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NOVEL DATA TYPES

# Chapter Two: Social Media Data in Ediscovery

## Key Case Law Rulings Regarding Social Media Data in Ediscovery

Numerous case law rulings have come down over the years regarding evidence from social media platforms. Here are several notable cases involving social media data in ediscovery.

- Lester v. Allied Concrete Co. (Va. Cir. Ct. September 6, 2011)
- People v. Harris (N.Y.C. Crim. Ct., June 30, 2012)
- EEOC v. Original Honeybaked Ham Co. of Georgia (D. Colo. November 7, 2012)
- Shenwick v. Twitter, Inc. (N.D. Cal. February 7, 2018)
- Forman v. Henkin (N.Y. February 13, 2018)
- Vasquez-Santos v. Mathew (N.Y. App. Div. January 24, 2019)
- Hampton v. Kink, et al. (S.D. Ill. January 13, 2021)
- Brown v. SSA Atlantic (S.D. Ga. March 16, 2021)
- Torgersen v. Siemens Bldg. Tech. et al. (N.D. Ill. May 24, 2021)
- State v. Jesenya O. (N.M. June 16, 2022)

[redacted]

# CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

Isaiah Lester,
Administrator
of the Estate of
Jessica Lynn Scott Lester,
deceased

v.

Allied Concrete Co.
and William Donald Sprouse

Case No. CL08-150

Isaiah Lester

v.

Allied Concrete Co.
and William Donald Sprouse

Case No. CL09-223

[redacted]

BY JUDGE EDWARD L. HOGSHIRE

September 6, 2011

On the 27th day of May 2011, came the parties, Isaiah Lester ("Lester"), Administrator of the Estate of Jessica Lynn Scott Lester, by his counsel, Malcolm P. McConnell, III, Esq., and Defendants Allied Concrete Company ("Allied") and William Donald Sprouse, by their counsel, David M. Tafuri, Esq., Rory E. Adams, Esq., John W. Zunka, Esq., Richard H. Milnor, Esq., and John M. Roche, Esq., and came the beneficiaries, Gary C. Scott and Jeannine Scott, by their counsel, Joseph A. Sanzone, and came Matthew B.

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Murray, Esq., by his counsel, Thomas Williamson, Esq., and Marlina Smith, by her counsel, M. Bryan Slaughter, Esq., and Malcolm P. McConnell, III, Esq., by his counsel, Robert T. Hall, Esq., for a hearing upon Defendants' Post-Trial Motions, including Motions for Sanctions against Matthew B. Murray and Isaiah Lester, and Defendants' Post-Trial Motion for Mistrial for Newly Discovered Juror Bias. After careful review of the record in this case, including, but not limited to, deposition, trial and hearing transcripts and accompanying exhibits, legal memoranda, and arguments of counsel, the Court hereby renders the following findings and conclusions.

## I. *Procedural Background*

These civil actions, seeking monetary damages for personal injuries and wrongful death from an accident which occurred on June 21, 2007, were consolidated for trial in this Court by virtue of an Order dated August 3, 2009. Plaintiff Lester alleges that the Defendants, Allied and Sprouse, were negligent in causing an accident which resulted in the death of Jessica Lynn Scott Lester, Lester's wife, and which caused injury to himself. Lester filed suit as Administrator and beneficiary of his wife's estate, as well as on his own behalf, for injuries suffered in the accident of June 21, 2007, and has named as additional statutory beneficiaries the parents of Jessica Scott Lester, Gary C. Scott and Jeannine Scott.

Soon after the cases were consolidated, disputes over discovery-related issues and disagreements between counsel intensified, resulting in the Court's granting Defendants' initial Motion for Continuance. As the second trial date approached, Defendants filed a Second Motion for Continuance, premised in part on Plaintiff's failure to disclose the contents of Lester's Facebook account. In a hearing on March 3, 2009, relating to that motion, Murray accused Tafuri, co-counsel for Defendants, of "hacking" into Lester's Facebook account.

Denying Murray's accusations regarding hacking, Defendants filed a Motion for Sanctions against Murray under Virginia Code § 8.01-271.1 and Rule 4:1(g) of the Rules of the Supreme Court of Virginia.

Asserting that Murray had not complied with certain discovery requests, specifically Request No. 10 of Defendants' Fourth Interrogatory and Requests for Production of Documents, which sought the contents of Lester's Facebook account, Defendants filed a Motion to Compel Plaintiffs to file a complete response.

Following a May 14, 2009, *ore tenus* hearing, the Court entered an Order on June 28, 2010, in which the Court found that "[r]easonable inquiry by Plaintiff's counsel [Murray] would have revealed that there was no reasonable ground for such charges based on the facts available to him," and that such unfounded accusations violated Virginia Code § 8.01-271.1 as well as Rule 4:1(g) of the Rules of the Supreme Court of Virginia.

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Murray was ordered to pay reasonable costs and attorneys' fees associated with defending the groundless accusations and prosecuting the motion for sanctions, the total sum to be determined at a later date. This sanction will be heard with respect to costs and fees due along with remaining issues to be resolved at the hearing on September 23, 2011.

Discovery progressed until August 18, 2010, when Defendants filed a Motion for Sanctions for Plaintiff's Spoliation of Evidence, alleging deliberate destruction of evidence which should have been supplied in response to Request No. 10 of Defendants' Fourth Interrogatory and Request for Production of Documents to Plaintiff.

On November 22, 2010, the Court conducted an *ore tenus* hearing on Defendants' Motion for Sanctions for Plaintiff's Spoliation of Evidence. Joshua Scotson, an expert in internet technology retained by Defendants, testified without contradiction that, based upon his review of the Facebook logs and phone records of Lester and paralegal Smith, an employee of the Allen Firm, Lester had deleted sixteen photos from his Facebook page on May 11, 2009. Scotson further attested that he was able to recover fifteen of the deleted photos and that there was a high probability that the sixteenth photo was subsequently provided to defense counsel by the Plaintiff. (All of these photographs were available to the Defendants prior to trial, and Defendants suffered no prejudice from the spoliation at trial.) H'rg Tr. Nov. 22, 2010, at 125-26, 128, 161.

