**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| **FRANK SCHMALZ,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**VILLAGE OF NORTH RIVERSIDE, et al.,**<br><br>**Defendants.** | **No. 13 C 8012**<br><br>**Magistrate Judge Mary M. Rowland** |

## REPORT AND RECOMMENDATION

For the reasons set forth below, the Court recommends that Plaintiff's renewed motion for Rule 37 sanctions for Defendants' failure to produce text messages and the spoliation of evidence [179] be granted in part and denied in part.[1]

## I. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Frank Schmalz ("Plaintiff") brought this action against Defendants in November 2013. (Dkt. 1). As alleged in his amended complaint, Plaintiff was a police sergeant employed by the Village of North Riverside, Illinois. (Compl. ¶ 21). He was also president of the local Fraternal Order of Police (FOP), Lodge 110, and was the FOP chief negotiator with the Village. (*Id.* ¶ 4). Finally, he served in a supervisory capacity on a task force, known as West Suburban Enhanced Drug & Gang En-

[1] This ruling takes the form of a Report and Recommendation because the motion seeks a judgement on sanctions under rule 37, which are "dispositive." *Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d. 856, 868–69 (7th Cir. 1996) (finding that rulings on sanctions are "dispositive" and require a magistrate judge to issue a report and recommendation).

forcement (WEDGE). Plaintiff's claims arise from his union activity and endorsement of former trustee Rocco Desantis in Desantis' unsuccessful run for Village Mayor in April 2013. (*Id.* ¶ 22). Defendant Hermanek won the election and served as Mayor beginning in May 2013. (*Id.* ¶ 81). After the election, the new police chief, Defendant Neimann, removed Plaintiff from the WEDGE taskforce and failed to promote him to lieutenant, despite Plaintiff having passed the lieutenants' promotional examination. (*Id.* ¶¶ 24, 51, 57–60). Plaintiff brought this action pursuant to 42 U.S.C. § 1983, asserting claims for: violations of his First Amendment rights, mandamus; and a state-law claim for defamation *per se*.

In his February 2016 deposition, Defendant Niemann revealed that he had "at least 50" text message communications before and after the election with Defendant Hermanek about the police department, who he would promote to the Commander position, why he did not want a lieutenant's position, and about Plaintiff specifically. *See* (Dkt 179-3, Ex. 3 (Excerpts of L. Niemann Dep.), at 5–10). On June 8, 2017, Plaintiff issued a discovery request for the text messages identified in Defendant Neimann's deposition. (Dkt. 168 at 6). Defendants answered that there were no texts to be produced because "neither defendant Hermanek nor defendant Niemann still possess their cell phones from that time period." (*Id.*). On October 12, 2017, Plaintiff filed a motion to compel production of the text messages identified in Defendant Niemann's deposition or in the alternative to permit an adverse inference as a sanction if the text messages had been destroyed. (Dkt. 163, at 16–17). On October 31, 2017, the Court granted in part Plaintiff's motion to produce text messages

between Defendant Niemann and Defendant Hermanek. (Dkt. 170). The Court found that the text messages are relevant and ordered the parties to confer "regarding what information Defendants are going to provide regarding when the two telephones at issue were replaced and what measures, if any, were taken to preserve the pertinent text messages." (*Id.*).[2]

On November 21, 2017, Defendants produced a privilege log to Plaintiff, indicating that on September 2013, Defendants received a "litigation hold" letter relating to Plaintiff. *See* (Dkt. 179-5, at 1–2, Doc. Nos. 16, 18). Further, on December 5, 2017, Defendants provided a letter to Plaintiff with additional information regarding attempts to preserve the text messages at issue. *See* (Dkt. 179-2, at 2–3). In the letter, Defendants stated that the Village did not implement any back-up procedures to preserve cell phone information in 2013, and that Defendants are not aware of any measures taken to preserve ESI from cell phones in 2013. (*Id.*). Defendants indicated that Defendant Neimann used a "Droid Razor HD" cell phone provided by and paid for by the Village in 2013; that he replaced his "Droid Razor HD" phone with an iPhone on January 22, 2014; that he has "upgraded his phone" twice since January 22, 2014; that Defendant Neimann cannot locate the Droid Razor HD; and that his current device does not contain the lost text messages. (*Id.*). Defendants stated that Defendant Hermanek had private cell phone service through Sprint in 2013 before and after the election, as the Village does not provide

