the costs, including attorneys' fees, that they in-

Slip Copy  
Slip Copy, 2010 WL 645253 (S.D.Tex.)  
(Cite as: 2010 WL 645253 (S.D.Tex.))

Page 35

curred in connection with this motion."); [Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 512-13 \(D.Md.2005\)](#) (ordering the defendant to pay "reasonable costs and attorneys' fees," including those for "client, third party and intra-office meetings" and "time charged for drafting and editing the motion" but reducing the amount sought).

### C. The Perjury Allegations

\*35 Rimkus alleges that Bell and Cammarata perjured themselves during their depositions. [\[FN36\]](#) Perjury is offering "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." [United States v. Dunnigan, 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 \(1993\)](#). Perjury is not established by mere contradictory testimony from witnesses or inconsistencies in a witness's testimony. See [Koch v. Puckett, 907 F.2d 524, 531 \(5th Cir.1990\)](#).

[FN36](#). Rimkus also alleges that DeHarde, Janowsky, and Darren Balentine of U.S. Forensic Associates, LLC, gave false testimony in their depositions. These individuals are not parties and did not testify as a party representative. The Rule 30(b)(6) witness for U.S. Forensic was Gary Bell. Rimkus does not allege, and there is no basis to conclude, that DeHarde, Janowsky, or Balentine gave testimony on behalf of U.S. Forensic. The testimony of these third parties, false or not, does not provide a basis for sanctioning the party defendants in this case.

Rimkus argues that inconsistencies between Bell's deposition testimony and documents produced in this case establish that he committed perjury. Rimkus cites Bell's deposition testimony that he did not take customer information or other confidential Rimkus information when he left the company and emails Bell sent in November and December 2006 soliciting work from individuals he dealt with while at Rimkus. Rimkus also points to the recently produced April 2008 email Bell sent himself that contained Rimkus customer information that appeared to have been created by Balentine while he was still employed at Rimkus and Bell's testimony that he did not use Rimkus customer information in soliciting U.S. Forensic

clients. Rimkus argues that Bell could not have obtained contact information for these individuals without using Rimkus customer lists and that Bell's "denial of the use of Rimkus's confidential client information in soliciting clients therefore is outright false." (Docket Entry No. 313 at 25).

Rimkus's arguments do not take into account Bell's deposition testimony about how he obtained contact information and who he attempted to contact after he left Rimkus. Bell testified that when he first began soliciting business for U.S. Forensic, the internet was his primary source for obtaining contact information. He also used the Casualty Adjuster's Guide. Bell testified that he "tried to get work from anybody that would send us work. It didn't matter to me if they were a Rimkus customer, if they weren't a Rimkus customer, I-I had to do it on my own--and, you know, many of the people that don't use Rimkus were exactly the people we wanted to target." (*Id.*, Ex. D, Deposition of Gary Bell, Vol. II at 62:15-:21). Although many of the emails show that U.S. Forensic focused its solicitation efforts on former Rimkus clients the U.S. Forensic founders knew, which is inconsistent with Bell's testimony, the record is not sufficient to show that Bell committed perjury when he stated that he did not take Rimkus's confidential customer contact information.

Rimkus argues that the April 2008 email Bell sent himself, with Rimkus client-contact information attached, makes Bell's prior testimony that he did not take or use Rimkus client-contact information false. Although the April 2008 email is evidence that Bell had Rimkus client information after he left Rimkus, it does not establish that Bell took the information when he left Rimkus. Rimkus argues that Bell obtained the information from Balentine after Bell left Rimkus. Nor does it establish that Bell *used* this client-contact information to solicit Rimkus customers for U.S. Forensic. Sanchez's affidavit also does not compel the conclusion that Bell used the contact information contained in the attachments to the April 2008 email because Sanchez's affidavit and deposition testimony do not show that the only source of the contact information was the information contained in the email attachments or other Rimkus sources.

\*36 Rimkus also cites Bell's deposition testimony about when he began telling potential clients about U.S. Forensic and soliciting business from them.



Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 36

Rimkus argues that this testimony is contradicted by the dates of emails from Bell to potential clients. Rimkus points to the following exchange in Bell's deposition:

Q. Okay. Prior to November 16th, the date you began formal operations of U.S. Forensic--

A. Uh-huh.

Q.--did you have communications with any person that you knew to provide business to Rimkus Consulting Group about your starting a competing business?

A. I don't believe so.

Q. Well, you would know; wouldn't you?

A. No.

Q. So, as you sit here today, you can't tell the ladies and gentlemen of the jury whether or not you contacted somebody or not? You just don't know?

A. I think, I didn't. We didn't have insurance. We didn't have engineers.

(*Id.* at 63:13-64:4). Rimkus contrasts this testimony with two November 15, 2006 emails Bell sent Rimkus clients to tell them he was starting a new company. These emails do not prove perjury. Bell clearly testified that although he did not believe that he had contacted Rimkus clients about his new company before November 15, 2006, he was not sure. Given Bell's uncertainty about when he contacted Rimkus clients on behalf of U.S. Forensic, the fact that two emails were sent one day before the date Bell was asked about does not establish that he intentionally gave false testimony.

Rimkus also argues that Bell falsely testified that he took precautions not to contact customers he knew to be Rimkus clients. Rimkus points to an email from Cammarata telling a former client that if he wanted Cammarata to work on the project to ask Rimkus to send the file but asking him not to forward the email to Rimkus and emails Bell sent in December 2006 to individuals Bell had worked with at Rimkus. (Docket Entry No. 394, Ex. F). These emails do not establish perjury. Bell testified that he "*generally* tried to avoid sending" marketing emails to Rimkus clients. (Docket Entry No. 313, Ex. D, Deposition of Gary Bell, Vol. II at 57:20). The fact that some of the hundreds of marketing emails Bell sent on behalf of U.S. Forensic were sent to people Bell knew were Rimkus clients is not inconsistent with Bell's testimony.

Rimkus also points to a recently produced email dated August 15, 2006, with a letter of intent to sub-

lease office space in Louisiana, which states that Bell was in the process of separating from his company and was planning to use the space for four employees and to grow over five years. (Docket Entry No. 410, Ex. Supp. Q). Rimkus points to Bell's previous testimony that he did not know he was leaving Rimkus and that he did not have a firm plan to form U.S. Forensic until after he left Rimkus. According to Rimkus, the letter of intent establishes that Bell's earlier testimony that he did not have a firm plan prior to leaving Rimkus was false. (Docket Entry No. 410 at 13-23).

\*37 The passages of Bell's deposition testimony that Rimkus cites do not show perjury. The testimony Rimkus points to shows that Bell did not provide a firm date on which the lease began or when he found the office space; Bell testified that it was "something like" November 5, but he did not know the exact date. (Docket Entry No. 410 at 20). Bell responded "maybe so" to a question asking if the lease started in October. (*Id.* at 21). Bell also testified that even if a lease was in place by October, there still was not a firm plan to form U.S. Forensic. (*Id.* at 22). Bell's testimony is insufficient to show perjury.

Finally, Rimkus argues that Bell falsely testified that he did not use personal email accounts for "purposes related to Rimkus or U.S. Forensic" and that he did not try to get rid of evidence. (Docket Entry No. 313 at 27). Bell testified that during his "employment at Rimkus," he used the Rimkus email system for Rimkus work, not a personal email account. (*Id.*, Ex. D, Deposition of Gary Bell, Vol. I at 17:21-25). When Rimkus completed a forensic analysis of its own computer system, it found a "cookie" showing that Bell accessed his BellSouth e-mail address on his Rimkus computer to forward documents to garylbell@gmail.com. Bell had previously specifically denied having a Gmail account. (Docket Entry No. 314, Deposition of Gary Bell, Vol. II at 247:20-248:1). Bell was not asked, and did not testify about, whether he used a personal email account for U.S. Forensic business.

When asked about deleting emails, Bell testified that he "didn't try to get rid of anything that [he] thought [he] shouldn't." (*Id.*, Deposition of Gary Bell, Vol. I at 18:1-13). Later in his deposition, Bell admitted deleting all U.S. Forensic marketing-related emails. (*Id.*, Vol. II at 342:3-5). He also testified that he de-

Slip Copy  
Slip Copy, 2010 WL 645253 (S.D.Tex.)  
(Cite as: 2010 WL 645253 (S.D.Tex.))

Page 37

leted some, but not all, of the emails on his computer to conserve server space, (*Id.*, Vol. I at 55:8), and that his deletion wasn't "as, you know, planned as-as it could have been," (*Id.* at 18:3-4). That is inconsistent with DeHarde's testimony that some time in the summer or fall 2006, but before November 15, 2006, the founding members of U.S. Forensic agreed to delete all emails after two weeks in part out of space concerns. (Docket Entry No. 313, Ex F, Deposition of Michael DeHarde at 34:21-25, 45:16- 25).

Evidence in the record shows that Bell did delete emails relevant to his disputes with Rimkus, emails that he had a duty to preserve. The deletions occurred after Bell and others had decided to sue Rimkus and continued after they filed suit in Louisiana and were sued in Texas. The record shows that Bell's testimony that he was not trying to delete emails relevant to this case was inconsistent and included some false information. The testimony delayed discovery and made it even more difficult and costly for Rimkus to obtain information that Bell deleted and destroyed from other sources. This testimony provides additional support for the adverse inference jury instruction and for the award of Rimkus's fees and costs in identifying and litigating the spoliation. *See, e.g., Belak v. Am. Eagle, Inc.*, 99-3524-CIV, 2001 WL 253608, at \*6 (S.D.Fla. Mar.12, 2001) (awarding the defendant the attorneys' fees incurred in moving to strike a pleading that contained false testimony). Rimkus is entitled to the fees and costs it incurred in attempting to recover the deleted emails from other sources and in redeposing the witnesses after those attempts. In addition, Rimkus is entitled to recover the reasonable costs and attorneys' fees incurred in moving for sanctions based on Bell's false testimony about getting rid of evidence.

\*38 Rimkus also alleges that Cammarata committed perjury. According to Rimkus, Cammarata falsely testified that he did not solicit Rimkus customers on behalf of U.S. Forensic. Rimkus argues that emails Cammarata sent to clients he worked with while employed at Rimkus show that his testimony was false. This argument is unpersuasive. Cammarata testified that he has "called people that used to be a client of [his] at Rimkus" since starting U.S. Forensic but that he did not recall sending marketing emails to such clients. (Docket Entry No. 314, Deposition of Nickie G. Cammarata at 114:25-115:1; 134:14-17). Cammarata testified that he "communicate[s] with some

clients that way. A given client, I might do it regularly, but I don't regularly communicate with all the clients via email." (*Id.* at 134:18-23). The emails Rimkus cites were the subject of specific questions at Cammarata's deposition. Cammarata testified that the emails were only to clients for whom he had open files when he resigned from Rimkus. Cammarata testified that after he gave Rimkus his two-week notice, "at least two, possibly three clients were pursuing my continuance on these files while I was at Rimkus. And within the two-week period I felt a duty to those clients, on behalf of their interest and Rimkus' interest, to inform them that by November 15th I would no longer be with Rimkus." (*Id.* at 112:16-23). The emails Rimkus relies on show that the clients contacted Cammarata to discuss open files. (Docket Entry No. 313, Exs. L, M). Cammarata responded by stating that he was with a new company but that if the client wanted him to continue working on the file, it could be transferred from Rimkus if the client contacted Rimkus to make those arrangements. Cammarata gave his new contact information and brief information about U.S. Forensic. These emails are consistent with Cammarata's deposition testimony that he did not recall sending marketing emails to clients but that he did communicate with some existing clients about open files. These emails do not show that Cammarata provided false testimony.

Rimkus also alleges that Bell and Cammarata falsely testified that they did not have concrete plans to start U.S. Forensic until November 2006. Rimkus points to the evidence that before leaving Rimkus, Bell registered U.S. Forensic's web site, met with his attorney, applied for a trademark, created a U.S. Forensic logo, created resumes on U.S. Forensic letterhead, and received a letter of intent to lease office space for U.S. Forensic. Corporate formation documents for U.S. Forensic were filed in October 2006, shortly after Bell resigned. Rimkus asserts that this evidence shows "there were definite plans being communicated among the members in direct contradiction to their testimony." (Docket Entry No. 313 at 36).

The law is clear that taking preparatory steps to compete with an employer while still working for that employer is not actionable. *See Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 284 (5th Cir.2007) ("[U]nder Texas law, an at-will employee may properly plan to go into competition with his employer and may take active steps to do so while

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 38

still employed Even the existence of a fiduciary relationship between employee and employer does not preclude the fiduciary from making preparations for a future competing business venture; nor do such preparations necessarily constitute a breach of fiduciary duties." (quotation marks and citations omitted); [\*Ameristar Jet Charter, Inc. v. Cobbs\*, 184 S.W.3d 369, 374 \(Tex.App.-Dallas 2006, no pet.\)](#) (holding there was no breach of fiduciary duty when an employee formed a competing business while still employed but did not actually compete with the employer until he resigned); [\*Abetter Trucking Co. v. Arizpe\*, 113 S.W.3d 503, 510 \(Tex.App.-Houston \[1st Dist.\] 2003, no pet.\)](#) ("An at-will employee may properly plan to compete with his employer, and may take active steps to do so while still employed. The employee has no general duty to disclose his plans and may secretly join with other employees in the endeavor without violating any duty to the employer." (citation omitted)); see [\*id.\* at 511](#) ("To form his own company, Arizpe had to incorporate or otherwise establish a business entity, obtain permits, and obtain insurance. These were permissible preparations to compete, not breaches of a fiduciary duty.").

\*39 A review of the deposition testimony Rimkus relies on does not reveal false statements. Bell did not testify that he did not take steps to form U.S. Forensic before leaving Rimkus. Bell testified that he and Cammarata, DeHarde, and Janowsky had vague discussions about going into business with one another and that there was no agreement to form U.S. Forensic until after Bell had left Rimkus. But there is no evidence that before Bell resigned, he communicated his preparations to Cammarata, DeHarde, or Janowsky. Cammarata testified that he was not asked to take any steps to organize information related to U.S. Forensic before leaving Rimkus on November 15, 2006. The record evidence is consistent with the deposition testimony of Bell and Cammarata. Bell took the preparatory steps to form U.S. Forensic. Bell and Cammarata did not testify falsely about when they agreed to form U.S. Forensic.

In sum, with one exception, the grounds Rimkus cites to urge this court to find that Bell and Cammarata committed perjury do not support such a finding.

D. The Additional Allegations of Failures to Comply with Court Orders and to Respond to Discovery Re-

quests

Rimkus alleges that in addition to the spoliation allegations analyzed above, the defendants failed to comply with this court's orders to produce reasonably accessible, relevant, nonprivileged electronically stored information and to determine the feasibility, costs, and burdens of retrieving electronically stored information that is not reasonably accessible. At the August 6, 2009 hearing, this court ordered the defendants to search the accessible sources and to produce electronically stored information relating to marketing efforts on behalf of U.S. Forensic or information obtained from Rimkus. On August 13, 2009, the defendants informed the court of their efforts to retrieve the information. This court held a hearing on August 17, 2009, and determined that considering the scant likelihood of recovering further responsive electronically stored information, the potential benefits of further retrieval efforts were outweighed by the costs and burdens. The defendants complied with this order.

The defendants' failures to respond to discovery, as outlined in Rimkus's motion for sanctions, were addressed at several hearings, and orders for further responses entered addressed the defendants' objections to many of the discovery requests. Those issues were resolved and the defendants made further responses. Many of the defendants' discovery responses were incomplete and untimely. But it is only fair to note that defense counsel was inundated with fourteen sets of requests for production, six sets of interrogatories, and seven sets of requests for admission. Some of Rimkus's discovery requests were repetitive of previous requests. The alleged additional discovery deficiencies support the sanctions already imposed but do not justify additional measures.

#### E. Conclusion

There is evidence in the record showing that the defendants intentionally deleted emails after a duty to preserve had clearly arisen. There is evidence in the record showing that at least some of this lost evidence would have been relevant and favorable to Rimkus's case. The loss of the evidence prejudiced Rimkus, though not irreparably. These failures have imposed significant costs on the parties and the court. Sanctions are appropriate. Accordingly, the court will allow the jury to hear the evidence of the defendants'

Slip Copy  
Slip Copy, 2010 WL 645253 (S.D.Tex.)  
(Cite as: 2010 WL 645253 (S.D.Tex.))