During the hearing on November 22, 2010, Lester, through his counsel Murray, admitted that there had been spoliation of evidence which should have been provided pursuant to the March 25, 2009, discovery request. H'rg Tr. Nov. 22, 2010, at 153:22-154:2. In an Order reflecting the findings from the hearing on November 22, 2010, entered December 6, 2010, while overruling a Defense motion for another continuance of the trial, then set to begin December 7, 2010, the Court found that "there had been spoliation of evidence by the Plaintiff, Isaiah Lester, and that the actions of his counsel and their agents in that spoliation remain the subject of further findings of fact at a future date." The December 6, 2010, Order also provided that an "adverse inference" instruction be given to the jury in relation to the acts of spoliation by the Plaintiff and that Plaintiff and his counsel would remain subject to further findings of fact and possible sanctions at a future date, including the payment of Defendants' fees and costs incurred related to the sanctions motion.

The cases were tried before a jury on December 7-9, 2010. After hearing all the evidence, the jury awarded the sum of $2,350,000, plus interest, to Lester in compensation for his personal injuries, the sum of $6,227,000, plus interest, to Lester as beneficiary of the estate of Jessica Lynn Scott Lester, the sum $1,000,000, plus interest, to Gary C. Scott, as beneficiary of the estate of Jessica Scott Lester, and the sum of $1,000,000, plus interest, to Jeannine Scott, as beneficiary of the estate of Jessica Lynn Scott Lester.

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During the week following trial, Plaintiff filed a Notice of Presentation of Final Order, to which Defendants responded with a Motion to Quash Notice of Entry of Final Order and Request to Schedule Post-Trial Motions. Following a hearing on those post-trial motions on December 22, 2010, the Court ordered on February 4, 2011, that entry of the final order on the jury verdict would be deferred and that the Plaintiff must produce all e-mails "previously produced for *in camera* inspection described in Plaintiff's November 29, 2010, privilege log to Defendants" and produce to Defendants all other e-mails or documents previously requested regarding the spoliation of evidence by Plaintiff and his attorneys.

The February 4, 2010, Order also established the schedule for the filing of additional post-trial motions, addressed discovery issues, compelled production of previously subpoenaed documents, and declared that the "attorney-client privilege" and the "work product doctrine" do not apply to any actions or statements by Plaintiff, his counsel, his counsel's legal assistants, or concerning the Defendants' March 25 Request for Production of Documents, the responses to that request for production of documents, any other aspect of Plaintiff's Facebook account, and any and all actions taken relating to spoliation of evidence from the Facebook account or the producing of information in discovery related to the spoliation of evidence from the Facebook account.

On January 18, 2011, Defendants filed a number of motions, including, *inter alia*, a Motion for Monetary Sanctions against Matthew B. Murray, Esq., as Principal to Smith, Motion for Monetary Sanctions against Isaiah Lester, Motion for Monetary Sanctions against Matthew B. Murray, Esq., Motion for Sanctions for Plaintiffs' Counsel's Improper Disclosure of Confidential Mediation Discussions, Defendants' Post-Trial Motions, with Appendix attached, Defendants' Memorandum of Costs and Fees Related to Motion for Sanctions for Plaintiffs' Spoliation of Evidence, and Defendants' Motion for Mistrial for Newly Discovered Juror Bias.

In these post-trial motions, Defendants seek the dismissal of Plaintiffs' claims, or in the alternative, a new trial on liability and damages or a new trial on damages alone, or finally, an order of remittitur.

Defendants assert that such remediation is warranted by virtue of the actions of Plaintiff Lester and his counsel Murray in the spoliation of evidence and the cover-up by counsel of his deceptive behavior, the failure of Murray to disclose the longstanding relationship that he and his firm had with the jury foreperson, Murray's intemperate behavior at trial, including, *inter alia*, his invoking God and prayer as well as crying during open and closing presentations to the jury, his violation of the Court's pre-trial ruling barring mention to the jury that Defendants had originally asserted that Lester was contributorily negligent, Murray's production of "sympathy-inducing" testimony, and Murray's "coaching of a witness." While this argument appears in the January 18, 2011, filings, it was not argued in the

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May 27, 2011, hearing, and this Court has received no evidence nor heard argument on the issue. Since this argument has apparently been abandoned by the Defendants, the Court declines to make any finding regarding it.

Defendants assert that Murray, by these actions, "followed a consistent and purposeful strategy of converting a judicial proceeding . . . into a tainted proceeding whereby the jury rendered an excessive verdict based on an incomplete record and motivated by bias and raw emotion." Defs.' Post-Trial Mots., Summ. of Arg., Jan. 18, 2011, at 2

Plaintiff Lester, through attorney McConnell of the Allen Firm, Murray, through his counsel, Mr. and Mrs. Scott, through their counsel, and Smith, through her counsel, then filed responses to these motions.

The Court conducted an *ore tenus* hearing addressing all pending motions on May 27, 2011, in which the Defendants introduced evidence in support of their allegations. McConnell on behalf of Lester presented evidence and argument in defense of the motions, and Murray, through his counsel Thomas Williamson, Esq., presented evidence and argument. Murray testified on his own behalf and admitted that he had committed most of the transgressions alleged by Defendants but denied having instructed Lester to delete the contents of his Facebook page on May 11, 2009. Murray also denied any wrongdoing relating to his role in the selection of the jury. H'rg Tr. May 27, 2010, at 187-223.