[2] At the motion hearing on October 31, 2017, the Court left open the possibility of allowing additional discovery, including taking deposition testimony on the limited issue of efforts made to preserve the text messages. *See* (Dkt. 179-1, at 6–9). Plaintiff did not request additional discovery before filing the instant motion.

or pay for cell phone service for its Mayor; that Defendant Hermanek recycled his cell phone in April 2017; that he cannot locate any cell phones that he used before April 2017; and that his current device does not contain the lost messages. (*Id.*). Defense counsel noted that the letter "was prepared after an extensive search by the defendants and is reflective of all information available." (*Id.*).

On December 18, 2017, Plaintiff filed a renewed motion for Rule 37 sanctions for Defendants' failure to produce text messages and the spoliation of evidence. (Dkt. 179). In the instant motion, Plaintiff requests that: (1) "adverse inferences and evidentiary presumptions will be drawn in favor of Plaintiff and against Defendants arising from Defendants' spoliation of material evidence"; and (2) Defendants will be barred from "presenting evidence claims or defenses that are inconsistent with the adverse inferences and evidentiary presumptions that must be drawn in Plaintiff's favor arising from Defendants' spoliation of material evidence." (*Id.* at 15).

## II. DISCUSSION

### A. Legal standard for spoliation of evidence

"Spoliation of evidence occurs when one party destroys evidence relevant to an issue in the case." *Smith v. United States*, 293 F.3d 984, 988 (7th Cir. 2002). Federal Rule of Civil Procedure 37(e) provides remedies that a federal district court may order when a party fails to preserve or destroys electronically stored information ("ESI"). Effective December 1, 2015, Rule 37(e) was amended to "foreclose[ ] reliance on inherent authority or state law to determine when certain measures would be used." Fed. R. Civ. P. 37(e), 2015 Amendment Advisory Committee Notes. "Amend-

ed Rule 35(e), relative to its predecessor, significantly limits a court's discretion to impose sanctions for the loss or destruction of ESI." *Jenkins v. Woody*, No. 3:15CV355, 2017 WL 362475, at *12–13 (E.D. Va. Jan. 21, 2017). The purpose of the amendment was, in part, "to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve [ESI]." Fed. R. Civ. P. 37(e), 2015 Amendment Advisory Committee Notes. Amended Rule 37(e) provides:

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
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> (1) upon finding of prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
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> (2) only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
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> (A) presume that the information was unfavorable to the party;
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> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
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> (C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e). Sanctions under subsection (e)(1) require a finding of prejudice, and are limited to "measures no greater than necessary to cure the prejudice." *Id*. By contrast, sanctions under subsection (e)(2) require "a finding that the party acted with the intent to deprive another party of the information's use in the litigation." *Id*. Subsection (e)(2) applies to the most severe sanctions available under Rule 37 including permissive or mandatory adverse inference instructions to the jury,

dismissal or entry of a default judgment. *See* Fed. R. Civ. P. 37(e), 2015 Amendment Advisory Committee Notes.

**B. Analysis**

**1. Duty to preserve and breach of that duty**

Under the amended Rule 37(e), a court must first make a finding that the following elements are met before determining whether sanctions are appropriate: (a) the ESI "should have been preserved in the anticipation or conduct of litigation"; (b) "a party failed to take reasonable steps to preserve" the ESI; (c) the ESI was "lost" as a result; and (d) the ESI "could not be restored or replaced by additional discovery." Fed. R. Civ. P. 37(e); 2015 Amendment Advisory Committee Notes.