Page 39

deletion of emails and attachments, and inconsistent testimony about the emails, the concealment of email accounts, and the delays in producing records and information sought in discovery. The jury will be instructed that if it decides that the defendants intentionally deleted emails to prevent their use in litigation against Rimkus, the jury may, but need not, infer that the deleted emails that cannot be produced would have been adverse to the defendants. Rimkus is also entitled to an award of attorneys' fees and costs reasonably incurred in investigating the spoliation, obtaining emails from third-party subpoenas, taking additional depositions of Cammarata and Bell, and moving for sanctions based on the deleted emails and on Bell's false testimony.

#### V. Rimkus's Motion to Extend the Pretrial Motions Deadline

\*40 Rimkus has moved to extend the pretrial motions deadline on the basis that "discovery remains incomplete." (Docket Entry No. 306 at 5). The discovery issues Rimkus complains about have been resolved. Yahoo! produced the subpoenaed information to this court on July 20, 2009. This court's *in camera* review of the Yahoo! emails did not reveal any emails relevant to the defendants' preparations to leave Rimkus and form U.S. Forensic or to any marketing or soliciting efforts by the defendants on its behalf. Rimkus's outstanding discovery requests and the defendants' responses to them have been fully heard and addressed.

The discovery in this case has been extensive. In addition to the litigation over the deleted emails and attachments, the parties have propounded numerous written discovery requests and taken dozens of depositions. Rimkus does not assert that it will file more motions if the deadline for doing so is extended or that it needs additional discovery in specific areas. Rimkus did not move for a continuance under Rule 56(f) in response to the defendants' summary judgment motion. Instead, Rimkus argued that the evidence already in the record is sufficient to create fact issues precluding summary judgment. Since filing its motion to extend the pretrial motions deadlines, Rimkus has had additional opportunities to conduct discovery and supplement the summary judgment record. Since the motions for summary judgment were filed in July 2009, this court has held several discovery conferences and allowed further discovery

and supplemental briefs and evidence. The record does not provide a basis to grant the relief Rimkus seeks. The motion to extend the pretrial motions filing deadline is denied.

#### VI. The Defendants' Motion for Summary Judgment

##### A. The Legal Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." [Triple Tee Golf, Inc. v. Nike, Inc.](#), 485 F.3d 253, 261 (5th Cir.2007) (citing [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by " 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." See [Celotex](#), 477 U.S. at 325. While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. [Boudreaux v. Swift Transp. Co.](#), 402 F.3d 536, 540 (5th Cir.2005). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." [Sossamon v. Lone Star State of Texas](#), 560 F.3d 316, 326 (5th Cir.2009) (quotation omitted), *petition for cert. filed*, 77 U.S. L.W. 3251 (U.S. Nov. 2, 2009) (No. 08- 1438). "If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." [United States v. \\$92,203.00 in U.S. Currency](#), 537 F.3d 504, 507 (5th Cir.2008) (quoting [Little v. Liquid Air Corp.](#), 37 F.3d 1069, 1075 (5th Cir.1994) (en banc) (per curiam)).

\*41 When the moving party has met its [Rule 56\(c\)](#) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings. The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. [Baranowski v. Hart](#), 486 F.3d 112, 119 (5th Cir.2007). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 40

unsubstantiated assertions, or by only a scintilla of evidence.' " [Boudreaux](#), 402 F.3d at 540 (quoting [Little](#), 37 F.3d at 1075). In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. [Connors v. Graves](#), 538 F.3d 373, 376 (5th Cir.2008).

#### B. Claim Preclusion

The defendants argue that this entire suit should be dismissed because of the May 11, 2009 Louisiana state-court decision granting summary judgment on Rimkus's reconventional demand. The defendants argue that the Louisiana state-court judgment in favor of Bell, Cammarata, and DeHarde on Rimkus's claims for breach of the covenant not to take or use Rimkus's proprietary or trade secret information, breach of fiduciary duty, and disparagement was based on Texas law. The defendants argue that this decision precludes relitigation of any claims that were or could have been raised in Rimkus's reconventional demands and requires dismissal of this suit.

The Full Faith and Credit Clause of the United States Constitution and its implementing statute, [28 U.S.C. § 1738](#), govern the preclusive effect of a state-court judgment in a subsequent federal action. [\[FN37\]](#) Final judgments of state courts "have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." [28 U.S.C. § 1738](#). Under Full Faith and Credit, "[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force." [Baker ex rel. Thomas v. Gen. Motors Corp.](#), 522 U.S. 222, 233, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998) (footnote omitted).

[FN37](#). The Full Faith and Credit Clause states:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and

Proceedings shall be proved, and the Effect thereof.

[U.S. CONST. art IV, § 1. Title 28 U.S.C. § 1738](#) states in relevant part:

The records and judicial proceedings of any court of any ... State, Territory or Possession ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

A federal court applies the rendering state's law to determine the preclusive effect of a state court's final judgment. *See* [28 U.S.C. § 1738](#); [Migra v. Warren City Sch. Dist. Bd. of Educ.](#), 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *see also* [Norris v. Hearst Trust](#), 500 F.3d 454, 460-61 (5th Cir.2007). This rule applies even if the rendering state's judgment is based on public policy offensive to the enforcing state. [Baker](#), 522 U.S. at 233-34. Because enforcing states decide the scope of a judgment, a rendering state can "determine the extraterritorial effect of its judgment ... only ... indirectly by prescribing the effect of its judgments within the State." [Thomas v. Wash. Gas Light Co.](#), 448 U.S. 261, 270, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980). "To vest the power of determining the extraterritorial effect of a State's own ... judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Id.* at 272.

\*42 The Louisiana *res judicata* statute states:

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 41

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

[La.Rev.Stat. § 13:4231](#). Louisiana courts have observed that this statute "embraces the broad usage of the phrase *res judicata* to include both claim preclusion (*res judicata*) and issue preclusion (collateral estoppel)." *Am. Med. Enters., Inc. v. Audubon Ins. Co.*, 2005-2006, p. 6 (La.App. 1 Cir. 6/8/07); [964 So.2d 1022, 1028](#).

Under claim preclusion, the *res judicata* effect of a final judgment on the merits precludes the parties from relitigating matters that were or could have been raised in that action. Under issue preclusion or collateral estoppel, however, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue in a different cause of action between the same parties. Thus, *res judicata* used in the broad sense has two different aspects: (1) foreclosure of relitigating matters that have never been litigated, but should have been advanced in the earlier suit; and (2) foreclosure of relitigating matters that have been previously litigated and decided.

*Id.* (citing *Five N Company, L.L. C. v. Stewart*, 02-0181, p. 15 (La.App. 1 Cir. 7/2/03); [850 So.2d 51, 61](#)).

The claim preclusion aspect of *res judicata* applies under Louisiana law "when all of the following are satisfied: (1) the judgment is valid; (2) the judgment is final; (3) the parties in the two matters are the same; (4) the cause or causes of action asserted in the second suit existed at the time of the final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation." *Smith v. State*, 04-1317, p. 22 (La.3/11/05); [899 So.2d 516, 529-30](#).

#### 1. Finality

Rimkus argues that the summary judgment ruling in Louisiana is not final for purposes of preclusion because it is "subject to vacation and revision" on appeal, (Docket Entry No. 321-1 at 1), "such that this litigation does not constitute an impermissible collateral attack on a decision already made." (*Id.* at 7). Rimkus argues that the Louisiana *res judicata* statute

provides that "a valid and final judgment is conclusive between the same parties, except on appeal or other direct review." (Docket Entry No. 353 at 2). As a result, according to Rimkus, a state court decision on appeal cannot be a final judgment for *res judicata* purposes.

\*43 Courts applying Louisiana law have rejected the argument that a pending appeal from a trial court's judgment defeats finality for preclusion purposes. In *Fidelity Standard Life Insurance Co. v. First National Bank & Trust Co. of Vidalia, Georgia*, [510 F.2d 272, 273 \(5th Cir.1975\)](#) (per curiam), the plaintiff sued in federal district court to enforce a judgment against the defendant obtained in Louisiana state court. The federal district court held that the Louisiana judgment was entitled to full faith and credit. *Id.* On appeal, the Fifth Circuit rejected the contention that the Louisiana judgment was not final for *res judicata* purposes because it was on appeal in the state courts. *Id.* The court held that "[a] case pending appeal is *res judicata* and entitled to full faith and credit unless and until reversed on appeal." *Id.*

Similarly, in *Energy Development Corp. v. St. Martin*, [296 F.3d 356, 360-61 \(5th Cir.2002\)](#), the Fifth Circuit analyzed Louisiana's *res judicata* statute and held that a state court judgment is final for *res judicata* purposes when the trial court enters judgment. The Fifth Circuit relied on comment (d) of the Louisiana statute, which provides that the "preclusive effect of a judgment attaches once a final judgment has been signed by the trial court and would bar any action filed thereafter unless the judgment is reversed on appeal." *Id.* (quoting [La.Rev.Stat. § 13:4231](#), comment (d)). In *Maples v. LeBlanc, Maples & Waddell, LLC*, No. Civ. A. 02-3662, 2003 WL 21467540 (E.D.La. June 20, 2003), the plaintiff argued that a prior Louisiana state court decision was not final because it was on appeal and the Louisiana *res judicata* statute provides that "a valid and final judgment is conclusive between the same parties, *except on appeal or other direct review*," *id.* at \*3. The court rejected this interpretation of the statute because it was inconsistent with the case law and with comment (d) of the Louisiana *res judicata* statute. *Id.* at \*4.

One Louisiana court has held that a judgment is not final while an appeal is pending. See *Dupre v. Floyd*, 01-2399, p. 4 (La.App. 1 Cir. 7/1/02); [825 So.2d 1238, 1240](#). But that court relied on "[t]wo older

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 42

cases under prior law," *Mente & Co. v. Anciens Etablissements Verdier-Dufour & Cie*, 177 La. 829, 149 So. 492, 493 (La.1933), and *Richmond v. Newson*, 24 So.2d 174, 175 (La.App. 2 Cir.1945), which involved a narrower version of Louisiana preclusion law. Before the 1991 statutory amendments, Louisiana law on *res judicata* was substantially narrower than federal law. See *Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.*, 95-0654 (La.1/16/96):666 So.2d 624, 631. The original Louisiana doctrine of *res judicata* was based on presuming the correctness of the prior judgment rather than on extinguishing the causes of action that might have been raised in the litigation that led to that judgment. See *id.* at 631-32. The court in *Dupre* relied on cases that were based on that presumption of correctness, ignoring the fact that the current version of Louisiana *res judicata* law is more like federal law in using the transaction-or-occurrence test to determine the preclusive effect of a prior judgment. Under federal law, a final judgment of a federal trial court is preclusive until that judgment is modified or reversed. "[T]he established rule in the federal courts [is] that a final judgment retains all of its *res judicata* consequences pending decision of the appeal ... [.]" *Pharmacia & Upjohn Co. v. Mylan Pharms., Inc.*, 170 F.3d 1373, 1381 (Fed.Cir.1999) (third alteration and omission in original) (quoting *Warwick Corp. v. Md. Dep't of Transp.*, 573 F.Supp. 1011, 1014 (D.Md.1983), *aff'd*, 735 F.2d 1359 (4th Cir.1984)).

\*44 The *Restatement (Second) of Judgments* recognizes this view of finality--that the pendency of an appeal should not suspend the operation of a judgment for purposes of *res judicata* or collateral estoppel--as "[t]he better view." *Restatement (Second) of Judgments* § 13, cmt. f (1982); see also 18A *Charles Alan Wright et al., Federal Practice and Procedure* § 4433, at 94 (2d ed. 2002) ("Despite the manifest risks of resting preclusion on a judgment that is being appealed, the alternative of retrying the common claims, defenses, or issues is even worse. All of the values served by *res judicata* are threatened or destroyed by the burdens of retrial, the potential for inconsistent results, and the occasionally bizarre problems of achieving repose and finality that may arise.").

The cases make clear that a pending appeal does not affect the finality of a Louisiana state trial court's judgment for *res judicata* purposes. See *Tolis v. Bd.*

*of Supervisors of La. State Univ.*, 95-1529 (La.10/16/95):660 So.2d1206, 1206-07 (per curiam) ("A final judgment is conclusive between the parties except on direct review. *La.Rev.Stat. 13:4231*.... Once a final judgment acquires the authority of the thing adjudged, no court has jurisdiction, in the sense of power and authority, to modify, revise or reverse the judgment, regardless of the magnitude of the error in the final judgment."). [FN38] The part of the Louisiana *res judicata* statute that Rimkus quotes--"a valid and final judgment is conclusive between the same parties, except on appeal or other direct review"--means that a trial court's final judgment has preclusive effect except in those courts reviewing the judgment on direct appeal or collateral challenge. The May 11, 2009 Louisiana state-court judgment dismissing on summary judgment the claims in Rimkus's reconventional demand is a final judgment for preclusion purposes.

[FN38]. See also *Segal v. Smith, Jones & Fawer, L.L.P.*, 02-1448, pp. 7-8 (La.App. 4 Cir. 1/29/03); 838 So.2d 62, 66 ("Although SJF argues that the September 12, 2001 judgment is currently on appeal before the First Circuit, the judgment is final for *res judicata* purposes unless it is reversed on appeal and was, therefore, final at the time the Civil District Court judgment was rendered.").

## 2. Identity of Parties

Rimkus also argues that the parties in the two suits are not the same because U.S. Forensic, a defendant in this suit, was not involved in the Louisiana state-court litigation. The defendants respond that U.S. Forensic is in privity with Bell and Cammarata, who were parties to the Louisiana litigation. The identity of parties requirement is satisfied "whenever the same parties, their successors, or others appear, as long as they share the same quality as parties or there is privity between the parties." *Austin v. Markey*, 08-381, p. 5 (La.App. 5 Cir. 11/25/08):2 So.3d 438, 440 (quoting *Smith v. Parish of Jefferson*, 04-860 (La.App. 5 Cir. 12/28/04):889 So.2d 1284, 1287); see also *Burguières v. Pollingue*, 02-1385, p. 8 n. 3 (La.2/25/03); 843 So.2d 1049, 1054 n. 3. In general, "privity" is the mutual or successive relationship to the same right of property, or such an identification in interest of one person with another as to represent the

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 43

same legal right." *Five N Company, L.L. C. v. Stewart*, 2002-0181, p. 16 (La.App. 1 Cir. 7/2/03); [850 So.2d 51, 61](#). Privity exists for *res judicata* purposes: "(1) where the non-party is the successor in interest to a party's interest in property; (2) where the non-party controlled the prior litigation; and (3) where the non-party's interests were adequately represented by a party to the original suit." *Condrey v. Howard*, No. 28442-CA, p. 5 (La.App. 2 Cir. 8/21/96); [679 So.2d 563, 567](#).

\*45 The record shows an identity of interest between Bell and Cammarata on the one hand and U.S. Forensic on the other. Bell, Cammarata, and DeHarde, the plaintiffs in the Louisiana litigation, own 75% of U.S. Forensic. The actions of Bell and Cammarata--the defendants in this federal case--in leaving Rimkus, forming U.S. Forensic, and competing with Rimkus are the basis of both the Louisiana litigation and this case. Rimkus seeks to hold U.S. Forensic liable with Bell and Cammarata for these actions. Bell and Cammarata represented U.S. Forensic's interests in the Louisiana litigation in seeking to have the non-competition and nonsolicitation covenants declared unenforceable. The identity of parties requirement for preclusion is met.

### 3. The Relationship of the Claims

Rimkus contends that the claims in this suit and the Louisiana suit do not arise out of the same transaction or occurrence because the Louisiana state-court judgment did not involve Rimkus's federal claims for cyberpiracy and trademark infringement, (Docket Entry No. 321-1 at 8-9), and the Louisiana court could not decide the Texas contract and tort claims Rimkus raised, (Docket Entry No. 324 at 12). Rimkus argues that, notwithstanding that both it and Bell and Cammarata argued Texas (as well as Louisiana) law in the briefs they filed on the Bell and Cammarata motion for summary judgment, the Louisiana court "could not evaluate the issues in dispute under Texas law." (*Id.*).