At the conclusion of the hearing on May 27, 2011, the Court requested counsel to submit any final arguments in writing to the Court, accompanied by proposed findings of fact and conclusions of law. Subsequent to the hearing, the Allen Firm, through its counsel, Hugh M. Fain, III, Esq., of Spotts Fain, P.C., filed its objection to being held responsible for the actions of Murray during the course of Murray's representation of the Plaintiff in these cases. What follows is the Court's ruling on the issues presented.

## II. *Findings of Fact*

### A. *Preliminary Findings*

Murray, as counsel for Plaintiff and the statutory beneficiaries, along with Joseph Sanzone, Esq., of Sanzone and Baker, P.C., were the lead attorneys in filing and prosecuting these cases. Murray, at all times while acting as lead attorney for the Plaintiff, was the managing principal of the Charlottesville office of the Allen Firm, and all actions taken by him were taken in that capacity. At all times relevant to this action, Smith has been a paralegal employed by the Allen Firm and worked under the direction of Murray.

While there have been accusations of wrongdoing involving paralegal Smith and attorney McConnell, both employed by the Allen Firm, Defendants have not requested that either be sanctioned for their actions

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in these cases. Consequently, no findings regarding their behavior will be addressed herein.

B. *Lester's Deposition Misrepresentations Unrelated to Spoliation*

Lester was clearly evasive and possibly untruthful about his history of depression and his past use of anti-depressants during the discovery phase of these cases. Lester alleged that he suffered from serious Post-Traumatic Stress Disorder and "Major Depressive Disorder, Single Episode, Severe," as a result of the accident. *See Lester v. Allied Concrete Co.*, No. CL09-251, Compl. ¶ 6.

On July 7, 2009, Lester told his psychiatrist, Dr. John P. D. Shemo, during an examination that "he had previously been given a low dose of what he had recalled as being Lexapro while in college by a practitioner whose identity he does not recall." Dr. John P. D. Shemo Dep. 62:1-6, July 30, 2010. In breach of his obligation to cooperate with discovery requests, Lester failed to disclose the details relating to his admitted use of Lexapro. Isaiah Lester Dep. 25-26, Dec. 16, 2009.

Lester also admitted that he was not truthful when he stated, in response to discovery requests that he volunteered at the Boys & Girls Club. App. to Defs.' Post-Trial Mots., Jan. 18, 2011, Ex. A, Oct. 27, 2009, Interrog. Resp. No. 3; Lester Dep. 137:19-24, Dec. 16, 2009.

C. *Response to Defendants' Fourth Interrogatory and Request for Production of Documents and May 11, 2009, Spoliation of Evidence*

On the afternoon of March 25, 2009, Defendants served Murray by facsimile Defendants' Fourth Interrogatory and Request for Production of Documents to Plaintiff. Matthew B. Murray, Esq., Ex., May 27, 2010, Hr'g Materials, (hereinafter "Murray") May 27, 2011, Ex. 4. This pleading sought discovery relating to the contents of Lester's Facebook account and attached was a photo obtained by Tafuri from Lester's Facebook page. The photo depicts Lester clutching a beer can, wearing a T-shirt emblazoned with "I ♥ hot moms" and in the company of other young adults. Tafuri gained access to Lester's Facebook page via Facebook message on January 9, 2009.

On the evening of March 25, 2009, Murray notified Lester via e-mail about the receipt of the "I ♥ hot moms" photo and the related discovery request. Murray May 27, 2011, Ex. 2.

On the morning of March 26, 2009, Murray met with Smith and brought to her attention Defendants' Fourth Interrogatory and Request for Production of Documents and requested Smith to retrieve what the Defendants were seeking in that request. Smith Dep. 22-23, Feb. 28, 2011. During the course of their discussion, Murray questioned how the Defendants had obtained

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the "I ♥ hot moms photo." Smith said she thought the photo likely came from Facebook. Smith accessed Lester's Facebook page, and, after seeing the Facebook photo, Murray instructed Smith to tell Lester to "clean up" his Facebook because "we don't want blowups of this stuff at trial." Smith Dep. 15-16, Feb. 28, 2011; Matthew B. Murray Dep. 38-39, Feb. 28, 2011; H'rg Tr. May 27, 2010, at 192-93, 244.

Following Murray's instructions, Smith e-mailed Lester at 9:54 a.m. and 3:49 p.m. on March 26, 2009. The first e-mail requested information from Lester to answer the interrogatory seeking the identities of the individuals in the "I ♥ hot moms" photo. After informing Lester that the "I ♥ hot moms photo" was on his Facebook page, Smith stated there are "some other pics that should be deleted." The second e-mail exhorted Lester to "clean up" his Facebook page because "we do NOT want blow ups of other pics at trial; so please, please clean up your facebook and myspace." Murray May 27, 2011, Ex. 6, 7.

Between March 26 and April 15, 2009, Murray and Smith worked with Lester to respond to Defendants' Fourth Interrogatory and Request for Production of Documents to Plaintiff. Murray May 27, 2011, Ex. 8-13.

On March 26, 2009, Murray began developing a response to Request No. 10, which sought production of "screen print copies on the day this request is signed of all pages from Isaiah Lester's Facebook page, including but not limited to all pictures, his profile, his message board, status updates, and all messages sent or received." Instead of providing what was sought, Murray created a scheme to take down or deactivate Lester's Facebook page and to respond by stating that Lester had no Facebook page as of the date the response was signed. H'rg Tr. May 27, 2010, at 194-95; Murray May 27, 2011, Ex. 6. Murray communicated this plan to Lester who, following the directions of his counsel, deactivated his Facebook page on April 14. Murray May 27, 2011, Ex. 6, 8, 12, 14.