Defendants do not dispute that these elements are present. Indeed, Defendants' duty to preserve the text messages arose as early as August 2013 when they received a litigation hold letter. *See* (Dkt. 207-1). Further, Defendants admit that they failed to take *any* steps to preserve the text messages. *See* (Dkt. 179-2, at 2–3). Likewise, Defendants admit that the text messages have been lost and cannot be replaced by additional discovery as they have exhausted all efforts to retrieve the messages. *See* (Dkt. 179-2, at 2–3). Given that these predicate elements are met, the Court next determines whether Plaintiff is prejudiced from loss of the text messages. *See* Fed. R. Civ. P. 37(e)(1).

**2. Prejudice under Rule 37(e)(1)**

Establishing prejudice when the ESI has been destroyed and the contents are unknown can be challenging. In recognition of this difficulty, the Advisory Committee states:

> The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in some such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Fed. R. Civ. P. 37(e), 2015 Amendment Advisory Committee Notes. Accordingly, Rule 37(e) does not explicitly place the burden of proving or disproving prejudice on either party, and the court is given great discretion in assessing prejudice.

"To suffer substantive prejudice due to spoliation of evidence, the lost evidence must prevent the aggrieved party from using evidence essential to its underlying claim." *In re Old Banc One shareholders Securities Litig.*, 2005 WL 3372783, at *4 (N.D. Ill. Dec. 8, 2005) (*citing Langley by Langley v. Union Elec. Co.*, 107 F.3d 510, 515 (7th Cir. 1997). As such, "[t]o evaluate prejudice, the court must have some evidence regarding the particular nature of the missing ESI." *Snider v. Danfoss, LLC*, No. 15 CV 4748, 2017 WL 2973464, at *5 (N.D. Ill. July 12, 2017), report and recommendation adopted, No. 1:15-CV-04748, 2017 WL 3268891 (N.D. Ill. Aug. 1, 2017) (*citing Eshelman v. Puma Biotechnology, Inc.*, No. 7:16-CV-18-D, 2017 WL 2483800, at *5 (E.D.N.C. June 7, 2017)). Here, Defendant Niemann revealed in his

February 2016 deposition that he exchanged approximately 50 text messages before and after the election with Defendant Hermanek about the police department, who he would promote to the Commander position, why he did not want a lieutenant's position, and about Plaintiff specifically. *See* (Dkt 179-3, Ex. 3 (Excerpts of L. Niemann Dep.), at 5–10). These text messages are certainly relevant as they involve private communications between the primary defendants and decision-makers in the case during a critical time period, and the alleged subject matter of the text messages involve issues highly pertinent to the underlying claim, including promotions in the police department and the Plaintiff specifically.

Defendants' argument that Plaintiff is not prejudiced because "there are other means to obtain the contents of the conversations from the defendants, including prior oral discovery and potential trial testimony," (Def.'s Resp., Dkt. 196 at 5), is unavailing. "A party has the right to prosecute its case in the way it deems fit based on all available relevant evidence." *Larson v. Bank One Corp.,* No. 00 C 2100, 2005 WL 4652509, at *14 (N.D. Ill. Aug. 18, 2005); *see also Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 392, 91 L. Ed. 451 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."). The content of text messages cannot be replaced simply by eliciting testimony from the Defendants, and by having Plaintiff accept that testimony rather than relying on the actual messages to use as they deem fit. Without the lost text messages, Plaintiff is deprived of the opportunity to know "the precise nature and frequency" of those private communications, which occurred during a critical time period. *See Ronnie Van*

*Zant, Inc. v. Pyle,* 270 F. Supp. 3d 656, 670 (S.D.N.Y. 2017) (finding prejudice when text messages were lost and "the precise nature and frequency of those communications cannot be verified"). Accordingly, the Court finds that Plaintiff has suffered prejudice as a result of the spoliation of highly relevant text messages.

Upon a finding of prejudice, a court may order "measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1). Under Subdivision (e)(1), the court has much discretion to fashion an appropriate sanction, and "[t]he range of such measures is quite broad if they are necessary for this purpose." Fed. R. Civ. P. 37(e), 2015 Amendment Advisory Committee Notes. The Advisory Committee offers the following examples of available sanctions under subdivision (e)(1):

> In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies.