Claim preclusion applies to bar in a subsequent suit all "claims that were or could have been litigated in a previous lawsuit." *Horacek v. Watson*, 06-210, p. 3 (La.App. 3 Cir. 7/5/06); [934 So.2d 908, 910](#) (quoting *Walker v. Howell*, 04-246, p. 2 (La.App. 3 Cir. 12/15/04); [896 So.2d 110, 112](#)). Under Louisiana law, a defendant is required to "assert in a reconventional

demand all causes of action that he may have against the plaintiff that arise out of the transaction or occurrence that is the subject matter of the principal action." [La.Code Civ. Proc. art. 1061](#)(B). Rimkus asserted its claims for breach of the noncompetition and nonsolicitation covenants in its reconventional demands. The Louisiana court ruled that, despite the Texas forum-selection and choice-of-law provision in the Employment Agreement, Louisiana law applied to invalidate the covenants. Louisiana law prevented Rimkus from litigating the noncompetition and nonsolicitation claims under Texas law in the Louisiana court. As this court previously held, the Louisiana court's ruling that Louisiana law applies in Louisiana to invalidate the Texas forum-selection and choice-of-law provisions in the Employment Agreement does not invalidate those provisions in all states. Because Rimkus could not have litigated its Texas-law claims for breach of the noncompetition and nonsolicitation covenants in the Louisiana state court, claim preclusion does not apply to those claims. The defendants' motion for summary judgment dismissing this case based on claim preclusion is denied.

\*46 As discussed below, the Louisiana court entered a valid and final judgment under Texas law on Rimkus's reconventional demand for misappropriation of trade secrets, breach of fiduciary duty, and disparagement, satisfying the Louisiana elements for preclusion. See *Smith v. State*, 04-1317, p. 22 (La.3/11/05); [899 So.2d 516, 529-30](#). However, whether analyzed under issue or claim preclusion, the defendants' spoliation of evidence warrants applying the Louisiana statutory exception to *res judicata*. The defendants' spoliation prevented Rimkus from litigating its misappropriation and related claims in Louisiana. The spoliation justifies granting Rimkus relief from preclusion under the statute.

### C. Issue Preclusion

The defendants alternatively argue issue preclusion. Each of the allegedly precluded issues is analyzed below.

#### 1. Noncompetition and Nonsolicitation Covenants

On January 4, 2008, the Louisiana state appellate court ruled that the noncompetition clause in Bell's Stock Purchase Agreement was invalid and unenforceable because it was contrary to Louisiana law



Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 44

and public policy. (Docket Entry No. 309, Ex. N). On March 17, 2008, the Louisiana state trial court ruled that the nonsolicitation of employees clause in the defendants' employment agreements was unenforceable. (*Id.*, Ex. Q). The defendants argue that issue preclusion bars relitigation of Rimkus's claims for breach of these covenants. Rimkus responds that "[t]his court is obligated to apply Texas law to the enforcement of the non-solicitation of employees provision ... which is not the same issue that the Louisiana court had to decide in ruling on the enforceability of the provision in the Louisiana action." (Docket Entry No. 324 at 22).

The January and March 2008 Louisiana state-court judgments are entitled to the same preclusive effect as the July 26, 2007 Louisiana state-court judgment declaring the noncompetition and nonsolicitation covenants unenforceable under Louisiana law. The Louisiana court's determination that in Louisiana, the noncompetition covenant in the Stock Purchase Agreement and the nonsolicitation of employees provision in the Employment Agreement are unenforceable under Louisiana law is entitled to preclusive effect in this court. The Louisiana court's ruling, however, does not invalidate the noncompetition and nonsolicitation provisions in all states and does not preclude this court from considering the enforceability of the noncompetition and nonsolicitation covenants under Texas law--which the parties specified in their agreements--for activities outside Louisiana that allegedly breached those covenants.

## 2. Misappropriation of Trade Secrets, Breach of Fiduciary Duty, and Disparagement

The defendants argue that Rimkus litigated its claims for misappropriation of trade secrets, breach of fiduciary duty, and disparagement in the Louisiana court and that the May 11, 2009 judgment dismissing Rimkus's reconventional demand disposed of these claims. The defendants argue that this judgment is entitled to preclusive effect in this court with respect to these issues, which were actually litigated in the Louisiana case. Rimkus responds that issue preclusion does not apply because "there is no way to determine what issue or issues the Louisiana court must have considered in disposing of Rimkus' reconventional demand." (Docket Entry No. 324 at 20). Rimkus contends that the May 11, 2009 Louisiana judgment does not show that the claims for misappropriation

of trade secrets, breach of fiduciary duty, and disparagement asserted in Rimkus's reconventional demand were "actually litigated and finally adjudged." (*Id.*). Rimkus also argues that the Louisiana court could not have applied Texas law to those claims because that court had previously held that under Louisiana law, the Texas choice-of-law provision in the Employment Agreement was invalid. In its supplemental response, Rimkus argues that the misappropriation claim was not litigated in Louisiana because the reconventional demand did not plead a tort cause of action for misappropriation. Instead, Rimkus contends that the reconventional contract claim was based on a breach of the confidentiality provision in the Employment Agreement. Rimkus contends that the reconventional demand's factual allegations do "not support a conclusion of a trade secret cause of action being pled" because there are no "allegations enumerating the existence of confidential information or Cammarata's taking of that information." (Docket Entry No. 362 at 4).

\*47 Under Louisiana law, the three requirements for issue preclusion are: "(1) a valid and final judgment; (2) identity of the parties; and (3) an issue that has been actually litigated and determined if its determination was essential to the prior judgment." *Sanchez v. Ga. Gulf Corp.*, 02-1617, p. 14 (La.App. 1 Cir. 8/13/03); [853 So.2d 697, 706](#). "Issue preclusion does not bar re-litigation of what might have been litigated and determined, but only those matters in controversy upon which the prior judgment or verdict was actually based." *Goodman v. Spillers*, 28933-CA, p. 10-11 (La.App. 2 Cir. 12/23/96); [686 So.2d 160, 167](#) (emphasis omitted).

Rimkus's argument that preclusion does not apply because the Louisiana lawsuit involved a breach-of-contract claim and not a tort claim for misappropriation of confidential information is unpersuasive. "Trade secrets are in the nature of property rights that the law protects through both tort and contract principles." [Mabrey v. SandStream, Inc.](#), 124 S.W.3d 302, 310 (Tex.App.-Fort Worth 2003, no pet.). A misappropriation claim may be brought as a claim for breach of a contractual duty, breach of confidence, or in tort. See [Murrco Agency, Inc. v. Ryan](#), 800 S.W.2d 600, 605 n. 8 (Tex.App.-Dallas 1990, no writ) (breach of contract and breach of confidence); [Avera v. Clark Moulding](#), 791 S.W.2d 144, 145 (Tex.App.-Dallas 1990, no writ) (misappropriation of

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 45

trade secrets). "A person is liable for disclosure or use of trade secrets if he either (a) discovers the secret by improper means or (b) his disclosure or use, after properly acquiring knowledge of the secret, constitutes a breach of a confidence reposed in him." [Mabrey, 124 S.W.3d at 310.](#)

Whether a misappropriation claim is brought in contract or tort, the test for determining whether the information at issue is protectable is the same. Texas courts analyze the six relevant nonexclusive factors set out in the *Restatement of Torts*: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to safeguard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which others could properly acquire or duplicate the information. [In re Bass, 113 S.W.3d 735, 739 \(Tex.2003\).](#)

Contrary to Rimkus's argument, the Louisiana re-conventional demand alleged "the existence of confidential information" and the defendants' "taking of that information." Rimkus alleged that Bell and Cammarata violated the "Proprietary Information/Trade Secrets" covenants, which stated that Rimkus client data and workpapers are valuable, confidential, proprietary, or trade secret information and obtained by Rimkus at considerable expense. In the Employment Agreement, Bell and Cammarata agreed not to remove any Rimkus confidential, proprietary, or trade secret information from the premises except in the performance of their job duties; to return any such information in their possession to Rimkus within twenty-four hours after their employment ended; and that "so long as such confidential information or trade secrets may remain confidential, secret, or otherwise totally or partially protectable or proprietary," they would "not use or divulge such information." To determine whether Bell or Cammarata violated this contractual provision, a court would have to determine whether they took information from Rimkus; whether that information qualified as confidential, proprietary, or trade secret information; and whether that information was used or divulged in violation of the Employment Agreement. See [Murco Agency, 800 S.W.2d at 605](#) (analyzing a misappropriation-of-trade-secrets claim brought as a

breach-of-contract action under cases that used common-law standards to decide whether the information at issue was confidential, proprietary, or a trade secret). The legal and factual questions involved--whether the claim is in contract or tort--are the same in both the Louisiana and Texas lawsuits. Rimkus's misappropriation claim satisfies the elements of issue preclusion.

\*48 To the extent the breach of fiduciary duty claim against Bell is based on misappropriation, it also satisfies the elements of preclusion. The May 11, 2009 judgment is valid and final and the parties in both suits are the same. Rimkus's argument that the issues were not actually litigated in Louisiana because the Louisiana court applied Louisiana law is not supported by the record. The Louisiana court held applied Louisiana law to "the claims of the plaintiffs"--Cammarata, Bell, and DeHarde. The Louisiana court stated that it invalidated the Texas choice-of-law provision and the noncompetition and nonsolicitation covenants in the Employment Agreement under Louisiana law. But the Louisiana court did not state that it applied Louisiana law to Rimkus's claims involving the misappropriation of confidential, proprietary, and trade secret information or to the claims for breach of fiduciary duty and disparagement. Rimkus asked the Louisiana court to apply Texas law to its reconventional demand. The motion for summary judgment Cammarata, Bell, and DeHarde filed to dismiss the claims in Rimkus's reconventional demand did not deal with noncompetition or nonsolicitation claims, which had been decided by the Louisiana court in 2007, but rather with Rimkus's claims for misappropriation of trade secrets or proprietary information, breach of fiduciary duty, and disparagement. Both sides briefed these issues in the motion for summary judgment under Texas law. In oral argument on these issues, counsel relied on Texas law. The Louisiana court's order states that it was based on a review of "the evidence, the law and the arguments of counsel." (Docket Entry No. 309, Ex. G).

Rimkus also argues that issue preclusion does not apply because the Louisiana court "did not express any basis" for its ruling on the misappropriation, breach of fiduciary duty, or disparagement claims. Rimkus cites *Goodman v. Spillers*, 28933-CA, p. 11 (La.App. 2 Cir. 12/23/96); [686 So.2d 160, 167](#), in which the court stated that "[i]t is generally not sufficient for purposes of *issue* preclusion to simply prove

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 46

that a party to prior litigation argued numerous issues and lost his case. Issue preclusion requires the issue to be precluded to have been a dispositive issue which the prior court *must have considered* in a contest between the same parties." (Docket Entry No. 324 at 19- 20). Rimkus argues that there is no way to determine what issues the Louisiana court considered when it granted the motion for summary judgment on Rimkus's reconventional demand. Rimkus contends that although it pleaded several claims in its reconventional demand, the defendants have not shown that these claims were actually litigated and decided in the Louisiana court's May 11, 2009 judgment. Rimkus also cites [Lamana v. LeBlanc, 526 So.2d 1107, 1109 \(La.1988\)](#), which stated that "[a]n issue presented by the pleadings in a cause, but eliminated from the judgment of the court, cannot be invoked in support of res judicata." But issue preclusion does not require that a judgment be accompanied by a statement of the reasons or basis for the decision. And the Louisiana court clearly stated that its decision on these claims was based on "the arguments of counsel," which only raised Texas law.

\*49 The concerns addressed in the cases Rimkus cites are not present in this case. In *Goodman*, a corporation sued its former directors for breach of fiduciary duty. 28933-CV, p. 1; [686 So.2d at 162-63](#). One of the directors asserted a reconventional demand for unfair trade practices based on the filing of the suit. 28933-CV, p. 1; [686 So.2d at 162](#). The court granted a directed verdict dismissing the unfair trade practices claim. *Id.* The director then brought a separate suit for malicious prosecution. *Id.* The corporation argued that issue preclusion applied to essential elements of the malicious-prosecution claim. 28933-CV, p. 9; [686 So.2d at 166](#). The court rejected this argument, holding that the directed verdict in the previous suit--which was essentially a finding that no unfair trade practice occurred--did not equate to a finding about whether the corporation had engaged in fraud, deception, or misrepresentation. 28933-CV, p. 10; [686 So.2d at 167](#). The court held that the previous judgment was not entitled to preclusive effect because the court was unable to determine the basis on which that litigation was resolved. 28933- CV, p. 11; [686 So.2d at 167](#). By contrast, Bell and Cammarata moved under Texas law for summary judgment in Louisiana on Rimkus's reconventional demand claims for misappropriation of confidential, proprietary, or trade secret information, breach of fiduciary duty, and disparagement. The Louisiana court granted the

motion for summary judgment on these claims after reviewing the evidence, the law, and the parties' arguments, which were all under Texas law. The court stated the basis for its judgment. Rimkus's reliance on *Lamana* is also unavailing because in contrast to the facts in that case, the claims pleaded in Rimkus's reconventional demand were not "eliminated" from the Louisiana court's judgment.

The Louisiana court expressly granted the motion for summary judgment on all claims asserted in the reconventional demand. But this court is not precluded from reconsidering these issues because a statutory exception applies.

#### D. Exception to Preclusion under Louisiana Law

In Louisiana, "[a] judgment does not bar another action by the plaintiff ... [w]hen exceptional circumstances justify relief from the res judicata effect of the judgment." [La.Rev.Stat. § 13:4232. \[FN39\]](#) This statute was designed to "allow the court to balance the principle of res judicata with the interests of justice." *Id.* cmt.1990; see also [Jenkins v. State, 615 So.2d 405, 406 \(La.Ct.App.1993\)](#).

[FN39.](#) Louisiana courts have interpreted "*res judicata*" in Louisiana statutes to encompass both claim and issue preclusion. See *Am. Med. Enters., Inc. v. Audubon Ins. Co.*, 2005-2006, p. 6 (La.App. 1 Cir. 6/8/07); [964 So.2d 1022, 1028](#).

Louisiana's position is consistent with the *Restatement (Second) of Judgments*. The *Restatement* provides that fraud, concealment, or misrepresentation provide a basis to depart from claim preclusion. See [Restatement \(Second\) of Judgments § 26\(f\)](#); *id.* cmt. j; see also [18 CHARLES ALAN WRIGHT ET AL. FEDERAL PRACTICE AND PROCEDURE § 4415, at 359-61 & 360 n. 17 \(2d ed.2002\)](#). As to issue preclusion, the *Restatement* states that "[a]lthough an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded" when:

\*50 [t]here is a clear and convincing need for a new determination of the issue ... because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 47

not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

[Restatement \(Second\) of Judgments § 28\(5\)](#). Issue preclusion does not apply when one party "conceal[s] from the other information that would materially affect the outcome of the case." *Id.* cmt. j. In such circumstances,

the court in the second proceeding may conclude that issue preclusion should not apply because the party sought to be bound did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding. Such a refusal to give the first judgment preclusive effect should not occur without a compelling showing of unfairness, nor should it be based simply on a conclusion that the first determination was patently erroneous. But confined within proper limits, discretion to deny preclusive effect to a determination under the circumstances stated is central to the fair administration of preclusion doctrine.

*Id.*; see also [Metro. Sav. & Loan Ass'n v. Tarter](#), 730 S.W.2d 1, 5 (Tex.App.-Dallas 1987, writ granted) (citing [§ 28\(5\)](#) for the rule that an issue is not precluded if there is a clear need for redetermination due to misconduct on the part of an opposing party that prevented a full and fair adjudication of the original action), *rev'd on other grounds*, 744 S.W.2d 926 (Tex.1988). The Louisiana Supreme Court has cited the *Restatement* for the proposition that preclusion [\[FN40\]](#) does not apply, even when the elements are met, "if it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason." [Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.](#), 95-0654 (La.1/16/96); 666 So.2d 624, 632 (La.1996) (citing [Restatement \(Second\) of Judgments § 26](#)).

[FN40](#). In *Terrebonne*, the Louisiana Supreme Court identified the question as issue preclusion but cited the *Restatement (Second) of Judgments* section applicable to claim preclusion. See [666 So.2d at 632](#). In any event, Louisiana law considers both under the umbrella of "*res judicata*." Courts have interpreted "*res judicata*" in Louisiana statutes to encompass both claim and issue preclusion. See *Am. Med. Enters., Inc. v. Audubon Ins. Co.*, 2005-2006, p. 6 (La.App. 1 Cir. 6/8/07); [964 So.2d 1022, 1028](#). In *Terrebonne*, the court referred only to the "common law theory of *res judicata*." See

[Terrebonne](#), 666 So.2d at 632.