On April 15, 2009, Murray, knowing he was acting deceptively, signed and served upon Defendants Plaintiff's Answer to Defendants' Fourth Interrogatory and Responses to Request for Production of Documents. In this pleading, Murray responded as follows to the Request for Production seeking Facebook screen-prints: "I do not have a Facebook page on the date." This is signed April 15, 2009.

Defense counsel promptly complained to Murray about the Response, threatening to file a motion to compel if screen-prints of the Lester Facebook page "on the day this request is signed" were not produced. Murray May 27, 2011, Ex. 19. When Murray refused, Defendants filed a Motion to Compel Discovery and noticed the Motion for hearing on May 14, 2009.

On April 23, 2009, Murray contacted Melinda South, Esq., a lawyer employed by the Allen Firm as a "research attorney," seeking advice about the Defendants' entitlement to screen-prints of the Facebook page. Ms. South advised Murray about the January 1, 2009, addition to Rule 4:9 of the

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Rules of the Supreme Court of Virginia, expressly governing e-discovery. H'rg Tr. May 27, 2010, at 197; Murray May 27, 2011, Ex. 22. Murray then decided to produce the requested screen-prints of Lester's Facebook page, and on May 11, 2009, he instructed Smith to obtain screen-prints of its contents to produce to the Defendants. H'rg Tr. May 27, 2010, at 197-99; Smith Dep. 44-46, Feb. 28, 2011.

At 1:34 p.m. that afternoon, Smith e-mailed Lester inquiring about the date he deactivated his Facebook account, and Lester replied, "The day before the questions were due [April 15, 2009.]" H'rg Tr. May 27, 2010, at 197-99; Murray May 27, 2010, Ex. 24.

At 2:11 p.m., Lester and Smith spoke by phone. Smith requested Lester to reactivate his Facebook account. Lester claims to have reactivated and deactivated his Facebook account confirming his capability to restore his Facebook page for the requested screen-printing. At 3:43 p.m., Lester telephoned Smith and informed her that he could reactivate his Facebook account. Smith Dep. 46-47, Feb. 28, 2011. Lester was at his place of employment and could not cooperate with the effort to screen-print his Facebook page until after his work day concluded. Smith Dep. 46-47, Feb. 28, 2011.

At the time he left the Allen Firm offices on the afternoon of May 11, Murray had been informed that the Lester Facebook page could be recovered. H'rg Tr. May 27, 2010, at 200-01; Murray May 27, 2011, Ex. 47.

On the evening of May 11, 2009, between 6:46 p.m. and 7:07 p.m., Smith spoke with Lester by phone from her home and accessed and screen printed Lester's Facebook page. Smith Dep. Ex. 15, Feb. 28, 2011. On the evening of May 11, in the 6:49 p.m. time frame, Lester deleted sixteen photos from his Facebook page, an act consistent with the earlier directive from Murray to "clean up" his Facebook account. H'rg Tr. Nov. 22, 2010, at 125-26, 128, 161; Smith Dep. Ex. 15, Feb. 28, 2011.

Smith maintains that she did not know Lester had deleted the 16 photos at the time she printed the contents of Lester's Facebook page on May 11, 2009. Smith Dep. 96-98, Feb. 28, 2011; H'rg Tr. May 27, 2011, at 259-60.

On May 12, 2009, Lester e-mailed Smith inquiring if she "got everything [she] needed" and expressing his desire to give defense counsel "all they wanted" to avoid any trial delay. Murray May 27, 2011, Ex. 26, 27. Murray e-mailed Smith on May 13, 2009, asking if she had gotten the Facebook screen-prints and if there was "[a]nything of interest?" Smith replied the screen-prints were in Murray's box and there was "[n]othing crazy." Murray May 27, 2011, Ex. 28.

When Murray returned to his office on May 14, he reviewed Plaintiff's First Supplemental Response to Defendants' Request for Production of Documents and "skimmed" the attached screen-prints including the numerous thumbnail-sized copies of photos. Murray then signed the response and served it on defense counsel prior to the hearing on May 14.

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H'rg Tr. May 27, 2010, at 206-07; Murray May 27, 2011, Ex. 29. Murray insists that he did not know at the time he delivered this response to defense counsel on May 14, that Lester, on May 11, had deleted the sixteen photos. H'rg Tr. May 27, 2010, at 205.

At the hearing on May 14, 2009, the Court deferred ruling on the Motion to Compel Discovery pending Defendants' review of this response, received shortly before the hearing commenced. H'rg Tr. May 14, 2009, at 23-24.

On October 12, 2009, Murray served upon Defendants Plaintiff's First Supplemental Response to Defendants' Request for Production of Documents providing additional screen-prints of the Lester Facebook page. Murray May 27, 2011, Ex. 30. Lester, testifying under oath about his Facebook page at a deposition on December 16, 2009, stated that he had never deactivated or taken down his page. But Lester's e-mails and later testimony appear to show that he knew this statement was false. Lester Dep. 59:7-16, 61:2-7, 61:20-25, 62:13-64:11, 69:3-25, 70:12-17, 77:10-78:3, 83:10-25, 84:15-23, 104:18-24, Dec. 16, 2009. Lester persisted in denying the deactivation during his testimony at trial. Trial Tr. Dec. 8, 2010, at 542-46.

On March 1, 2010, Murray forwarded to counsel for Defendants Lester's Facebook IP logs sent to Murray by counsel for Facebook. Defs.' Mot. for Sanctions for Pl.'s Spoliation of Evidence, August 18, 2010, (hereinafter "Spoliation") at 8.

On August 3, 2010, counsel for Defendants hired Joshua Scotson, H'rg Tr. Nov. 22, 2010, at 44-45, and on August 18, 2010, Murray received the Scotson opinion that spoliation had transpired on May 11, 2009. Murray and McConnell engaged K. Gus Dimitrelos, an IT expert, to scrutinize the methodology of Scotson. Dimitrelos agreed with Scotson that Lester had deleted sixteen photos on the evening of May 11, 2009. Murray Dep. 28, Ex. 14, Feb. 28, 2011; H'rg Tr. May 27, 2010, at 208-09.