*Id.* The Advisory Committee cautions that "[c]are must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation." *Id.*

Here, Plaintiff requests, at a minimum, a mandatory adverse inference sanction. This is considered one of the most severe sanctions and is governed by subdivision (e)(2), which requires a finding of intent.[3] As such, the Court next turns to whether

[3] Under Subdivision (e)(2), if the court finds that a party intended to deprive another party of the use of the ESI, then prejudice is presumed. "This is because the finding of intent re-

Defendants acted "with the intent to deprive" Plaintiff of the text messages that were destroyed. Fed. R. Civ. P. 37(e)(2).

**3. "Intent to deprive" under Rule 37(e)(2)**

Only if the Court finds that Defendants intended to deprive Plaintiff of the use of the text messages may the Court impose an adverse inference sanction as requested by Plaintiff. A finding of negligence, or even gross negligence, would not satisfy the intent requirement under subsection (e)(2). The Advisory Committee explains:

> Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference.

Fed. R. Civ. P. 37(e), 2015 Amendment Advisory Committee Notes. Indeed, the Advisory Committee specifically states that the amended Rule 37(e)(2) "rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence." *Id.* Accordingly, to impose the most severe sanctions under subsection (e)(2), a finding of bad faith is required. *See Martinez v. City of Chicago*, No. 14-CV-369, 2016 WL 3538823, at *23–24 (N.D. Ill. June 29, 2016).

Plaintiff argues that the fact that Defendants took no reasonable steps to identify or preserve the text messages in question despite having litigation hold letter as

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quired by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position." *See* Fed. R. Civ. P. 37(e), 2015 Amendment Advisory Committee Notes.

early as August 2013 is evidence of bad faith. (*See* Pl.'s Mem., Dkt. 179 at 12–14). Plaintiff cites to several out of circuit cases for the proposition that intent and bad faith can be demonstrated by failing to take reasonable steps to preserve ESI. In these cases, however, the courts identified other factors *in addition to* failing to take reasonable steps to preserve ESI to support a finding of intent. In *GN Netcom*, the court justified its finding of "bad faith with intent to deprive" by referring to defendant's "double" deletion of emails and "his instructing of others to delete emails." *GN Netcom, Inc. v. Plantronics, Inc.*, No. CV 12-1318-LPS, 2016 WL 3792833, at *7 (D. Del. July 12, 2016). In *O'Berry*, the court pointed to "irresponsible and shiftless behavior" including defendants' failure to contact plaintiff about the documents for an extended time period despite numerous requests for the documents by plaintiff's counsel. *O'Berry v. Turner*, No. 7:15-CV-00064-HL, 2016 WL 1700403, at *4 (M.D. Ga. Apr. 27, 2016). In *Brown Jordan*, the court found that defendant's "deliberate deletion and destruction of evidence and lack of candor concerning these actions unquestionably constitutes bad-faith litigation conduct." *Brown Jordan Int'l, Inc. v. Carmicle*, No. 0:14-CV-60629, 2016 WL 815827, at *36–37 (S.D. Fla. Mar. 2, 2016), *aff'd*, 846 F.3d 1167 (11th Cir. 2017). After an evidentiary hearing, the court explained its bad faith finding by referencing the defendant's unbelievable excuse for the destruction of his password (that his 8 year old son destroyed it) as well as defendant's implausible explanations, other than an affirmative act on his part, for the fact that 2.4 million emails were accessed on his personal computer 48 hours before a forensic examination was to be conducted. Similarly, in *Internmatch*, the

court concluded that defendants "willfully spoliated evidence" in bad faith after finding that defendants undertook "extraordinary measures" to mislead opposing counsel, including providing an unbelievable assertion that the ESI was lost due to a power surge. *Internmatch, Inc. v. Nxtbigthing, LLC*, No. 14-CV-05438-JST, 2016 WL 491483, at *11 (N.D. Cal. Feb. 8, 2016), *appeal dismissed* (June 10, 2016) ("The Court also finds Defendants' evidence that a [power] surge occurred in the first place is unbelievable. Not only is the alleged chronology of events highly improbable, but Defendants' story is filled with inconsistencies"). Here, Plaintiff points to no such additional factors to support a finding of intent, like "double deletion", instructing others to destroy ESI, or undertaking "extraordinary measures" to mislead opposing counsel.