In the present case, weighing the policies underlying preclusion law against the evidence that the defendants spoliated evidence relevant to the misappropriation claims, this court concludes that exceptional circumstances exist such that preclusion does not apply to those claims. The record shows that the defendants deleted emails and attachments and delayed producing documents in discovery showing information taken from Rimkus and used for U.S. Forensic. The record also shows that the defendants delayed providing information or provided incomplete information that would have revealed the deletions. Rimkus was able to obtain some deleted emails and attachments from third parties. Some of the recovered documents show that the defendants solicited Rimkus clients, including individuals with whom Bell and Cammarata had worked while at Rimkus, shortly after forming U.S. Forensic. Some of the recovered documents support Rimkus's allegations that the defendants had Rimkus client information, financial information, and copyrighted information and used the information for U.S. Forensic. The September 30, 2006 email Bell forwarded himself containing confidential Rimkus information, including income/loss statements for several Rimkus offices, emails showing that Cammarata forwarded Rimkus reports to a private email account, and the April 6, 2008 email Bell sent himself with attachments containing Rimkus client-contact information are among the items that were only recently discovered, despite Rimkus's vigorous efforts to obtain them much earlier. None of this evidence was available to Rimkus to litigate the misappropriation claim in the Louisiana lawsuit.

\*51 Generally, newly discovered evidence does not affect the preclusive effect of a judgment. [In re Howe](#), 913 F.2d 1138, 1147 (5th Cir.1990). The information Rimkus has recently obtained, however, is not merely "new" evidence. Rather, the record contains evidence that would permit a reasonable jury to conclude that this newly obtained information was previously unavailable to Rimkus because the defendants deleted it in bad faith. By deleting relevant emails, by providing information in discovery that concealed their existence and deletion, and by delaying discovery responses, the defendants "conceal[ed] from [Rimkus] information that would materially affect the outcome of the case." The policies underlying preclusion law--conserving judicial resources and

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 48

protecting litigants from multiple lawsuits--are not served by applying issue preclusion to the misappropriation and related claims in this case. The defendants' conduct prevented a full and fair opportunity for Rimkus to litigate the misappropriation, breach of fiduciary duty, and disparagement claims in the Louisiana lawsuit. The facts of this case call for denying the application of issue and claim preclusion. Rimkus's claims for misappropriation, breach of fiduciary duty, and disparagement are not barred by the May 11, 2009 Louisiana state court judgment granting summary judgment on the claims in Rimkus's reconventional demand.

The defendants have also moved for summary judgment on these claims on grounds other than preclusion. Those grounds are examined below.

#### E. The Merits of the Defendants' Motion for Summary Judgment on Rimkus's Claims

##### *I. Misappropriation of Confidential, Proprietary, and Trade Secret Information*

The defendants argue that the record does not raise a fact issue as to Rimkus's misappropriation claim. According to the defendants, the names and contact information of Rimkus's clients are not confidential, proprietary, or trade secret information because they are generally known or readily accessible in industry guides and publications and on the internet. The defendants assert that Rimkus's pricing information is not entitled to protection because Rimkus shares that information with its clients. The defendants further contend that there is no evidence in the record that they took or used Rimkus's client, pricing, financial, or business plan information.

Rimkus responds by pointing to this court's August 13, 2008 opinion, which stated that Rimkus's "customer database, pricing information, and annual business plan are entitled to trade secret protection." (Docket Entry No. 159 at 49). Rimkus argues that the contact information for many of the Rimkus clients the defendants solicited in November and December 2006 was not publicly available at that time. Rimkus contends that the evidence in the record raises a fact issue as to where the defendants obtained the names and email addresses and whether that information was entitled to protection as Rimkus's confidential, proprietary, or trade secret information. Rimkus ar-

gues that the evidence in the record, including the September 30, 2006 and April 6, 2008 emails Bell forwarded to himself, raises fact issues as to whether the defendants took and used confidential Rimkus information.

\*52 Texas law defines a "trade secret" as a "formula, pattern, device or compilation of information used in a business, which gives the owner an opportunity to obtain an advantage over his competitors who do not know or use it." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir.2007) (quoting *Taco Cabana Int'l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1123 (5th Cir.1991)). "To state a claim for trade secret misappropriation under Texas law, a plaintiff must (1) establish that a trade secret existed; (2) demonstrate that the trade secret was acquired by the defendant through a breach of a confidential relationship or discovered by improper means; and (3) show that the defendant used the trade secret without authorization from the plaintiff." *Gen. Univ. Sys., Inc. v. Lee*, 379 F.3d 131, 149-50 (5th Cir.2004). To determine whether information is a trade secret protected from disclosure or use, a court must examine six "relevant but nonexclusive" criteria: "(1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to safeguard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Id.* at 150 (citing *In re Bass*, 113 S.W.3d 735, 739-40 (Tex.2003)); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 22 (Tex.App.-Houston [1st Dist.] 1998, pet. dism'd). All six factors need not be satisfied "because trade secrets do not fit neatly into each factor every time." *Gen. Univ. Sys.*, 379 F.3d at 150 (quoting *Bass*, 113 S.W.3d at 740).

Courts in Texas identify trade secrets, proprietary information, and confidential information separately but provide them similar protection if the requirements--including that of secrecy--are met. [FN41] "Use" of a trade secret refers to "commercial use" and occurs whenever "a person seeks to profit from the use of the secret." [FN42]

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 49

FN41. See, e.g., [Gallagher Healthcare Ins. Servs. v. Vogelsang](#), --- S.W.3d ---, 2009 WL 2633304, at \*10 (Tex.App.-Houston [14 Dist.] 2009, no pet. hist.) ("Moreover, a covenant not to compete is enforceable not only to protect trade secrets but also to protect proprietary and confidential information."); [Norwood v. Norwood](#), No. 2-07-244-CV, 2008 WL 4926008, at \*8 (Tex.App.-Fort Worth 2008, no pet.) (mem.op.) ("But a former employee may not use confidential or proprietary information or trade secrets the employee learned in the course of employment for the employee's own advantage and to the detriment of the employer."); [Bluebonnet Petroleum, Inc. v. Kolkhorst Petroleum Co.](#), No. 14-07-00380-CV, 2008 WL 4527709, at \*5 (Tex.App.-Houston [14 Dist.] 2008, pet. denied) (mem.op.) ("The issue, therefore, is whether the mere identity of the potential accounts with which Robinson was working when he left Bluebonnet is a trade secret, or even merely proprietary information accorded similar protection. To decide whether the information qualifies as a trade secret we must consult the six factors listed above."); [SP Midtown, Ltd. v. Urban Storage, L.P.](#), No. 14-07-00717-CV, 2008 WL 1991747, at \*5 n. 5 (Tex.App.-Houston [14 Dist.] 2008, pet. denied) (mem.op.) ("In its brief, Space Place argues the common law tort of misappropriation does not solely depend on the existence of a trade secret. Essentially, Space Place argues a claim of misappropriation of confidential information can survive even if the information does not constitute a trade secret. We disagree. There is no cause of action for misappropriation of confidential information that is not either secret, or at least substantially secret."); [Shoreline Gas, Inc. v. McGaughey](#), No. 13-07-364-CV, 2008 WL 1747624, at \*7 (Tex.App.-Corpus Christi 2008, no pet.) (mem.op.) ("Examples of such legitimate, protectable interests [in a noncompete covenant] include business goodwill, trade secrets, and other confidential or proprietary information."); TEX. JUR. *Trademark* § 54 ("There is no cause of action for misappropriation of confidential information that is not either secret or at least substantially secret."). At least one

court collapsed them under the heading "trade secret." See [Parker Barber & Beauty Supply, Inc. v. The Wella Corp.](#), 03-04-00623-CV, 2006 WL 2918571, at \*14 n. 14 (Tex.App.-Austin 2006, no pet.) ("The parties alternatively used each of these terms [trade secret and confidential and proprietary information] at various times. For ease, we will refer to such information simply as 'trade secrets.'").

FN42. [Gen. Univ. Sys., Inc. v. HAL, Inc.](#), 500 F.3d 444, 450 (5th Cir.2007) (quoting [Trilogy Software, Inc. v. Callidus Software, Inc.](#), 143 S.W.3d 452, 464 (Tex.App.-Austin 2004, no pet.)). "Use" is "any exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant." *Id.* at 451 (quoting [Restatement \(Third\) of Unfair Competition § 40](#)). "Any misappropriation of trade secrets, followed by an exercise of control and domination, is considered a commercial use." [Carbo Ceramics, Inc. v. Keefe](#), 166 F.App'x 714, 721 (5th Cir.2006) (unpublished) (citing [Univ. Computing Co. v. Lykes-Youngstown Corp.](#), 504 F.2d 518, 542 (5th Cir.1974), and [Garth v. Staktek Corp.](#), 876 S.W.2d 545, 548 (Tex.App.-Austin 1994, writ dismissed)).

Under Texas law, customer lists may be protected as trade secrets. See [Sharma v. Vinmar Int'l, Ltd.](#), 231 S.W.3d 405, 425 & n. 14 (Tex.App.-Houston [14th Dist.] 2007, no pet.) (collecting cases). But "[a] customer list of readily ascertainable names and addresses will not be protected as a trade secret." [Guy Carpenter & Co. v. Provenzale](#), 334 F.3d 459, 467 (5th Cir.2003) (citing [Gaal v. BASF Wyandotte Corp.](#), 533 S.W.2d 152, 155 (Tex.Civ.App.-Houston [14th Dist.] 1976, no writ)). [FN43] Texas courts consider three factors to determine whether a customer list is a trade secret: "(1) what steps, if any, an employer has taken to maintain the confidentiality of a customer list; (2) whether a departing employee acknowledges that the customer list is confidential; and (3) whether the content of the list is readily ascertainable." [Guy Carpenter & Co. v. Provenzale](#), 334 F.3d 459, 467 (5th Cir.2003). In considering whether information was readily ascertainable, courts have considered the expense of compiling it. See

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 50

[Zoecon Indus. v. Am. Stockman Tag Co.](#), 713 F.2d 1174, 1179 (5th Cir.1983) ("Even if the names and addresses were readily ascertainable through trade journals as the defendants allege, the other information could be compiled only at considerable expense."). [FN44] Other Texas courts focus on the method used to acquire the customer information. Even if the information is readily available in the industry, it will be protected if the competitor obtained it working for the former employer. See *Brummerhop*, 840 S.W.2d at 633; *Am. Precision Vibrator Co. v. Nat'l Air Vibrator Co.*, 764 S.W.2d 274, 277 (Tex.App.-Houston [1st Dist.] 1988, no writ) ("In Texas, courts condemn the employment of improper means to procure trade secrets. The question is not, 'How could he have secured the knowledge?' but 'How did he?' " (citations and internal quotation marks omitted)), *withdrawn and stayed on other grounds*, 771 S.W.2d 562 (Tex.App.-Houston [1st Dist.] 1989, no writ). [FN45]

[FN43]. See *Adco Indus. v. Metro Label Corp.*, No. 05-99-01128-CV, 2000 WL 1196337, at \*4 (Tex.App.-Dallas 2000, no pet.) (not designated for publication) (affirming the trial court's conclusion that customer lists and other information were not trade secrets because the defendant was able to purchase a new customer list and duplicate the process he followed at the plaintiff company to yield information); *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 602 (Tex.App.-Amarillo 1995, no writ) (affirming a temporary injunction preventing the use of a customer list even though "some information contained [in the list] may have been susceptible to discovery through independent investigation of public material" because "the record [did] not establish that the appellants so gathered it"); see also *Inflight Newspapers, Inc. v. Magazines In-Flight, LLC*, 990 F.Supp. 119, 129-30 (E.D.N.Y.1997) (holding that the plaintiff's customer lists were not trade secrets because the customer identity could be easily found through publicly available means, such as the internet, trade shows, trade directories, and telephone books, or were imbedded in the defendant's memory); *Millet v. Loyd Crump*, 96-CA-639, pp. 5-6 (La.App. 5 Cir. 12/30/96); 687 So.2d 132, 136 (holding that the trial court erred in concluding that cus-

tomers lists were trade secrets under the Uniform Unfair Trade Secrets Act because the defendant had monthly access to the files to complete an ongoing audit, the defendant could obtain client information when clients contacted her directly, and insurance companies and policy holders also had the information alleged to be confidential).

[FN44]. See also *Crouch v. Swing Machinery Co.*, 468 S.W.2d 604, 607 (Tex.Civ.App.-San Antonio 1971, no writ) ("[T]here is evidence to the effect that the important information relates not to the identity of particular businesses which might purchase plaintiff's products, but the identity of officers or other employees of such concerns who make the decisions concerning the purchase of such equipment. There is also evidence which at least tends to show that ascertaining the identity of such key personnel requires the expenditure of considerable time and money."). Courts have also considered the difficulty of compiling the customer list to determine whether it is confidential. See *M.N. Dannenbaum, Inc. v. Brummerhop*, 840 S.W.2d 624, 632 (Tex.App.-Houston [14th Dist.] 1992, writ denied).

[FN45]. See also *Jeter v. Associated Rack Corp.*, 607 S.W.2d 272, 276 (Tex.Civ.App.-Texarkana 1980, writ ref'd n.r.e.) ("The fact that [the information the plaintiff claimed was confidential] might have been available on the open market is not determinative. The primary issue is whether the [defendants] engaged in a course of conduct to obtain access to confidential business information from the premises of [the plaintiff], without permission in order to facilitate the forming of their new corporation.").

\*53 Based on the evidence presented at the injunction hearing held in 2008, this court concluded that Rimkus's client database, pricing information, and business plan were the type of information that courts had recognized as entitled to trade secret protection. Rimkus claims that its customer lists are trade secrets. The defendants argue that the Rimkus client-contact information is not a trade secret because it is publicly available in industry guides like the Louisi-

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 51

ana Casualty Adjuster's Guide and on the internet. But, as Rimkus points out, nearly all the individuals Bell and Cammarata solicited in November and December 2006 are not listed in the 2006 Louisiana Casualty Adjuster's Guide. The record also shows that Bell did not have a copy of the Guide until after December 10, 2006, after he had sent multiple solicitation emails on behalf of U.S. Forensic. The full list of recipients of Bell's December 1, 2006 solicitation email remains unknown. Bell submitted an affidavit showing that many of the insurance adjusters he sent marketing emails to in 2008 had their contact information available on the internet. But there is no evidence that the contact information for these adjusters was available on the internet in 2006. Moreover, the client-contact information Bell was able to find on the internet in 2008 does not account for all the Rimkus clients Bell and Cammarata emailed in November and December 2006. The record shows that Bell and Cammarata sent multiple solicitation emails on behalf of U.S. Forensic in the first few weeks and months of operation. Nearly all the solicitation emails recovered by Rimkus were sent by Bell or Cammarata to individuals with whom they worked while at Rimkus. The record raises fact issues as to whether the contact information for the clients U.S. Forensic solicited in late 2006 was publicly available and whether the defendants obtained it from client lists and similar information they took from Rimkus.

The defendants' argument that Rimkus's pricing information is not a trade secret because Rimkus shares that information with its prospective or actual clients is also unpersuasive. Disclosure does not destroy the protection given to a trade secret if, when it is disclosed, the owner of that secret obligates the party receiving it not to disclose or use it. See [Taco Cabana Int'l, Inc. v. Two Pesos, Inc.](#), 932 F.2d 1113, 1123-24 (5th Cir.1991) (holding that the plaintiff's disclosure to contractors of the architectural plans for its restaurants did not extinguish the confidential nature of those plans); see also [Metallurgical Indus. Inc. v. Fourtek, Inc.](#), 790 F.2d 1195, 1200 (5th Cir.1986) (trade secrets remained confidential when they were disclosed only to businesses with whom the plaintiff dealt with the expectation of profit). Rimkus did not publicly announce its pricing information, particularly not to its competitors. Instead, Rimkus disclosed the information only to prospective or actual clients and did not reveal how the prices charged to one compared with prices charged to others. Even if Rimkus gave its clients pricing information, Rimkus

took steps to prevent competitors from learning it. Rimkus's pricing information, which Rimkus safeguards and which would give a competitor an advantage, is entitled to trade secret protection. The record raises disputed fact issues material to determining whether the defendants took Rimkus pricing information and used it on behalf of U.S. Forensic.

\*54 The record also raises fact issues material to determining whether the defendants took or used Rimkus business plan information, Rimkus financial information, and other Rimkus information. Bell forwarded himself an email containing confidential Rimkus income/loss statements. Bell downloaded other Rimkus financial information from the Rimkus server to his work laptop on the day he resigned. Cammarata emailed himself Rimkus reports. Bell and Cammarata obtained a Rimkus powerpoint from a former Rimkus client and used it in their work for U.S. Forensic. And Cammarata retained multiple boxes of documents containing Rimkus information and only recently disclosed the existence of these materials. The evidence in the record raises disputed fact issues precluding summary judgment on the misappropriation claim. The defendants' motion for summary judgment on this claim is denied.