Based upon the opinion of Dimitrelos and the Scotson deposition, Murray and McConnell, by October 16, 2010, knew that expert opinion would confirm that Lester had deleted the photos on May 11, 2009. Malcolm McConnell, III, Dep. 17-18, Ex. 3, May. 5, 2011.

Lester testified in his deposition on November 17, 2010, that he alone, without input from anyone, made the decision to delete the photos from his Facebook page. Lester Dep. 48, Nov. 17, 2009.

D. *Privilege Log Misrepresentations*

On September 28, 2010, Defendants served on Smith a subpoena *duces tecum* commanding the production of any and all e-mails between herself and Lester between March 25 and May 15, 2009. Claiming attorney-client privilege, Plaintiff's counsel moved to quash this subpoena, and, on October

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19, 2010, Defendants filed a Motion to Require Compliance with Subpoena *Duces Tecum*.

On October 21, 2010, the Plaintiff's counsel agreed to the production of all e-mails between Smith and Lester referencing Facebook in response to the March 25, 2009, Request for Production of Documents unless subject to a claim of privilege, in which event, the e-mails would be produced for *in camera* inspection by the Court.

During the course of a hearing on November 17, 2010, the Court ordered Plaintiff to file a privilege log listing everything Plaintiff claimed was privileged and the basis for the claim. H'rg Tr. Nov. 17, 2010, at 39-40. On November 18, 2010, Murray, on behalf of Plaintiff, filed a spoliation privilege log with the Court. During the hearing on November 22, 2010, the Court declared the privilege log filed by Murray to be inadequate and ordered Plaintiff to file by Monday, November 28, 2010, an amended privilege log setting forth in detail why each document identified in the privilege log was protected by the claimed privilege and to deliver to the Court everything Plaintiff claimed to be privileged without redaction. H'rg Tr. Nov. 22, 2010, at 166-67.

On November 28, 2010, Murray filed with the Court the Enhanced Privilege Log and produced *in camera* the e-mails identified in the Enhanced Privilege Log. Murray intentionally omitted from the Privilege Log and the Enhanced Privilege Log the March 26, 2009, 9.54 a.m. e-mail from Smith to Lester and willfully failed to deliver it to the Court for *in camera* inspection. Murray concealed the e-mail from the Court out of fear that the Court would grant yet another continuance of the trial, scheduled to begin on December 7, 2010.

After the trial, Murray furnished the March 26, 2009, 9:54 a.m. e-mail to the Court on December 14, 2010. In his letter of transmittal, Murray falsely represented to the Court that the omission of this now notorious e-mail was caused by the mistake of a paralegal then employed by the Allen Firm, when, in fact, Murray knew his own misconduct caused the omission. Murray Dep. 23-29, 94-98, 101-04, Feb. 28, 2011; H'rg Tr. May 27, 2010, at 187.

E. *Redaction of Smith Cell Phone Records*

On November 10, 2010, M. Bryan Slaughter, Esq., counsel for Smith, produced Smith's personal cell phone records in response to a subpoena seeking documentation of phone calls between Smith and Lester in the time frame of Lester's deletion of Facebook photos. Smith Dep. 16-19, Feb. 28, 2011. After the production, Smith discovered that she had redacted a May 11, 2009, phone call with a number which, unknown to her when redactions were made, was Lester's cell phone number. On Friday, November 12, Smith notified McConnell of the error upon discovering it. Smith Dep. 60, Feb. 28, 2011.

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On the afternoon of November 12, Murray, with Smith's assistance, prepared a draft e-mail disclosing the inadvertent redaction and sent it to McConnell, who was in the midst of communicating with defense counsel on other issues. Murray May 27, 2011, Ex. 39; Smith Dep. 66, Feb. 28, 2011.

Slaughter, upon learning of the inadvertent redaction, e-mailed to defense counsel on Tuesday, November 16, 2010, a copy of the phone records without the redaction. Murray May 27, 2011, Ex. 40.

There was no prejudice to the Defendants caused by this error.

F. *Coe E-mail Redaction*

In December, 2010, Murray requested Thomas Coe, the Information Technology Director at the Allen Firm, to redact two portions of e-mail chains, telling Coe that they were not responsive and were protected by privilege, and the redactions were made. Coe Dep. 78-79; Murray Dep. 99-101, Feb. 28, 2011. No evidence established that the redactions made by Coe related to the Facebook spoliation controversy.

The only redaction clearly identified in documents produced by Coe and his counsel is a Lester e-mail of 9:09 a.m. April 7, 2009, in a chain of earlier e-mails. This redaction related to liability and bore no relationship to the Facebook spoliation controversy. Murray May 27, 2011, Ex. 45, Reinhardt 110519 Ltr. Attach 1-3.

G. *Murray Letter Re Lexapro Usage*

At the request of Murray, a psychiatrist, John P. D. Shemo, M.D., agreed to examine Lester and review his records. Shemo Dep. 32, July 30, 2010. According to Dr. Shemo's July 7, 2009, examination notes, Lester told Dr. Shemo that he had taken the medication Lexapro in the summer of his freshman year in college. Shemo Dep. 163, July 30, 2010. In an effort to ascertain the source of the Lexapro, Murray spoke by telephone with Veronica C. Ballard, Lester's mother. Based upon the telephone conversation and the information imparted to him by Ms. Ballard, Murray authored and sent to counsel for Defendants a letter dated February 24, 2010, in which Murray stated:

> I have spoken to Isaiah's mother, Veronica Ballard, who has a recollection of these events. Ms. Ballard told me that Isaiah came home to Texas on a break and was in a bad mood because he had lost his track scholarship. Ms. Ballard mentioned this to her physician who gave her samples of Lexapro to try. Ms. Ballard recalls Isaiah took the pills for a few days and discontinued them because they made him feel poorly. Shortly

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> thereafter, he snapped out of what was bothering him and returned to Ohio University.