In his reply, Plaintiff argues that, contrary to Defendants' assertions, "courts in this district have stated under similar circumstances that adverse inference sanctions are not only appropriate but also necessary." (*See* Pl.'s Reply, Dkt 207 at 5). To support this argument, Plaintiff cites to two cases in this district, ruled on prior to the 2015 amendment to Rule 37(e). As noted above, "Amended Rule 37(e), relative to its predecessor, significantly limits a court's discretion to impose sanctions for the loss or destruction of ESI." *Jenkins*, 2017 WL 362475, at *12–13. Moreover, the cases cited are distinguishable from the matter at hand. In *Krumwiede*, the court found willfulness and bad faith evidenced by plaintiff's: (1) continuing to alter, modify, and destroy thousands of potentially relevant files immediately after receiving notice that the contents of the files were the subject of litigation; and then (2) lying to

the court about the date he received notice. *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05 C 3003, 2006 WL 1308629, at *9–10 (N.D. Ill. May 8, 2006). Here, however, Plaintiff cites to no similar evidence of bad faith such as lying to the court, or altering and destroying thousands of files immediately following receipt of notice of litigation. In *Wiginton*, the court issued its ruling under its inherent authority, noting that sanctions under Rule 37 were not available because "no order was in place directing [defendant] to preserve any electronic evidence." *Wiginton v. Ellis*, No. 02 C 6832, 2003 WL 22439865, at *3 (N.D. Ill. Oct. 27, 2003). Further, although the court found that "knowing that relevant documents would be destroyed if they did not act to preserve them, is evidence of bad faith," the court dismissed the motion to sanction without prejudice, declining to impose sanctions until the parties had a chance to review three months of back up tapes of the lost ESI. *Wiginton*, 2003 WL 22439865, at *7–8.

In his motion, Plaintiff also notes that "[c]ourts in this district have held that a party's failure 'to obtain documents from more than three employees at the first sign of litigation constitutes *gross negligence*.'" (Pl.'s Mem., Dkt 179 at 14) (emphasis added) (citing *Jones v. Bremen High Sch. Dist. 228*, No. 08C3548, 2010 WL 2106640, at *8 (N.D. Ill. May 25, 2010)). As indicated above, gross negligence is insufficient to warrant sanctions under the Amended Rule 37(e)(2).

The Court agrees with Plaintiff that Defendants' behavior rises above the level of "inadvertent negligence." (*See* Pl.'s Reply, Dkt. 207, at 5). The Court is disturbed that Defendants admit to failing to take *any* steps to identify and preserve the text

messages in question despite having a duty to preserve relevant evidence arising as early as August 2013, when Defendants received a litigation hold letter. This is particularly troublesome considering Defendant Hermanek himself is a lawyer and should know the significance of a litigation hold letter. (*See* Pl.'s Reply, Dkt. 207, at 4). However, absent additional evidence of deliberate intent to deprive Plaintiff of use of the text messages, the Court finds that Defendants' behavior, while certainly constituting gross negligence, does not rise to the level of bad faith. The Court finds that Plaintiff has not presented sufficient evidence to make a finding of willfulness or bad faith required to find intent. *See Below by Below v. Yokohama Tire Corp.*, No. 15-CV-529-WMC, 2017 WL 764824, at *2 (W.D. Wis. Feb. 27, 2017) (finding plaintiff's failure to preserve "possible electronic evidence" when plaintiff's counsel "certainly should have" taken additional measures, "falls somewhere between negligence and gross negligence, but perhaps short of bad faith or intentional conduct requiring an adverse inference instruction."); *Mcqueen v. Aramark Corp.,* No. 2:15-CV-492-DAK-PMW, 2016 WL 6988820, at *3–4 (D. Utah Nov. 29, 2016) (although finding that defendant failed to take reasonable steps to preserve ESI after receiving a preservation letter, the court declined to find that defendants actions "were intentional or that its conduct establishes bad faith;" rather, the court concluded that defendant "acted with gross negligence, which is insufficient to show bad faith or intent."); *Martinez*, 2016 WL 3538823, at *24 (finding that plaintiff failed to establish that defendants acted in bad faith with regard to mislabeling surveillance videos, noting that negligence or even gross negligence do not warrant an adverse