## 2. Breach of Fiduciary Duty

Rimkus alleges that Bell breached his fiduciary duty as an officer of Rimkus by preparing to form U.S. Forensic before he left Rimkus, misappropriating confidential Rimkus information, and soliciting Rimkus customers and employees. Under Texas law, the elements of a breach of fiduciary duty claim are: (1) the plaintiff and defendant had a fiduciary relationship; (2) the defendant breached its fiduciary duty to the plaintiffs; and (3) the defendant's breach resulted in injury to the plaintiff or benefit to the defendant. [Navigant Consulting, Inc. v. Wilkinson](#), 508 F.3d 277, 283 (5th Cir.2007); see also [Jones v. Blume](#), 196 S.W.3d 440, 447 (Tex.App.-Dallas 2006, pet. denied). An employee may prepare to go into competition with his employer--before resigning--without breaching fiduciary duties owed to that employer. [Navigant Consulting, Inc.](#), 508 F.3d at 284. [FN46] But an employee "may not appropriate his employer's trade secrets" or "carry away certain information, such as lists of customers." [Id.](#) at 284 (quoting [Johnson v. Brewer & Pritchard, P.C.](#), 73 S.W.3d 193, 202 (Tex.2002)). In [Navigant Consulting](#), the



Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 52

court concluded that the defendant's disclosure of detailed business information to competitors, "including revenue projections, backlog estimates, margin rates, [and] descriptions of current and potential engagements," was part of the defendant's breach of fiduciary duty. *Id.* at 286.

[FN46.Ameristar Jet Charter, Inc. v. Cobbs, 184 S.W.3d 369, 374 \(Tex.App.-Dallas 2006, no pet.\)](#) (no breach of fiduciary duty when an employee formed a competing business while still employed but did not actually compete with the employer until he resigned); [Abetter Trucking Co. v. Arizpe, 113 S.W.3d 503, 510 \(Tex.App.-Houston \[1st Dist.\] 2003, no pet.\)](#) ("An at-will employee may properly plan to compete with his employer, and may take active steps to do so while still employed. The employee has no general duty to disclose his plans and may secretly join with other employees in the endeavor without violating any duty to the employer." (citation omitted)); *see id.* at [511](#) ("To form his own company, Arizpe had to incorporate or otherwise establish a business entity, obtain permits, and obtain insurance. These were permissible preparations to compete, not breaches of fiduciary duty.").

Contrary to Rimkus's argument, the evidence of Bell's preparations to form Rimkus does not, as a matter of law, provide a basis for a breach of fiduciary duty claim. The evidence of misappropriation does, however, raise disputed fact issues as to whether Bell breached his fiduciary duty to Rimkus by misappropriating confidential, proprietary, or trade secret information obtained while he was an officer of Rimkus and by using that information to solicit Rimkus customers and compete against Rimkus. Bell's motion for summary judgment on this aspect of the breach of fiduciary duty claim is denied.

### 3. Disparagement

\*55 In the amended complaint, Rimkus alleged that Bell made disparaging statements about Rimkus to third parties, causing harm to its reputation and a loss of business. Bell argues that there is no evidence in the record to support Rimkus's disparagement claim. In its initial response to Bell's summary judgment

motion, Rimkus conceded that, at the time, it had no proof that Bell disparaged Rimkus. (Docket Entry No. 321 at 24). Rimkus asserted that it lacked such evidence because Bell had deleted emails and asked this court to delay ruling on the summary judgment motion until "after the dust settle[d] regarding the email production." (*Id.*).

On August 24, 2009, Rimkus filed a supplemental brief and evidence, including previously undisclosed emails that were belatedly produced pursuant to court order. Rimkus contends that these emails provide evidence of disparagement. Rimkus "believes there are similar documents which Mr. Bell has destroyed and ... has not produced." (Docket Entry No. 374 at 2). Bell replies that Rimkus still lacks evidence to support any elements of a business disparagement claim. (Docket Entry No. 377 at 4-6).

Rimkus relies on two email exchanges between Bell and individuals who worked for Rimkus clients who had worked with Bell while he was at Rimkus. [\[FN47\]](#) The first email, sent on November 5, 2007, states that Bell and other engineers left their "old companies" to "create a smaller, honest, cost effective engineering alternative for the insurance claims industry that responds to the needs of the clients in terms of cost and timeliness of reports." (Docket Entry No. 371; Docket Entry No. 374, Ex. U). Rimkus argues that this sentence is disparaging because it "suggests rather pointedly that Rimkus is neither honest nor cost effective." (Docket Entry No. 374 at 3). Rimkus argues that it is clear Bell is referring to Rimkus because he closes the email by stating, "I hope we can work together again." (Docket Entry No. 371; Docket Entry No. 374, Ex. U). The second email, which Bell sent to a Rimkus client on August 1, 2007, states: "We have never been a target of the media, the plaintiff's bar, or investigated by a government entity." (Docket Entry No. 372; Docket Entry No. 374, Ex. Z). Bell continues: "[W]e are currently being used by attorneys for [Client] that appreciate the difference between us and the big clearinghouse engineering firms." (*Id.*). Rimkus argues that this email is disparaging because it "impl[ies] that Rimkus has done something wrong since it has been discussed in the news, that it has been sued--without doubt by a plaintiff, or that the work of its engineers was investigated in the aftermath of Hurricane Katrina." (Docket Entry No. 374 at 6).

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 53

FN47. Rimkus also submitted email conversations between Bell and other Rimkus employees that allegedly contain disparaging comments. A plaintiff alleging business disparagement must prove that false statements of fact were made to third parties. Advanced Modular Power Sys., Inc. v. E-One N.Y., Inc., No. 01-06-00607-CV, 2008 WL 963007, at \*4 (Tex.App.- Houston [1 Dist.] 2008, no pet.) (mem.op.) ("The false statement of fact must be published to a third party."). These emails do not support the disparagement claim.

Under Texas law, business disparagement requires publication by the defendant of statements that are false, maliciously stated, not privileged, and result in special damages. C.P. Interests, Inc. v. Cal. Pools, Inc., 238 F.3d 690,694-95 (5th Cir.2001); see KLN Steel Prods. Co. v. CNA Ins. Cos., 278 S.W.3d 429, 438 n. 8 (Tex.App.-San Antonio 2008, pet. denied) ("[A] business disparagement claim ... requires proof of four elements: (1) the defendant published a false, defamatory statement of fact about the plaintiff, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff." (citing Forbes Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 170 (Tex.2003))). Unlike defamation, a claim for business disparagement always requires a plaintiff to prove actual malice. See Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 766 (Tex.1987). A plaintiff must show that the defendant knew its statements were false or acted with reckless disregard for their falsity; acted with ill will or with an intent to interfere in the plaintiff's economic interests; and had no privilege to do so. *Id.* To prove special damages, a plaintiff must provide evidence "that the disparaging communication played a substantial part in inducing third parties not to deal with the plaintiff, resulting in a direct pecuniary loss that has been realized or liquidated, such as specific lost sales, loss of trade, or loss of other dealings." Astoria Indus. of Iowa, Inc. v. SNF, Inc., 223 S.W.3d 616, 628 (Tex.App.-Fort Worth 2007, pet. denied); see also Johnson v. Hosp. Corp. of Am., 95 F.3d 383, 391 (5th Cir.1996); Hurlbut, 749 S.W.2d at 767.

\*56 The record, including the recently produced emails, as a matter of law fails to show any basis to find disparagement. "To support a claim for business disparagement, the published statements must be, at a

minimum, defamatory." Granada Biosciences, Inc. v. Forbes, Inc., 49 S.W.3d 610, 616 (Tex.App.- Houston [14 Dist.] 2001, pet. granted), *rev'd on other grounds*, 124 S.W.3d 167 (Tex.2003). "[T]o maintain an action for an alleged defamatory statement, it must appear that [the plaintiff] is the person with reference to whom the statement was made." Kaufman v. Islamic Soc'y of Arlington, 291 S.W.3d 130, 144 (Tex.App.-Fort Worth 2009, pet. denied) (quoting Newspapers, Inc. v. Matthews, 161 Tex. 284, 339 S.W.2d 890, 893 (Tex.1960)). "It is 'not necessary that the individual referred to be named if those who knew and were acquainted with the plaintiff understand from reading the publication that it referred to [the] plaintiff'; however, the 'settled law requires that the false statement point to the plaintiff and to no one else.'" *Id.* (alteration in original) (quoting Matthews, 339 S.W.2d at 894). Whether a plaintiff is referred to in a statement is "a question of law for the court." Ledig v. Duke Energy Corp., 193 S.W.3d 167, 180 (Tex.App.-Houston [1st Dist.] 2006, no pet.). A "claimed implication" is insufficient to refer to a defamation plaintiff when it is not consistent with the "plain language" and the "full import" of a defendant's statement. Matthews, 339 S.W.2d at 894.

Rimkus's argument that the emails clearly refer to it and it alone as a dishonest and expensive engineering firm involved in lawsuits and government investigations is unpersuasive. The November 5, 2007 email begins by stating that a "group of us from three different engineering firms left our old companies and formed U.S. Forensic." (Docket Entry No. 371; Docket Entry No. 374, Ex. U) (emphasis added). Bell refers to U.S. Forensic as an "alternative" for the insurance industry and then states that we would put "our guys' experience up against anyone else." (*Id.*) (emphasis added). The August 1, 2007 email states that attorneys for clients of U.S. Forensic "appreciate the difference between us and the big clearinghouse engineering firms." (Docket Entry No. 372; Docket Entry No. 374, Ex. Z) (emphasis added). Bell does not name Rimkus or any other engineering firm in these emails. The content and context of these emails show that the purpose of the challenged statements was to highlight the difference between U.S. Forensic and large forensic engineering firms in general, including but not limited to Rimkus. A reasonable reader, including a Rimkus client, would not automatically associate these statements with Rimkus and ignore the reference to multiple engineering firms and companies in general. There is no basis to con-

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 54

clude that the implications of Bell's statements "point to [Rimkus] and to no one else."

\*57 In addition, there is no evidence in the record of special damages. [FN48] There is no evidence that any of the allegedly disparaging statements played a substantial part in causing third parties not to do business with Rimkus. Rimkus does not assert that it has lost any specific client as a result of Bell's disparaging statements.

FN48. For this reason, Rimkus's supplemental response to the defendants' summary judgment motion, which contains other similar emails, do not raise a fact issue as to disparagement. (Docket Entry No. 389, Ex. K; Docket Entry No. 392). There is no evidence that the sending of these emails caused Rimkus to suffer special damages.

This court's rulings on spoliation do not change this analysis. The evidence in the record does not show that emails deleted by the defendants would be relevant to the disparagement claim or that Rimkus has been prejudiced in its ability to litigate the disparagement claim because of the defendants' spoliation. The emails Rimkus relies on--dated November 5, 2007 and August 21, 2007--do not provide evidence of disparagement. There is no basis to conclude that any of the unrecovered emails would contain anything different than the emails Rimkus already has in its possession. Summary judgment is granted on the disparagement claim.

#### *4. Rimkus's Damages for Breach of the Noncompetition and Nonsolicitation Covenants*

Cammarata moved for summary judgment on Rimkus's claim for damages for the alleged breach of the covenants not to compete and not to solicit customers. Cammarata cites Texas Business and Commercial Code [§ 15.51\(c\)](#) for the proposition that when, as in this case, the court finds that the covenant's limitations as to time, geographical scope, and the activity to be restrained are unreasonable and greater than necessary to protect the employer's business interests, damages for breach are only available after the court reforms the covenant. Cammarata argues that because this court has not reformed the covenants and the noncompetition period has expired, Rimkus is not entitled to damages for any alleged breach of the

covenants not to compete and not to solicit customers.

Rimkus responds that [§ 15.51\(c\)](#) does not foreclose damages in this case but only requires that reformation of the noncompetition covenant precede any damages award. Rimkus contends that this court may reform the covenant and award Rimkus damages for breach of the reformed covenant. Rimkus argues that "the source of ... damages for Cammarata's breach of his covenant not to compete is not merely statutory, but contractual as well." (Docket Entry No. 324 at 52).

Rimkus's argument that it may rely on the Employment Agreement as a source of its damages, even if the contractual noncompetition clause is overbroad under [§ 15.51](#), is unpersuasive. Under Texas law, "the procedures and remedies in an action to enforce a covenant not to compete provided by [Section 15.51](#) of [the Texas Business and Commerce Code] are *exclusive* and *preempt* any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise." [Tex. Bus. & Com.Code § 15.52](#) (emphasis added). Under this provision, remedies for breach of a covenant not to compete are limited to the remedies available under [§ 15.51\(c\)](#). See [Light v. Centel Cellular Co. of Tex.](#), 883 S.W.2d 642, 644 (Tex.1994) ("[Section 15.52](#) makes clear that the Legislature intended the Covenants Not to Compete Act to largely supplant the Texas common law relating to enforcement of covenants not to compete. Thus, we apply the Covenants Not to Compete Act to the facts of this case, in lieu of 'any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise.'"), *abrogated in part on other grounds by Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex.2006); [Perez v. Tex. Disposal Sys., Inc.](#), 103 S.W.3d 591, 593-94 (Tex.App.-San Antonio 2003, *pet. denied*) ("Just as the Act's criteria for enforcing a covenant not to compete preempt other law, so do the remedies provided under the Act."). Rimkus may only seek damages under [§ 15.51\(c\)](#).

\*58 Rimkus is not entitled to damages under [§ 15.51\(c\)](#) for Cammarata's alleged breach of the noncompetition and nonsolicitation covenants. That

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 55

section "precludes a damages award for conduct prior to any necessary reformation of the scope of the covenant." [Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding](#), 289 S.W.3d 844, 855 (Tex.2009) (Hecht, J., concurring); see also [Safeworks, LLC v. Max Access, Inc.](#), No. H-08-2860, 2009 WL 959969, at \*5 (S.D.Tex. Apr. 8, 2009) ("If a court reforms a covenant not to compete in order to make it reasonable and enforceable, 'the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief.'" (quoting Tex. Bus. & Com.Code § 1551(c)); [Peat Marwick Main & Co. v. Haass](#), 818 S.W.2d 381, 388 (Tex.1991) ("Since MH obtained no reformation of the covenant before Haass' actions for which it sought damages, [Texas Business & Commerce Code § 15.51] would prohibit MH from obtaining damages."); [Butler v. Arrow Mirror & Glass, Inc.](#), 51 S.W.3d 787, 796 (Tex.App.-Houston [1st Dist.] 2001, no pet.) ("Applying section 15.51 to this case, once the trial judge reformed the covenant, money damages were precluded. No damages can be awarded for breach prior to the reformation; after reformation, the current injunction was in place preventing ReGlaze from competing with, and thus, harming Arrow."). "If the covenant meets the criteria for enforceability set forth in Section 15.50, a court may award an employer damages, injunctive relief, or both damages and injunctive relief. If the covenant not to compete does not meet the Section 15.50 criteria and the trial court reforms the covenant, a court may award an employer injunctive relief only." [Perez v. Tex. Disposal Sys., Inc.](#), 53 S.W.3d 480, 482 (Tex.App.-San Antonio 2001, pet. granted), rev'd on other grounds, 80 S.W.3d 593 (Tex.2002). On August 13, 2008, after an extensive evidentiary hearing, this court held that "[b]ecause the Employment Agreement covers many areas outside Louisiana where Cammarata did not work while employed by Rimkus, under Texas law the noncompetition covenant is broader in geographical scope than necessary to protect Rimkus's legitimate business interests." (Docket Entry No. 159, August 13, 2008 Memorandum and Opinion at 36). This court concluded that "to be reasonable, the geographic range of a reformed non-competition covenant would be limited to certain cities in Mississippi and Florida." (*Id.* at 37). With respect to the nonsolicitation covenant, this court concluded that "[b]ecause the covenant not to solicit customers extends to all Rimkus clients, the covenant is broader than necessary to protect Rimkus's legiti-

mate business interest in protecting its client base and is unenforceable." (*Id.* at 46). The record before this court did not "support this court's reformation of the nonsolicitation covenant" to include Louisiana because "Cammarata's work for Rimkus involved primarily Louisiana clients and the nonsolicitation prohibition is unenforceable in Louisiana." (*Id.*). Because Rimkus had delayed in seeking an injunction and the period for injunctive relief had expired, this court did not extend or reform the noncompetition or nonsolicitation covenants. (*Id.* at 37, 42). Rimkus's motion for a preliminary injunction to enforce the covenants was denied. (*Id.* at 46).

\*59 Under § 15.51(c), the cases interpreting it, and the evidence in this record, Rimkus is not entitled to damages for Cammarata's alleged breach of the non-competition and nonsolicitation covenants in his Employment Agreement. Cammarata's motion for summary judgment on Rimkus's claim for damages for breach of the noncompetition and nonsolicitation covenants is granted.