Pl.'s Opp. to Defs.' Second Mot. for Continuance, February 26, 2010, Ex. A.

On May 10, 2010, Ms. Ballard was deposed. In her deposition, Ms. Ballard testified that she knew that her son had indeed received some samples of Lexapro, tried them a short time, did not like the Lexapro, and then returned to school. She could not remember how he received the samples, but denied that she had told Murray that she provided the samples to her son. She did confirm the phone conversation with Murray in which she was "trying to brainstorm" the source of the Lexapro that she furnished. Veronica Ballard Dep. 33-37, 44-46

Defendants characterize Murray's February 24, 2010, letter as "false and misleading" because of its erroneous assertion that the documentation of Lexapro usage was derived from the records of Liza Gold, M.D., psychiatric expert retained by Defendants, instead of Dr. Shemo and the deposition testimony of Ms. Ballard denying that she was the source of the samples.

The discrepancy between the Murray letter of February 24, 2010, and the Ballard deposition testimony as to the source of the Lexapro was raised in the July 7, 2010, hearing regarding Defendants' Motion for Spoliation Remedy, at which time Murray accepted responsibility for the discrepancy, stating that it was based on a "misunderstanding."

Although troublesome, there is insufficient evidence to establish that Murray willfully made false statements or intended to mislead opposing counsel and the Court in the letter of February 24, 2010.

H. *Allegation of Juror Misconduct*

On the morning of December 7, 2010, trial of these actions commenced, and potential jurors, including Amanda Hoy, were called and sworn. Trial Tr. Dec. 7, 2010, at 8-9.

During *voir dire*, the Court posed the following question to the prospective jurors, including Hoy, during their examination under oath:

> THE COURT: All right. Are any of you related by blood or marriage to any of the attorneys? Do you know them or have significant involvement with them or their law firms?

Hoy verbalized no response to the Court's question. *See* Trial Tr. Dec. 7, 2010, at 71.

The evidence does not establish that Hoy's failure to respond in the affirmative to the question was dishonest and a violation of her oath.

The evidence is insufficient to prove that Murray had any knowledge of improper conduct by Hoy. Murray has testified that he had never met or spoken with Hoy prior to December 7, 2010. H'rg Tr. May 27, 2010, at 217.

The only evidence of any contact between Murray and Hoy was the one e-mail exchange of May 12-13, 2010, initiated by Hoy, inquiring if Murray would be willing to serve on the Board of Meals on Wheels, Hoy's former employer. This invitation was not accepted by Murray.

There has been insufficient evidence to establish that Hoy, on the date of trial, had a "significant involvement" with the Allen Firm. The meaning of "significant involvement" is subjective and to be determined by an examination of the state of mind of Hoy. No evidence has been adduced as to Hoy's state of mind or how she interpreted the term "significant involvement" at the time of *voir dire*. Her employment with Meals on Wheels had terminated in May of 2010, approximately seven months prior to the trial of this action. Grzegorczyk Dep. 14; Emily Krause Dep. 58, May 20, 2011.

Hoy could have honestly considered her involvement through Meals on Wheels with the Allen Firm to be insignificant at the time of trial.

I. *Murray's Behavior at Trial*

Murray's conduct at trial included a number of actions designed to inflame the passions and play upon the sympathy of the jury. These actions include the following:

a. Weeping during opening statement and closing argument;

b. Stating on two occasions to the jury, in one form or another, that defendant David Sprouse, the driver of the truck, "killed" the plaintiff; Trial Tr. Dec. 7, 2010, Dec. 9, 2010, 875:14-15;

c. Violating a pre-trial ruling from this Court by exclaiming in the jury's presence that the Defendants had asserted that Lester was contributorily negligent in causing his wife's death; Trial Tr. Dec 7, 2010, Dec, 8, 2010, 403:22-405:20;

d. Repeatedly invoking the name of God or religion by referring to the Plaintiff as one who attends church with his parents and by four times mentioning prayer. Trial Tr. Dec 7, 2010, Dec. 9, 2010, 889:5-14, 889:9-10.

Significantly, with the exception of (c), above, at no time did defense counsel object to any of the above-described behavior.

Defense counsel moved for a mistrial after Murray blurted out to the jury that Defendants had accused Lester of having been guilty of "contributory negligence." The Court overruled the motion contemporaneously and declines to revisit the issue post trial except as relates to remittitur, discussed below.

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## III. *Conclusions of Law*

### A. *Motion for Monetary Sanctions against Matthew B. Murray*

Defendants, as the moving parties in seeking sanctions, bear the burden of proving by a preponderance of the evidence facts establishing misconduct warranting an award of sanctions. *See United Dentists, Inc. v. Commonwealth*, 162 Va. 347, 358 (1934) (party has the burden of proof who seeks to move the court to act in his favor).

When Murray was served with Defendants' Fourth Interrogatory and Request for Production of Documents to Plaintiff, he had a duty to produce the documents and electronically stored information described in Request No. 10 which were in the possession, custody, or control of Plaintiff, absent timely assertion of a well-founded objection. Va. Sup. Ct. R. 4:9.

Murray's signature on Plaintiff's Answer to Defendants' Fourth Interrogatory and Responses to Request for Production of Documents constituted a certification that he had read the pleading and that to the best of his knowledge, information, and belief, formed after a reasonable inquiry the answer was (1) consistent with Part IV of Rules of the Supreme Court of Virginia and warranted by existing law or a good faith argument for extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. Va. Sup. Ct. R. 4:1(g).