inference instruction under the amended Rule 37(e)(2)); *Jenkins*, 2017 WL 362475, at *17 ("even considering the circumstantial evidence . . . the Court does not find sufficient proof of intent directed toward depriving Plaintiff of use of the Video Data to justify imposition of the harsh sanctions of default or an adverse inference instruction under the new Rule 37(e).")).

Because the Court finds that Defendants acted with gross negligence, which is insufficient to support a finding of intent as required under Rule 37(e)(2), the Court concludes that a lesser sanction under Rule 37(e)(1) is appropriate. The Advisory Committee states:

> [S]ubdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Fed. R. Civ. P. 37(e), 2015 Amendment Advisory Committee Notes. To address the prejudice resulting from Defendant's spoliation of evidence, the Court recommends that the parties shall be allowed to present evidence to the jury regarding the destruction of the text messages and the likely relevance of the lost information; and that the jury shall be instructed that it may consider this information when making its decision. However, the jury shall not be given specific instructions on any presumption or inference based on the destruction of the text messages. The Court

leaves it to the district judge to determine the appropriate means for presenting the evidence and arguments at trial on this issue.

**4. Attorneys' fees**

Plaintiff requests "the reasonable fees, costs and expenses incurred in seeking this discovery and obtaining this relief." (Pl.'s Mem., Dkt. 179 at 3). Defendants do not address Plaintiff's fee request in their response. Under Rule 37(a), "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5). Exceptions to this rule include:

> **(i)** the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
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> **(ii)** the opposing party's nondisclosure, response, or objection was substantially justified; or
>
> **(iii)** other circumstances make an award of expenses unjust.

*Id.* None of these three identified exceptions are applicable in this case. Because the Court recommends granting Plaintiff's motion for sanctions, and because Defendants make no response to Plaintiff's fee request, the Court recommends a finding that Plaintiff is entitled to the reasonable attorney's fees, limited to those fees incurred in filing the instant motion. *See Cahill v. Dart*, No. 13-CV-361, 2016 WL 7034139, at *5 (N.D. Ill. Dec. 2, 2016) (finding prevailing plaintiff entitled to reasonable attorneys' fees incurred in making the motion for sanctions); *Alabama Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 747 (N.D. Ala. 2017), motion to cer-

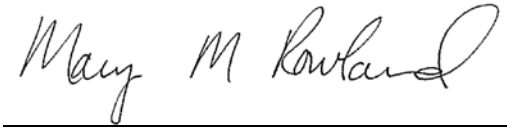
tify appeal denied, No. 2:11-CV-03577-RDP, 2017 WL 4572484 (N.D. Ala. Apr. 3, 2017) (awarding reasonable attorney's fees for successfully prosecuting motion for sanctions).

## III. CONCLUSION

For the foregoing reasons, it is recommended that Plaintiff's renewed motion for Rule 37 sanctions for Defendants' failure to produce text messages and the spoliation of evidence [179] be GRANTED in part, DENIED in part. To address the prejudice resulting from Defendant's spoliation of evidence, the Court recommends that the parties shall be allowed to present evidence to the jury regarding the spoliated evidence and the likely relevance of the lost information; and that the jury be instructed that it may consider this information when making its decision. Further, the Court recommends that Plaintiff shall be awarded reasonable attorney's fees and costs incurred in filing the instant motion. Specific written objections to this Report and Recommendation may be served and filed within 14 days from the date that this recommendation is served. Fed. R. Civ. P. 72. Failure to file objections with the district court within the specified time will result in a waiver of the right to appeal all findings, factual and legal, made by this Court in the Report and Recommendation. *Lorentzen v. Anderson Pest Control*, 64 F.3d 327, 330 (7th Cir. 1995).

E N T E R:

Dated: March 23, 2018



MARY M. ROWLAND
United States Magistrate Judge