### 5. Tortious Interference

The defendants argue that Rimkus's tortious interference claim fails because there is no evidence of a contract with which the defendants interfered. According to the defendants, Rimkus does not have a contractual relationship with its clients but rather operates on a job-to-job basis with each client. The defendants assert that none of Rimkus's clients use it for forensic engineering services on an exclusive basis. The clients are free to use a different forensic engineering firm whenever they choose. The defendants also contend that Rimkus's tortious interference claims fail because there is no evidence in the record that the defendants acted willfully or intentionally to interfere with any existing Rimkus contractual or prospective business relationship. Rimkus responds that it "enters into a contract with each one of its clients that governs the terms and conditions upon which Rimkus will perform its work." (Docket Entry No. 324 at 43-44). Rimkus contends that the evidence in the record shows that the defendants emailed and contacted Rimkus clients after leaving to form U.S. Forensic, knowing that "their interference with those clients would result in Rimkus [losing] the relationship with the client." (*Id.* at 44). Rimkus also argues that it need not show loss of an existing client because a defendant may be liable for tortious interfer-

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 56

ence with prospective business relations. (*Id.*).

To establish tortious interference with an existing contract, a plaintiff must show: "(1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff's injury, and (4) caused actual damages or loss." *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex.2000); see also *Amigo Broad., LP v. Spanish Broad. Sys., Inc.*, 521 F.3d 472, 489 (5th Cir.2008). The party alleging tortious interference has the burden of proving each element of the claim. *Dunn v. Calahan, No. 03-05-00426-CV, 2008 WL 5264886, at \*3* (Tex.App.-Austin Dec. 17, 2008, pet. denied) (mem.op.). A cause of action for tortious interference with a contract will not lie in the absence of a contract. *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 140 (Tex.App.-Waco 2005, pet. denied); *S & A Marinas, Inc. v. Leonard Marine Corp.*, 875 S.W.2d 766, 768 (Tex.App.-Austin 1994, writ denied).

A plaintiff alleging tortious interference with contract must produce some evidence that the defendant knowingly induced one of the contracting parties to breach its contract obligations. See *John Paul Mitchell Sys. v. Randalls Food Mkts., Inc.*, 17 S.W.3d 721, 730 (Tex.App.-Austin 2000, pet. denied); *Davis v. HydPro, Inc.*, 839 S.W.2d 137, 139-40 (Tex.App.-Eastland 1992, writ denied); see also *Dunn*, 2008 WL 5264886, at \*3. The plaintiff must present evidence that a contract provision was breached. See *N.Y. Life Ins. Co. v. Miller*, 114 S.W.3d 114, 125 (Tex.App.-Austin 2003, no pet.); *Archives of Am., Inc. v. Archive Litig. Servs., Inc.*, 992 S.W.2d 665, 667-68 (Tex.App.-Texarkana 1999, pet. denied). General claims of interference with a business relationship are insufficient to establish a tortious interference with contract claim. See *Playboy Enters., Inc. v. Editorial Caballero, S.A. de C. V.*, 202 S.W.3d 250, 265 (Tex.App.-Corpus Christi 2006, pet. denied).

\*60 Rimkus has failed to present or identify evidence that could support an inference that the defendants tortiously interfered with an existing contract between Rimkus and a client. Rimkus has not identified a written or an enforceable oral contract with a client with which the defendants interfered. There is no evidence that Rimkus's customers or clients had a contractual obligation to continue using Rimkus's services. Nor is there evidence that the defendants

induced any Rimkus customer or client to breach any such obligation under a contract with Rimkus. The defendants' motion for summary judgment on Rimkus's claim for tortious interference with existing contracts is granted.

Tortious interference with contract and tortious interference with prospective business relations are separate causes of action. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 716-21, 725, 727 (Tex.2001). To establish a claim for tortious interference with prospective business relations, the plaintiff must prove that: (1) there was a reasonable probability that the plaintiff would have entered into a contract; (2) the defendant committed an intentional act, with the purpose of harming the plaintiff; and (3) actual harm or damage resulted from the defendant's interference, i.e., that the defendant's actions prevented the relationship from occurring. See *Bradford v. Vento*, 48 S.W.3d 749, 757 (Tex.2001); *Martin v. Kroger Co.*, 65 F.Supp.2d 516, 563 (S.D.Tex.1999). The plaintiff must show that the defendant's conduct was either independently tortious or unlawful, that is, that the conduct violated some other recognized tort duty. See *Sturges*, 52 S.W.3d at 726; *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 632 (Tex.App.-Fort Worth 2007, pet. denied). The "prevented the relationship from occurring" element requires "at minimum, that the tortious conduct constitute a cause in fact that prevented the prospective business relationship from coming to fruition in the form of a contractual agreement. The test for cause in fact, or 'but for causation,' is whether the act or omission was a substantial factor in causing the injury 'without which the harm would not have occurred.'" *COC Servs., Ltd. v. Comp USA, Inc.*, 150 S.W.3d 654, 679 (Tex.App.-Dallas 2004, pet. filed) (quoting *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex.1995)).

Rimkus relies on the alleged misappropriation of trade secrets by the defendants as the independently tortious act required for a claim of tortious interference with prospective business relations. Misappropriation of trade secrets is a common-law tort cause of action under Texas law. *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 463 (Tex.App.-Austin 2004, pet. denied). Rimkus has alleged that the defendants committed an independently tortious act. The evidence in the record, however, does not raise a fact issue material to determin-

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 57

ing whether the defendants' actions prevented a contractual relationship between Rimkus and a customer from forming.

\*61 A plaintiff seeking to recover for tortious interference with prospective business relationships must establish proximate causation and damages with evidence rising above mere suspicion or speculation. *See B. Cantrell Oil Co. v. Hino Gas Sales, Inc.*, 756 S.W.2d 781, 784 (Tex.App.-Corpus Christi 1988, no writ), *superseded by statute on other grounds*. [FN49] Absent some evidence that the defendants' actions prevented Rimkus from entering into a business relationship with clients who instead did business with the defendants, Rimkus cannot raise a fact issue as to its claim for tortious interference with prospective business relations. Rimkus does not identify any evidence of a client with which it would have done business but for the defendants' conduct. There is no evidence in the summary judgment record that the defendants' competition against Rimkus, use of Rimkus's business information, or solicitation of Rimkus clients resulted in that client giving business to the defendants that it would otherwise have given to Rimkus. Summary judgment is granted dismissing Rimkus's claim for tortious interference with prospective business relations.

[FN49]. *See also Slaughter-Cooper v. Kelsey Seybold Med. Group P.A.*, 379 F.3d 285, 292 (5th Cir.2004) (doctor who had been terminated from a clinic failed to establish that she suffered actual harm or damage when the tortious interference with prospective business relations claim rested on the speculative contention that her patients would have "sought her out" once she opened her own practice four months later had the clinic not represented to former patients that she had resigned to pursue other professional interests).

#### 6. Unfair Competition and Civil Conspiracy

Civil conspiracy is defined as "a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex.1996); *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex.1968). "Unfair competition under Texas law 'is

the umbrella for all statutory and nonstatutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters.' " *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 486 (5th Cir.2000) (quoting *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 14 (5th Cir.1974)). This tort requires a plaintiff to show that the defendants engaged in an illegal act that interfered with the plaintiff's ability to conduct its business. *Id.* "Although the illegal act need not necessarily violate criminal law, it must at least be an independent tort." *Id.*

The defendants argue that Rimkus's claims for unfair competition and civil conspiracy fail as a matter of law because there is no underlying tort liability. Unfair competition and civil conspiracy are derivative torts. *See Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 640 (5th Cir.2007) (civil conspiracy); *Taylor Publ'g Co.*, 216 F.3d at 486 (unfair competition). Because Rimkus's claim for misappropriation of trade secrets survives summary judgment, the defendants' argument is moot.

The defendants also argue that the civil conspiracy claim fails because "there is no evidence of any collusion or agreement between Mr. Cammarata, Mr. Bell and/or U.S. Forensic." (Docket Entry No. 309-2 at 61). This argument is unpersuasive. The record raises fact issues as to whether the defendants agreed to take confidential information from Rimkus to use on behalf of U.S. Forensic. Summary judgment is denied on the conspiracy and unfair competition claims.

#### VI. The Cross-Motions for Summary Judgment on the Defendants' Counterclaims for Attorneys' Fees

\*62 Cammarata and Bell counterclaimed for attorneys' fees under [§ 15.51 of the Texas Business and Commerce Code](#). *See Tex. Bus. & Com.Code § 15.51*(c). Under this provision, a court may award costs and attorneys' fees incurred by an employee in defending an action to enforce covenants not to compete and covenants not to solicit clients if:

- (a) the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services;
- (b) the employer knew, at the time the agreement was executed, that the agreement did not contain reasonable limitations as to time, geographical

Slip Copy  
 Slip Copy, 2010 WL 645253 (S.D.Tex.)  
 (Cite as: 2010 WL 645253 (S.D.Tex.))

Page 58

area, and scope of activity to be restrained;  
 (c) the limitations were unreasonable; and  
 (d) the employer sought to enforce the agreement to a greater extent than necessary to protect its goodwill or business interests.

*See id.* Rimkus has moved for summary judgment on both counterclaims. Cammarata has also moved for summary judgment on his counterclaim for attorneys' fees.

#### A. Bell's Counterclaim

Rimkus argues that Bell is not entitled to attorneys' fees under this statute as a matter of law. When Rimkus filed this suit, it sought to enforce the covenants not to compete and not to solicit clients contained in the July 14, 2005 Common Stock Purchase Agreement between Rimkus and Bell. The Agreement states in pertinent part:

WHEREAS, for good and valuable consideration, the Corporation and the Shareholders have agreed to impose certain restrictions on said capital stock; and

WHEREAS, the Shareholders mutually agree that it is to their mutual benefit and in the best interests of the Corporation to restrict the assignability of the capital stock of the Corporation, to provide for the control and disposition of the Corporation, to provide for the orderly transition of ownership in the event of death, disability or retirement of a Shareholder or other termination of a Shareholder's interest in the Corporation, to provide for the purchase of a Shareholder's capital stock under specified conditions and to provide the funds necessary to carry out such purchases.

NOW, THEREFORE, in consideration of the mutual agreements contained herein and for other valuable consideration, the sufficiency and receipt of which is hereby acknowledged, it is mutually agreed by and among the parties to this Agreement as follows....

(Docket Entry No. 302, Ex. 1 at 1). Rimkus asserts that the primary purpose of this Agreement was to place conditions on the sale of Rimkus stock to Bell, not to obligate Bell to render personal services.

Bell responds that Rimkus never sold stock to him. Instead, John Culberson sold Bell the stock. Bell contends that because Rimkus itself did not provide consideration in the form of stock for this Agreement, "it can be argued that the primary purpose of the Stock

Purchase Agreement was to obligate [him] to render personal services in the form of the covenant not to compete contained in the Stock Agreement." (Docket Entry No. 317 at 2).

\*63 Bell's argument is unpersuasive. The primary purpose of the Agreement was not to obligate Bell to work for Rimkus but to place restrictions on the ownership and transferability of the stock Bell was acquiring. The language of the Agreement shows that the primary purpose was not to obligate Bell to render services to Rimkus. Section 1551(c) states that it applies only if the *primary* purpose of the agreement is to obligate the promisor to render personal services. Summary judgment is granted dismissing Bell's counterclaim.

#### B. Cammarata's Counterclaim

Rimkus argues that Cammarata is not entitled to attorneys' fees under [§ 15.51\(c\)](#) because there is no evidence that Rimkus knew that the limitations on time, geographic area, and scope of activity were unreasonable when Cammarata's Employment Agreement was executed. Rimkus contends that Cammarata has failed to establish that Rimkus knew or was on notice that these covenants were unreasonable. Rimkus cites [In re Nolle, 265 S.W.3d 487 \(Tex.App.-Houston \[1st Dist.\] 2008, orig. proceeding\)](#), for the proposition that for an employer to be liable for fees under [§ 15.51\(c\)](#), a court or fact finder must have first determined that the noncompetition and nonsolicitation covenants were unenforceable.

Cammarata argues that Rimkus was aware of the case law, which was clear in 1996, that an employer cannot enforce a noncompetition agreement against an employee outside the geographical area in which that employee actually worked. Cammarata contends that Rimkus knew in 1996 that it had eight offices in four different states and that as a result, Rimkus knew that Cammarata "would never be able to work in every geographical area in which Plaintiff had performed five (5) jobs in the five (5) previous years." (Docket Entry No. 322 at 10). Cammarata contends that although Rimkus knew such a limitation was unreasonable, Rimkus required him to sign an employment agreement restricting postemployment competition outside the areas where Cammarata would work during his employment.

Slip Copy  
Slip Copy, 2010 WL 645253 (S.D.Tex.)  
(Cite as: 2010 WL 645253 (S.D.Tex.))

Page 59

Cammarata's argument that Rimkus knew in 1996 that the covenants were unenforceable is not persuasive. Evidence that Rimkus knew about Cammarata's responsibilities and location is insufficient to establish that Rimkus knew that the noncompetition and nonsolicitation provisions of the Agreement contained unreasonable provisions. Although Texas case law on noncompetition and nonsolicitation restrictions was clear in 1996, there is no evidence that Rimkus knew that the relevant provisions of Cammarata's Employment Agreement were unreasonable under Texas law. See [\*Safeworks, LLC v. Max Access, Inc.\*, No. H-08-2860, 2009 WL 959969, at \\*7 \(S.D.Tex. Apr.8, 2009\)](#) (granting summary judgment on a claim for attorneys' fees under [§ 15.51](#) because even though Texas law was clear, there was "no evidence that Safeworks representatives actually *knew* that the relevant non-solicitation provisions were unreasonable under Texas law"). The reasonableness of the limits in part depended on Cammarata's work during his employment with Rimkus. Cammarata has failed to raise a disputed fact issue material to determining whether Rimkus knew in October 1996 that the posttermination restrictions on competition in his Employment Agreement were unreasonable. This court grants Rimkus's motion for summary judgment dismissing Cammarata's counterclaim. Cammarata's motion for summary judgment to recover on his counterclaim is denied.

## VII. Conclusion

\*64 Rimkus's motions for sanctions are granted in part and denied in part. Rimkus is not entitled to an order striking the defendants' pleadings and entering a default judgment. Based on the defendants' spoliation of evidence, Rimkus is entitled to an adverse inference instruction at trial. Rimkus is also entitled to the reasonable costs and fees it incurred in investigating the spoliation, obtaining emails via third-party subpoenas, moving for sanctions, and taking the additional depositions of Bell and Cammarata. By March 1, 2010, Rimkus will submit evidence of the costs and attorneys' fees.

The defendants' motion for summary judgment is granted in part and denied in part. Summary judgment is granted dismissing Rimkus's claims for disparagement, tortious interference, and damages for breach of the noncompetition and nonsolicitation provisions. Summary judgment is denied on Rimkus's

claims for misappropriation of trade secrets, breach of fiduciary duty to the extent it is based on misappropriation, unfair competition, and civil conspiracy. With respect to the counterclaim for attorneys' fees, Cammarata's motion for summary judgment is denied and Rimkus's motions for summary judgment are granted. A status conference is set for February 26, 2010, at 10:00 a.m.

Slip Copy, 2010 WL 645253 (S.D.Tex.)

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--- S.Ct. ----

Page 1

--- S.Ct. ----, 2010 WL 2400087 (U.S.)

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**H**CITY OF ONTARIO, CALIFORNIA, et al.

v.

QUON et al.  
No. 08-1332.

United States Supreme Court.

Argued April 19, 2010

Decided June 17, 2010

Syllabus [FN\*]

FN\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

Petitioner Ontario (hereinafter City) acquired alphanumeric pagers able to send and receive text messages. Its contract with its service provider, Arch Wireless, provided for a monthly limit on the number of characters each pager could send or receive, and specified that usage exceeding that number would result in an additional fee. The City issued the pagers to respondent Quon and other officers in its police department (OPD), also a petitioner here. When Quon and others exceeded their monthly character limits for several months running, petitioner Scharf, OPD's chief, sought to determine whether the existing limit was too low, *i.e.*, whether the officers had to pay fees for sending work-related messages or, conversely, whether the overages were for personal messages. After Arch Wireless provided transcripts of Quon's and another employee's August and September 2002 text messages, it was discovered that many of Quon's messages were not work related, and some were sexually explicit. Scharf referred the matter to OPD's internal affairs division. The investigating officer used Quon's work schedule to redact from his transcript any messages he sent while off duty, but the transcript showed that few of his on-duty messages related to police business. Quon was disciplined for violating OPD rules.