Murray, when he signed and served upon Defendants Plaintiff's Answer to Defendants' Fourth Interrogatory and Responses to Request for Production of Documents, violated Va. Sup. Ct. R. 4:1(g) by stating in response to Request No. 10 that Lester did "not have a Facebook page on the date this is signed, April 15, 2009." If Murray had, after a reasonable inquiry, believed Request No. 10 was objectionable, consistent with Part IV Rules of the Supreme Court of Virginia and warranted by existing law or a good faith argument for extension, modification, or reversal of existing law, he could have legitimately served an objection to Request No. 10. Murray, however, chose to obstruct production of the requested screen-prints by drafting a deceptive response to Request No. 10 and then instructing his client to take down his Facebook page.

If a pleading, motion, or other paper is signed or made in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of [redacted]tion, including a reasonable attorney's fee. Va. Sup. Ct. R. 4:1(g).

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The Court will impose upon Murray, as an appropriate sanction, the reasonable expenses, including a reasonable attorney's fee, incurred by Defendants because of Murray's violation of Va. Sup. Ct. R. 4:1(g), which would include but not be limited to, the expense of communicating with Murray seeking voluntary production of the requested screen-prints without the necessity of filing a motion to compel production, the preparation and filing of Motion to Compel Discovery, and preparation for the May 14, 2009, hearing on Motion to Compel Discovery, including the costs of retaining and deposing witnesses, expert witness fees.

Rule 3.4(a) of the Virginia Rules of Professional Conduct mandates that a lawyer shall not counsel or assist his client to alter, destroy, or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. The apparent violation of this Rule will be referred to the Virginia State Bar for any action it deems appropriate.

Both Lester and Murray must be held accountable for the spoliation. Lester did what Murray told him to do, deliberately delete Facebook photos that were responsive to a pending discovery request. Defendants are entitled to sanctions against Murray and Lester for the spoliation that occurred on May 11, 2009, as previously ordered.

Murray violated Va. Code § 8.01-271.1, Va. Sup. Ct. R. 4:1(g), and Va. Sup. Ct. R. 4:12 by omitting Smith's March 26, 2009, 9:54 a.m. e-mail from the Privilege Log and Enhanced Privilege Log submitted to the Court and by his failure to submit the subject e-mail to the Court for *in camera* inspection. Murray concedes by counsel that his behavior also violated Rules 3.3 and 3.4 of the Virginia Rules of Professional Conduct. The Court will refer this issue to the Virginia Bar.

Murray violated Va. Code § 8.01-271.1 by falsely representing to the Court in his letter of December 14, 2010, that a mistake of a paralegal and not his own misconduct caused the subject omission from the privilege logs. Murray concedes by counsel that his behavior also violated Rules 3.3 and 3.4 of the Virginia Rules of Professional Conduct. The Court will refer this issue to the Virginia Bar.

The Court imposes upon Murray, as an appropriate sanction, the reasonable expenses, including a reasonable attorney's fee, incurred by Defendants because of Murray's violations of Va. Code § 8.01-271.1, Va. Sup. Ct. R. 4:1(g), and Va. Sup. Ct. R. 4:12 arising out his above described misconduct relating to the privilege logs.

### IV. *Motion for Monetary Sanctions against Isaiah Lester*

Defendants, as the moving parties in seeking sanctions, bear the burden of proving by a preponderance of the evidence facts establishing misconduct by Lester that warrant an award of sanctions. *See United Dentists*, 162 Va.

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at 358 (party has the burden of proof who seeks to move the court to act in his favor).

Lester's misconduct, established by a preponderance of evidence, includes the following:

a. Deactivating his Facebook account and claiming he did not have one in a misleading response to Defendants' discovery request;

b. Deleting Facebook photos on May 11, 2010, prior to the production printed later that day by his counsel;

c. Misrepresenting in deposition that he was currently volunteering for the Boys and Girls Club;

d. Misrepresenting in deposition that he never deactivated or deleted his Facebook page;

e. Claiming on the stand at trial that he never deleted Facebook photos despite previously admitting to the same.

The foregoing actions, with the exception of (e) above, were known to the Court and Defendants prior to trial. His actions relating to spoliation have been addressed by a previous order. They related solely to the issue of damages and were mitigated, to the extent appropriate, by an adverse jury instruction; thus, they do not affect the validity of the verdict as to liability.

The Court will refer the allegations of perjury to the Commonwealth's Attorney for the City of Charlottesville for his review and consideration for any action he deems appropriate.

## V. *Motion for Sanctions for Plaintiff Counsel's Improper Disclosure of Confidential Mediation Discussions*

Defendants have alleged that Murray improperly disclosed details of mediation to the media following trial, but, since no evidence has been produced in the support of the motion, it appears to have been abandoned and, accordingly, will be dismissed.

## VI. *Remittitur*

This Court is empowered to set aside or remit a jury verdict that is excessive or is the product of passion, bias, sympathy, or prejudice. *See* Va. Code §§ 8.01-383, 8.01-383.1; *Baldwin v. McConnell*, 273 Va. 650, 655, 643 S.E.2d 703, 705 (2007) ("Setting aside a verdict as excessive . . . is an exercise of the inherent discretion of the trial court. . . ." (quoting *Shepard v. Capitol Foundry of Va., Inc.*, 262 Va. 715, 721, 554 S.E.2d 72, 75 (2001))). The evidence, however, must be considered in the light most favorable to the prevailing plaintiff, and the court must determine whether the amount of recovery bears a reasonable relation to the damages proven by the evidence. *Shepard*, 262 Va. at 721, 554 S.E.2d at 75.