He and the other respondents--each of whom had exchanged text messages with Quon during August and September--filed this suit, alleging, *inter alia*, that petitioners violated their Fourth Amendment rights and the federal Stored Communications Act (SCA) by obtaining and reviewing the transcript of Quon's pager messages, and that Arch Wireless violated the SCA by giving the City the transcript. The District Court denied respondents summary judgment on the constitutional claims, relying on the plurality opinion in *O'Connor v. Ortega*, 480 U. S. 709, to determine that Quon had a reasonable expectation of privacy in the content of his messages. Whether the audit was nonetheless reasonable, the court concluded, turned on whether Scharf used it for the improper purpose of determining if Quon was using his pager to waste time, or for the legitimate purpose of determining the efficacy of existing character limits to ensure that officers were not paying hidden work-related costs. After the jury concluded that Scharf's intent was legitimate, the court granted petitioners summary judgment on the ground they did not violate the Fourth Amendment. The Ninth Circuit reversed. Although it agreed that Quon had a reasonable expectation of privacy in his text messages, the appeals court concluded that the search was not reasonable even though it was conducted on a legitimate, work-related rationale. The opinion pointed to a host of means less intrusive than the audit that Scharf could have used. The court further concluded that Arch Wireless had violated the SCA by giving the City the transcript.

*Held:* Because the search of Quon's text messages was reasonable, petitioners did not violate respondents' Fourth Amendment rights, and the Ninth Circuit erred by concluding otherwise. Pp. 7-17.

(a) The Amendment guarantees a person's privacy, dignity, and security against arbitrary and invasive governmental acts, without regard to whether the government actor is investigating crime or performing another function. *Skinner v. Railway Labor Executives' Assn.*, 489 U. S. 602, 613-614. It applies as well when the government acts in its capacity as an employer. *Treasury Employees v. Von Raab*, 489 U. S. 656, 665. The Members of the *O'Connor* Court disagreed on the proper analytical framework for

--- S.Ct. ----

Page 2

--- S.Ct. ----, 2010 WL 2400087 (U.S.)

**(Publication page references are not available for this document.)**

Fourth Amendment claims against government employers. A four-Justice plurality concluded that the correct analysis has two steps. First, because 'some [government] offices may be so open ... that no expectation of privacy is reasonable,' a court must consider '[t]he operational realities of the workplace' to determine if an employee's constitutional rights are implicated. 480 U. S., at 718. Second, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation 'for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.' *Id.*, at 725-726. JUSTICE SCALIA, concurring in the judgment, would have dispensed with the 'operational realities' inquiry and concluded 'that the offices of government employees ... are [generally] covered by Fourth Amendment protections,' *id.*, at 731, but he would also have held 'that government searches to retrieve work-related materials or to investigate violations of workplace rules--searches of the sort that are regarded as reasonable and normal in the private-employer context--do not violate the ... Amendment,' *id.*, at 732. Pp. 7-9.

(b) Even assuming that Quon had a reasonable expectation of privacy in his text messages, the search was reasonable under both *O'Connor* approaches, the plurality's and JUSTICE SCALIA's. Pp. 9-17.

(1) The Court does not resolve the parties' disagreement over Quon's privacy expectation. Prudence counsels caution before the facts in this case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations of employees using employer-provided communication devices. Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve. Because it is therefore preferable to dispose of this case on narrower grounds, the Court assumes, *arguendo*, that: (1) Quon had a reasonable privacy expectation; (2) petitioners' review of the transcript constituted a Fourth Amendment search; and (3) the principles applicable to a government employer's search of an employee's physical office apply as well in the electronic sphere. Pp. 9-12.

(2) Petitioners' warrantless review of Quon's pager transcript was reasonable under the *O'Connor* plurality's approach because it was motivated by a legitimate work-related purpose, and because it was not excessive in scope. See 480 U. S., at 726. There were 'reasonable grounds for [finding it] necessary for a noninvestigatory work-related purpose,' *ibid.*, in that Chief Scharf had ordered the audit to determine whether the City's contractual character limit was sufficient to meet the City's needs. It was also 'reasonably related to the objectives of the search,' *ibid.*, because both the City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or, on the other hand, that the City was not paying for extensive personal communications. Reviewing the transcripts was an efficient and expedient way to determine whether either of these factors caused Quon's overages. And the review was also not 'excessively intrusive.' *Ibid.* Although Quon had exceeded his monthly allotment a number of times, OPD requested transcripts for only August and September 2002 in order to obtain a large enough sample to decide the character limits' efficaciousness, and all the messages that Quon sent while off duty were redacted. And from OPD's perspective, the fact that Quon likely had only a limited privacy expectation lessened the risk that the review would intrude on highly private details of Quon's life. Similarly, because the City had a legitimate reason for the search and it was not excessively intrusive in light of that justification, the search would be 'regarded as reasonable and normal in the private-employer context' and thereby satisfy the approach of JUSTICE SCALIA's concurrence, *id.*, at 732. Conversely, the Ninth Circuit's 'least intrusive' means approach was inconsistent with controlling precedents. See, *e.g.*, *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 663. Pp. 12-16.

(c) Whether the other respondents can have a reasonable expectation of privacy in their text messages to Quon need not be resolved. They argue that because the search was unreasonable as to Quon, it was also unreasonable as to them, but they make no corollary argument that the search, if reasonable as to Quon, could nonetheless be unreasonable as to them. Given this litigating position and the Court's conclusion that the search was reasonable as to Quon, these other respondents cannot prevail. Pp. 16-17.

--- S.Ct. ----

Page 3

--- S.Ct. ----, 2010 WL 2400087 (U.S.)

**(Publication page references are not available for this document.)**

529 F. 3d 892, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, THOMAS, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and in which SCALIA, J., joined except for Part III-A. STEVENS, J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in part and concurring in the judgment.

#### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JUSTICE KENNEDY delivered the opinion of the Court.

This case involves the assertion by a government employer of the right, in circumstances to be described, to read text messages sent and received on a pager the employer owned and issued to an employee. The employee contends that the privacy of the messages is protected by the ban on 'unreasonable searches and seizures' found in the Fourth Amendment to the United States Constitution, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U. S. 643 (1961). Though the case touches issues of far-reaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable.

#### I A

The City of Ontario (City) is a political subdivision of the State of California. The case arose out of incidents in 2001 and 2002 when respondent Jeff Quon was employed by the Ontario Police Department (OPD). He was a police sergeant and member of OPD's Special Weapons and Tactics (SWAT) Team. The City, OPD, and OPD's Chief, Lloyd Scharf, are petitioners here. As will be discussed, two respondents share the last name Quon. In this opinion 'Quon' refers to Jeff Quon, for the relevant events mostly revolve around him.

In October 2001, the City acquired 20 alphanumeric pagers capable of sending and receiving text messages. Arch Wireless Operating Company provided wireless service for the pagers. Under the City's service contract with Arch Wireless, each pager was allotted a limited number of characters sent or received

each month. Usage in excess of that amount would result in an additional fee. The City issued pagers to Quon and other SWAT Team members in order to help the SWAT Team mobilize and respond to emergency situations.

Before acquiring the pagers, the City announced a 'Computer Usage, Internet and E-Mail Policy' (Computer Policy) that applied to all employees. Among other provisions, it specified that the City 'reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.' App. to Pet. for Cert. 152a. In March 2000, Quon signed a statement acknowledging that he had read and understood the Computer Policy.

The Computer Policy did not apply, on its face, to text messaging. Text messages share similarities with e-mails, but the two differ in an important way. In this case, for instance, an e-mail sent on a City computer was transmitted through the City's own data servers, but a text message sent on one of the City's pagers was transmitted using wireless radio frequencies from an individual pager to a receiving station owned by Arch Wireless. It was routed through Arch Wireless' computer network, where it remained until the recipient's pager or cellular telephone was ready to receive the message, at which point Arch Wireless transmitted the message from the transmitting station nearest to the recipient. After delivery, Arch Wireless retained a copy on its computer servers. The message did not pass through computers owned by the City.

Although the Computer Policy did not cover text messages by its explicit terms, the City made clear to employees, including Quon, that the City would treat text messages the same way as it treated e-mails. At an April 18, 2002, staff meeting at which Quon was present, Lieutenant Steven Duke, the OPD officer responsible for the City's contract with Arch Wireless, told officers that messages sent on the pagers 'are considered e-mail messages. This means that [text] messages would fall under the City's policy as public information and [would be] eligible for auditing.' App. 30. Duke's comments were put in writing in a memorandum sent on April 29, 2002, by Chief Scharf to Quon and other City personnel.

Within the first or second billing cycle after the

--- S.Ct. ----

Page 4

--- S.Ct. ----, 2010 WL 2400087 (U.S.)

**(Publication page references are not available for this document.)**

paggers were distributed, Quon exceeded his monthly text message character allotment. Duke told Quon about the overage, and reminded him that messages sent on the paggers were 'considered e-mail and could be audited.' *Id.*, at 40. Duke said, however, that 'it was not his intent to audit [an] employee's text messages to see if the overage [was] due to work related transmissions.' *Ibid.* Duke suggested that Quon could reimburse the City for the overage fee rather than have Duke audit the messages. Quon wrote a check to the City for the overage. Duke offered the same arrangement to other employees who incurred overage fees.

Over the next few months, Quon exceeded his character limit three or four times. Each time he reimbursed the City. Quon and another officer again incurred overage fees for their pager usage in August 2002. At a meeting in October, Duke told Scharf that he had become 'tired of being a bill collector.' *Id.*, at 91. Scharf decided to determine whether the existing character limit was too low--that is, whether officers such as Quon were having to pay fees for sending work-related messages--or if the overages were for personal messages. Scharf told Duke to request transcripts of text messages sent in August and September by Quon and the other employee who had exceeded the character allowance.

At Duke's request, an administrative assistant employed by OPD contacted Arch Wireless. After verifying that the City was the subscriber on the accounts, Arch Wireless provided the desired transcripts. Duke reviewed the transcripts and discovered that many of the messages sent and received on Quon's pager were not work related, and some were sexually explicit. Duke reported his findings to Scharf, who, along with Quon's immediate supervisor, reviewed the transcripts himself. After his review, Scharf referred the matter to OPD's internal affairs division for an investigation into whether Quon was violating OPD rules by pursuing personal matters while on duty.

The officer in charge of the internal affairs review was Sergeant Patrick McMahon. Before conducting a review, McMahon used Quon's work schedule to redact the transcripts in order to eliminate any messages Quon sent while off duty. He then reviewed the content of the messages Quon sent during work hours. McMahon's report noted that Quon sent or

received 456 messages during work hours in the month of August 2002, of which no more than 57 were work related; he sent as many as 80 messages during a single day at work; and on an average work-day, Quon sent or received 28 messages, of which only 3 were related to police business. The report concluded that Quon had violated OPD rules. Quon was allegedly disciplined.

## B

Raising claims under Rev. Stat. §1979, 42 U. S. C. §1983; 18 U. S. C. §2701 *et seq.*, popularly known as the Stored Communications Act (SCA); and California law, Quon filed suit against petitioners in the United States District Court for the Central District of California. Arch Wireless and an individual not relevant here were also named as defendants. Quon was joined in his suit by another plaintiff who is not a party before this Court and by the other respondents, each of whom exchanged text messages with Quon during August and September 2002: Jerilyn Quon, Jeff Quon's then-wife, from whom he was separated; April Florio, an OPD employee with whom Jeff Quon was romantically involved; and Steve Trujillo, another member of the OPD SWAT Team. Among the allegations in the complaint was that petitioners violated respondents' Fourth Amendment rights and the SCA by obtaining and reviewing the transcript of Jeff Quon's pager messages and that Arch Wireless had violated the SCA by turning over the transcript to the City.

The parties filed cross-motions for summary judgment. The District Court granted Arch Wireless' motion for summary judgment on the SCA claim but denied petitioners' motion for summary judgment on the Fourth Amendment claims. *Quon v. Arch Wireless Operating Co.*, 445 F. Supp. 2d 1116 (CD Cal. 2006). Relying on the plurality opinion in *O'Connor v. Ortega*, 480 U. S. 709, 711 (1987), the District Court determined that Quon had a reasonable expectation of privacy in the content of his text messages. Whether the audit of the text messages was nonetheless reasonable, the District Court concluded, turned on Chief Scharf's intent: '[I]f the purpose for the audit was to determine if Quon was using his pager to 'play games' and 'waste time,' then the audit was not constitutionally reasonable'; but if the audit's purpose 'was to determine the efficacy of the existing character limits to ensure that officers were not paying hidden work-related costs, ... no constitutional violation oc-

--- S.Ct. ----

Page 5

--- S.Ct. ----, 2010 WL 2400087 (U.S.)

**(Publication page references are not available for this document.)**

curred.' 445 F. Supp. 2d, at 1146.

The District Court held a jury trial to determine the purpose of the audit. The jury concluded that Scharf ordered the audit to determine the efficacy of the character limits. The District Court accordingly held that petitioners did not violate the Fourth Amendment. It entered judgment in their favor.

The United States Court of Appeals for the Ninth Circuit reversed in part. 529 F. 3d 892 (2008). The panel agreed with the District Court that Jeff Quon had a reasonable expectation of privacy in his text messages but disagreed with the District Court about whether the search was reasonable. Even though the search was conducted for 'a legitimate work-related rationale,' the Court of Appeals concluded, it 'was not reasonable in scope.' *Id.*, at 908. The panel disagreed with the District Court's observation that 'there were no less-intrusive means' that Chief Scharf could have used 'to verify the efficacy of the 25,000 character limit ... without intruding on [respondents'] Fourth Amendment rights.' *Id.*, at 908-909. The opinion pointed to a 'host of simple ways' that the chief could have used instead of the audit, such as warning Quon at the beginning of the month that his future messages would be audited, or asking Quon himself to redact the transcript of his messages. *Id.*, at 909. The Court of Appeals further concluded that Arch Wireless had violated the SCA by turning over the transcript to the City.

The Ninth Circuit denied a petition for rehearing en banc. *Quon v. Arch Wireless Operating Co.*, 554 F. 3d 769 (2009). Judge Ikuta, joined by six other Circuit Judges, dissented. *Id.*, at 774-779. Judge Wardlaw concurred in the denial of rehearing, defending the panel's opinion against the dissent. *Id.*, at 769-774.

This Court granted the petition for certiorari filed by the City, OPD, and Chief Scharf challenging the Court of Appeals' holding that they violated the Fourth Amendment. 558 U. S. \_\_\_\_ (2009). The petition for certiorari filed by Arch Wireless challenging the Ninth Circuit's ruling that Arch Wireless violated the SCA was denied. *USA Mobility Wireless, Inc. v. Quon*, 558 U. S. \_\_\_\_ (2009).

## II

The Fourth Amendment states: 'The right of the peo-

ple to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ... .' It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations. *Camara v. Municipal Court of City and County of San Francisco*, 387 U. S. 523, 530 (1967). 'The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government,' without regard to whether the government actor is investigating crime or performing another function. *Skinner v. Railway Labor Executives' Assn.*, 489 U. S. 602, 613-614 (1989). The Fourth Amendment applies as well when the Government acts in its capacity as an employer. *Treasury Employees v. Von Raab*, 489 U. S. 656, 665 (1989).

The Court discussed this principle in *O'Connor*. There a physician employed by a state hospital alleged that hospital officials investigating workplace misconduct had violated his Fourth Amendment rights by searching his office and seizing personal items from his desk and filing cabinet. All Members of the Court agreed with the general principle that '[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer.' 480 U. S., at 717 (plurality opinion); see also *id.*, at 731 (SCALIA, J., concurring in judgment); *id.*, at 737 (Blackmun, J., dissenting). A majority of the Court further agreed that 'special needs, beyond the normal need for law enforcement,' make the warrant and probable-cause requirement impracticable for government employers. *Id.*, at 725 (plurality opinion) (quoting *New Jersey v. T. L. O.*, 469 U. S. 325, 351 (1985) (Blackmun, J., concurring in judgment); 480 U. S., at 732 (opinion of SCALIA, J.) (quoting same).

The *O'Connor* Court did disagree on the proper analytical framework for Fourth Amendment claims against government employers. A four-Justice plurality concluded that the correct analysis has two steps. First, because 'some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable,' *id.*, at 718, a court must consider '[t]he operational realities of the workplace' in order to determine whether an employee's Fourth Amendment rights are implicated, *id.*, at 717. On this view, 'the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.' *Id.*, at 718. Next,

--- S.Ct. ----

Page 6

--- S.Ct. ----, 2010 WL 2400087 (U.S.)

**(Publication page references are not available for this document.)**

where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation 'for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.' *Id.*, at 725-726.

JUSTICE SCALIA, concurring in the judgment, outlined a different approach. His opinion would have dispensed with an inquiry into 'operational realities' and would conclude 'that the offices of government employees ... are covered by Fourth Amendment protections as a general matter.' *Id.*, at 731. But he would also have held 'that government searches to retrieve work-related materials or to investigate violations of workplace rules--searches of the sort that are regarded as reasonable and normal in the private-employer context--do not violate the Fourth Amendment.' *Id.*, at 732.

Later, in the *Von Raab* decision, the Court explained that 'operational realities' could diminish an employee's privacy expectations, and that this diminution could be taken into consideration when assessing the reasonableness of a workplace search. 489 U. S., at 671. In the two decades since *O'Connor*, however, the threshold test for determining the scope of an employee's Fourth Amendment rights has not been clarified further. Here, though they disagree on whether Quon had a reasonable expectation of privacy, both petitioners and respondents start from the premise that the *O'Connor* plurality controls. See Brief for Petitioners 22-28; Brief for Respondents 25-32. It is not necessary to resolve whether that premise is correct. The case can be decided by determining that the search was reasonable even assuming Quon had a reasonable expectation of privacy. The two *O'Connor* approaches--the plurality's and JUSTICE SCALIA's--therefore lead to the same result here.

### III A

Before turning to the reasonableness of the search, it is instructive to note the parties' disagreement over whether Quon had a reasonable expectation of privacy. The record does establish that OPD, at the outset, made it clear that pager messages were not considered private. The City's Computer Policy stated that '[u]sers should have no expectation of privacy or confidentiality when using' City computers. App. to Pet. for Cert. 152a. Chief Scharf's memo and Duke's

statements made clear that this official policy extended to text messaging. The disagreement, at least as respondents see the case, is over whether Duke's later statements overrode the official policy. Respondents contend that because Duke told Quon that an audit would be unnecessary if Quon paid for the overage, Quon reasonably could expect that the contents of his messages would remain private.

At this point, were we to assume that inquiry into 'operational realities' were called for, compare *O'Connor*, 480 U. S., at 717 (plurality opinion), with *id.*, at 730-731 (opinion of SCALIA, J.); see also *id.*, at 737-738 (Blackmun, J., dissenting), it would be necessary to ask whether Duke's statements could be taken as announcing a change in OPD policy, and if so, whether he had, in fact or appearance, the authority to make such a change and to guarantee the privacy of text messaging. It would also be necessary to consider whether a review of messages sent on police pagers, particularly those sent while officers are on duty, might be justified for other reasons, including performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws. See Brief for Petitioners 35-40 (citing Cal. Public Records Act, Cal. Govt. Code Ann. §6250 *et seq.* (West 2008)). These matters would all bear on the legitimacy of an employee's privacy expectation.

The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. See, e.g., *Olmstead v. United States*, 277 U. S. 438 (1928), overruled by *Katz v. United States*, 389 U. S. 347, 353 (1967). In *Katz*, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. See *id.*, at 360-361 (Harlan, J., concurring). It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

Rapid changes in the dynamics of communication

--- S.Ct. ----

Page 7

--- S.Ct. ----, 2010 WL 2400087 (U.S.)

**(Publication page references are not available for this document.)**

and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. See Brief for Electronic Frontier Foundation et al. 16-20. Another *amicus* points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. See Brief for New York Intellectual Property Law Association 22 (citing Del. Code Ann., Tit. 19, §705 (2005); Conn. Gen. Stat. Ann. §31-48d (West 2003)). At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

Even if the Court were certain that the *O'Connor* plurality's approach were the right one, the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. See 480 U. S., at 715. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

A broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds. For present purposes we assume several propositions *arguendo*: First, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; second, petitioners' review of the transcript constituted a search within the meaning of the Fourth Amendment; and third, the principles applicable to a government employer's search of an employee's physical office apply with at least the

same force when the employer intrudes on the employee's privacy in the electronic sphere.

## B

Even if Quon had a reasonable expectation of privacy in his text messages, petitioners did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts. Although as a general matter, warrantless searches 'are *per se* unreasonable under the Fourth Amendment,' there are 'a few specifically established and well-delineated exceptions' to that general rule. *Katz, supra*, at 357. The Court has held that the 'special needs' of the workplace justify one such exception. *O'Connor*, 480 U. S., at 725 (plurality opinion); *id.*, at 732 (SCALIA, J., concurring in judgment); *Von Raab*, 489 U. S., at 666-667.

Under the approach of the *O'Connor* plurality, when conducted for a 'noninvestigatory, work-related purpose' or for the 'investigatio[n] of work-related misconduct,' a government employer's warrantless search is reasonable if it is 'justified at its inception' and if 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of' the circumstances giving rise to the search. 480 U. S., at 725-726. The search here satisfied the standard of the *O'Connor* plurality and was reasonable under that approach.

The search was justified at its inception because there were 'reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose.' *Id.*, at 726. As a jury found, Chief Scharf ordered the search in order to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's needs. This was, as the Ninth Circuit noted, a 'legitimate work-related rationale.' 529 F. 3d, at 908. The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications.

As for the scope of the search, reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use. The review was also not 'excessively intrusive.' *O'Connor, supra*, at 726 (plurality opinion). Al-

--- S.Ct. ----

Page 8

--- S.Ct. ----, 2010 WL 2400087 (U.S.)

**(Publication page references are not available for this document.)**

though Quon had gone over his monthly allotment a number of times, OPD requested transcripts for only the months of August and September 2002. While it may have been reasonable as well for OPD to review transcripts of all the months in which Quon exceeded his allowance, it was certainly reasonable for OPD to review messages for just two months in order to obtain a large enough sample to decide whether the character limits were efficacious. And it is worth noting that during his internal affairs investigation, McMahon redacted all messages Quon sent while off duty, a measure which reduced the intrusiveness of any further review of the transcripts.

Furthermore, and again on the assumption that Quon had a reasonable expectation of privacy in the contents of his messages, the extent of an expectation is relevant to assessing whether the search was too intrusive. See *Von Raab, supra*, at 671; cf. *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 654-657 (1995). Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises--and given that Quon had received no assurances of privacy--Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations.

From OPD's perspective, the fact that Quon likely had only a limited privacy expectation, with boundaries that we need not here explore, lessened the risk that the review would intrude on highly private details of Quon's life. OPD's audit of messages on Quon's employer-provided pager was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his home phone line, would have been. That the search did reveal intimate details of Quon's life does not make it unreasonable, for un-

der the circumstances a reasonable employer would not expect that such a review would intrude on such matters. The search was permissible in its scope.

The Court of Appeals erred in finding the search unreasonable. It pointed to a 'host of simple ways to verify the efficacy of the 25,000 character limit ... without intruding on [respondents'] Fourth Amendment rights.' 529 F. 3d, at 909. The panel suggested that Scharf 'could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if [OPD] wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to [OPD] to review the redacted transcript.' *Ibid*.

This approach was inconsistent with controlling precedents. This Court has 'repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment.' *Vernonia, supra*, at 663; see also, e.g., *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U. S. 822, 837 (2002); *Illinois v. Lafayette*, 462 U. S. 640, 647 (1983). That rationale 'could raise insuperable barriers to the exercise of virtually all search-and-seizure powers,' *United States v. Martinez-Fuerte*, 428 U. S. 543, 557, n. 12 (1976), because 'judges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished,' *Skinner*, 489 U. S., at 629, n. 9 (internal quotation marks and brackets omitted). The analytic errors of the Court of Appeals in this case illustrate the necessity of this principle. Even assuming there were ways that OPD could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable.

Respondents argue that the search was *per se* unreasonable in light of the Court of Appeals' conclusion that Arch Wireless violated the SCA by giving the City the transcripts of Quon's text messages. The merits of the SCA claim are not before us. But even if the Court of Appeals was correct to conclude that the SCA forbade Arch Wireless from turning over the transcripts, it does not follow that petitioners' actions



--- S.Ct. ----

Page 9

--- S.Ct. ----, 2010 WL 2400087 (U.S.)

**(Publication page references are not available for this document.)**

were unreasonable. Respondents point to no authority for the proposition that the existence of statutory protection renders a search *per se* unreasonable under the Fourth Amendment. And the precedents counsel otherwise. See *Virginia v. Moore*, 553 U. S. 164, 168 (2008) (search incident to an arrest that was illegal under state law was reasonable); *California v. Greenwood*, 486 U. S. 35, 43 (1988) (rejecting argument that if state law forbade police search of individual's garbage the search would violate the Fourth Amendment). Furthermore, respondents do not maintain that any OPD employee either violated the law him- or herself or knew or should have known that Arch Wireless, by turning over the transcript, would have violated the law. The otherwise reasonable search by OPD is not rendered unreasonable by the assumption that Arch Wireless violated the SCA by turning over the transcripts.

Because the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable under the approach of the *O'Connor* plurality. 480 U. S., at 726. For these same reasons--that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification--the Court also concludes that the search would be 'regarded as reasonable and normal in the private-employer context' and would satisfy the approach of JUSTICE SCALIA's concurrence. *Id.*, at 732. The search was reasonable, and the Court of Appeals erred by holding to the contrary. Petitioners did not violate Quon's Fourth Amendment rights.

## C

Finally, the Court must consider whether the search violated the Fourth Amendment rights of Jerilyn Quon, Florio, and Trujillo, the respondents who sent text messages to Jeff Quon. Petitioners and respondents disagree whether a sender of a text message can have a reasonable expectation of privacy in a message he knowingly sends to someone's employer-provided pager. It is not necessary to resolve this question in order to dispose of the case, however. Respondents argue that because 'the search was unreasonable as to Sergeant Quon, it was also unreasonable as to his correspondents.' Brief for Respondents 60 (some capitalization omitted; boldface deleted). They make no corollary argument that the search, if reasonable as to Quon, could nonetheless be unreasonable as to Quon's correspondents. See *id.*,

at 65-66. In light of this litigating position and the Court's conclusion that the search was reasonable as to Jeff Quon, it necessarily follows that these other respondents cannot prevail.

\* \* \*

Because the search was reasonable, petitioners did not violate respondents' Fourth Amendment rights, and the court below erred by concluding otherwise. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Although I join the Court's opinion in full, I write separately to highlight that the Court has sensibly declined to resolve whether the plurality opinion in *O'Connor v. Ortega*, 480 U. S. 709 (1987), provides the correct approach to determining an employee's reasonable expectation of privacy. See *ante*, at 9. Justice Blackmun, writing for the four dissenting Justices in *O'Connor*, agreed with JUSTICE SCALIA that an employee enjoys a reasonable expectation of privacy in his office. 480 U. S., at 737. But he advocated a third approach to the reasonable expectation of privacy inquiry, separate from those proposed by the *O'Connor* plurality and by JUSTICE SCALIA, see *ante*, at 8. Recognizing that it is particularly important to safeguard 'a public employee's expectation of privacy in the workplace' in light of the 'reality of work in modern time,' 480 U. S., at 739, which lacks 'tidy distinctions' between workplace and private activities, *ibid.*, Justice Blackmun argued that 'the precise extent of an employee's expectation of privacy often turns on the nature of the search,' *id.*, at 738. And he emphasized that courts should determine this expectation in light of the specific facts of each particular search, rather than by announcing a categorical standard. See *id.*, at 741.

For the reasons stated at page 13 of the Court's opinion, it is clear that respondent Jeff Quon, as a law enforcement officer who served on a SWAT Team, should have understood that all of his work-related actions--including all of his communications on his official pager--were likely to be subject to public and legal scrutiny. He therefore had only a limited expectation of privacy in relation to this particular audit of

--- S.Ct. ---

Page 10

--- S.Ct. ---, 2010 WL 2400087 (U.S.)

**(Publication page references are not available for this document.)**

his pager messages. Whether one applies the reasoning from Justice O'Connor's opinion, JUSTICE SCALIA's concurrence, or Justice Blackmun's dissent [FN\*] in *O'Connor*, the result is the same: The judgment of the Court of Appeals in this case must be reversed.

FN\*. I do not contend that Justice Blackmun's opinion is controlling under *Marks v. United States*, 430 U. S. 188, 193 (1977), but neither is his approach to evaluating a reasonable expectation of privacy foreclosed by *O'Connor*. Indeed, his approach to that inquiry led to the conclusion, shared by JUSTICE SCALIA but not adopted by the *O'Connor* plurality, that an employee had a reasonable expectation of privacy in his office. See *O'Connor v. Ortega*, 480 U. S. 709, 718 (1987) (plurality opinion). But Justice Blackmun would have applied the Fourth Amendment's warrant and probable-cause requirements to workplace investigatory searches, *id.*, at 732 (dissenting opinion), whereas a majority of the Court rejected that view, see *id.*, at 722, 725 (plurality opinion); *id.*, at 732 (SCALIA, J., concurring in judgment). It was that analysis--regarding the proper standard for evaluating a search when an employee has a reasonable expectation of privacy--that produced the opposite result in the case. This case does not implicate that debate because it does not involve an investigatory search. The jury concluded that the purpose of the audit was to determine whether the character limits were sufficient for work-related messages. See *ante*, at 6.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the Court's opinion except for Part III-A. I continue to believe that the 'operational realities' rubric for determining the Fourth Amendment's application to public employees invented by the plurality in *O'Connor v. Ortega*, 480 U. S. 709, 717 (1987), is standardless and unsupported. *Id.*, at 729-732 (SCALIA, J., concurring in judgment). In this case, the proper threshold inquiry should be not whether the Fourth Amendment applies to messages on *public* employees' employer-issued pagers, but whether it applies *in general* to such messages on employer-

issued pagers. See *id.*, at 731.

Here, however, there is no need to answer that threshold question. Even accepting at face value Quon's and his co-plaintiffs' claims that the Fourth Amendment applies to their messages, the city's search was reasonable, and thus did not violate the Amendment. See *id.*, at 726 (plurality opinion); *id.*, at 732 (SCALIA, J., concurring in judgment). Since it is unnecessary to decide whether the Fourth Amendment applies, it is unnecessary to resolve which approach in *O'Connor* controls: the plurality's or mine. [FN\*] That should end the matter.

The Court concedes as much, *ante*, at 9, 12-17, yet it inexplicably interrupts its analysis with a recitation of the parties' arguments concerning, and an excursus on the complexity and consequences of answering, that admittedly irrelevant threshold question, *ante*, at 9-12. That discussion is unnecessary. (To whom do we owe an *additional* explanation for declining to decide an issue, once we have explained that it makes no difference?) It also seems to me exaggerated. Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court's implication, *ante*, at 10, that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)--or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions--is in my view indefensible. The-times-they-are-a-changin' is a feeble excuse for disregard of duty.

Worse still, the digression is self-defeating. Despite the Court's insistence that it is agnostic about the proper test, lower courts will likely read the Court's self-described 'instructive' expatiation on how the *O'Connor* plurality's approach would apply here (if it applied), *ante*, at 9-11, as a heavy-handed hint about how *they* should proceed. Litigants will do likewise, using the threshold question whether the Fourth Amendment is even implicated as a basis for bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees' use of electronic media. In short, in saying why it is not saying more, the Court says much more than it should.

--- S.Ct. ----

--- S.Ct. ----, 2010 WL 2400087 (U.S.)

Page 11

**(Publication page references are not available for this document.)**

The Court's inadvertent boosting of the *O'Connor* plurality's standard is all the more ironic because, in fleshing out its fears that applying that test to new technologies will be too hard, the Court underscores the unworkability of that standard. Any rule that requires evaluating whether a given gadget is a 'necessary instrumen[t] for self-expression, even self-identification,' on top of assessing the degree to which 'the law's treatment of [workplace norms has] evolve[d],' *ante*, at 11, is (to put it mildly) unlikely to yield objective answers.

I concur in the Court's judgment.

FN\*. Despite his disclaimer, *ante*, at 2, n. (concurring opinion), JUSTICE STEVENS' concurrence implies, *ante*, at 1-2, that it is also an open question whether the approach advocated by Justice Blackmun in his *dissent* in *O'Connor* is the proper standard. There is room for reasonable debate as to which of the two approaches advocated by Justices whose votes supported the judgment in *O'Connor*--the plurality's and mine--is controlling under *Marks v. United States*, 430 U. S. 188, 193 (1977). But unless *O'Connor* is overruled, it is assuredly false that a test that would have produced the *opposite* result in that case is still in the running.

--- S.Ct. ----, 2010 WL 2400087 (U.S.)

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