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[redacted]

A court should award remittitur when a "verdict is so excessive as to shock the conscience of the court and to create the impression that the jury has been influenced by passion, corruption, or prejudice." *Condominium Servs., Inc. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 580, 709 S.E.2d 163, 175 (2011) (quoting *Smithey v. Sinclair Refining Co.*, 203 Va. 142, 146, 122 S.E.2d 872, 875 (1961)). Similarly, it is the duty of the judge to correct any injustice that results from an "award . . . so out of proportion to the injuries suffered to suggest that it is not the product of a fair and impartial decision. . . ." *Smithey*, 203 Va. at 146, 122 S.E.2d at 876.

After considering all of the evidence in the light most favorable to the Plaintiff, this Court finds that the jury's award of $6,227,000 to Lester as the beneficiary of his wife's estate was grossly disproportionate to the $1,000,000 given to the decedent's parents.

When compared to the award given to the decedent's parents, both of whom had a loving and long-lasting relationship with their daughter, it is clear that the award granted to Lester bears no reasonable relation to the damages proven by the evidence and that the award is so disproportionate to the injuries suffered that it is likely the product of an unfair and biased decision. The disproportionality of Lester's award is further highlighted when seen in light of the fact that Lester had been married less than two years before his wife's death, Trial Tr. Dec. 8, 2010, at 484:25, and that his behavior in the tragic aftermath was characterized by extensive social activities and travelling, both in the United States and overseas. *See* Trial Tr. Dec. 8, 2010, at 541-75.

After considering the evidence in the light most favorable to the Plaintiff, this Court also finds that the amount of the verdict in this case is so excessive on its face as to suggest that it was motivated by bias, sympathy, passion, or prejudice, rather than by a fair and objective consideration of the evidence.

Contributing substantially to the jury's excessive verdict was Murray's actions geared toward inflaming the jury. As witnessed by the Court and detailed above, Murray injected passion and prejudice into the trial, shouting objections and breaking into tears when addressing the jury. Most of Murray's actions in this respect were suffered without objections from defense counsel, who focused their defense upon the denial of liability (despite Defendant Sprouse's admission to having pleaded guilty to manslaughter in connection with the accident, Trial Tr. Dec. 9, 2010, at 642:12) and upon aggressive, but obviously ineffectual, attacks upon Lester's credibility and character. This defense strategy produced the extreme opposite of its desired effect, serving to create additional passion and sympathy for Lester and anger towards the Defendants.

Given the foregoing, finding the award given to Lester as the beneficiary of his wife's estate so grossly disproportionate to the injuries actually suffered that it suggests that the award was not the product of a fair and

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impartial decision and so excessive so as to shock the conscience of the Court and create the impression that the award was influenced by passion or prejudice, the Court will remit $4,127,000 of the $6,227,000 awarded to Lester as beneficiary, leaving him with an award of $2,100,000, adjusted for interest.

Since Lester suffered economic loss not sustained by Jessica Lester's parents, an award of $2,100,000 as beneficiary, clearly larger than that of each parent, is justified by the evidence. Lester's economic loss properly accounts for this differential and bears "a reasonable relation to the damages disclosed by the evidence." *Shepard*, 262 Va. at 721, 554 S.E.2d at 75.

Despite the acts of spoliation, combined with an adverse presumption instruction, and in the face aggressive challenges to Lester's character and credibility, the evidence was more than sufficient to establish that Lester suffered substantial personal loss from the accident, apart from the loss of his wife, and demonstrated at trial that he suffered personal injuries, both physical and mental; thus, he was properly compensated for these injuries by the jury with an award of $2,350,000. This award will stand without modification.

Defendants argue that Isaiah Lester may have been twice compensated for his mental anguish. Defendants had every opportunity to make such arguments and take precautions against such misunderstandings during the Court's deliberations over jury instructions. The Court will not revisit the instructions on this basis.

The award of $1,000,000 to the parents of Jessica Lester, Gary C. Scott and Jeannie Scott, was fair and clearly supported by the evidence. This award should not be disturbed.

Defendants additionally lament in their brief that this Court should consider the alleged unfairness of allowing beneficiaries Gary C. Scott and Jeannie Scott to have their own representation at trial and that said representation injected improper considerations into the proceedings. This argument was addressed prior to trial and found to be without merit. It will not be reconsidered here.

## VII. *Motion for Mistrial for Newly Discovered Juror Bias*

Hoy, while being examined under oath pursuant to Va. Code § 8.01-358, had a duty to not willfully swear falsely in her responses to questions posed to her by the Court and counsel during *voir dire*. Va. Code § 18.2-434. The evidence is insufficient to establish that Hoy swore falsely by her silence in response to questioning by the Court.

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[redacted]

VIII. *Order*

Consequently, the Court orders the following:

1. As set forth above, Defendant's Motion for Monetary Sanctions against Matthew B. Murray, is hereby granted;

2. Defendant's Motion for Monetary Sanctions against Isaiah Lester for his role in the spoliation of evidence is granted;

3. Defendant's Motion for Mistrial for Newly Discovered Juror Bias is denied;

4. The Court further orders the remittance of $4,127,000 by Isaiah Lester of the amount awarded to him as a beneficiary of Jessica Lynn Scott Lester, leaving the Defendants to pay Lester a total of $4,450,000, adjusted for interest as determined at trial. The jury's verdict shall remain undisturbed in all other respects.

5. This Court will hear argument on September 23, 2011, to determine the amount of the sanctions to be levied against Lester and Murray, as well as to the liability of the Allen Firm for the actions of Murray.

6. The Court will refer allegations that Murray violated the Code of Professional Responsibility in multiple respects to the Virginia State Bar and matters relating to allegations of perjury on the part of Lester to the Commonwealth's Attorney for the City of Charlottesville.

Endorsements are dispensed with pursuant to Rule 1:13 of the Supreme Court of Virginia. The Clerk is directed to mail a true copy of this Order to counsel of record, James M. McCauley, Esq., Ethics Counsel, Virginia State Bar, and to Warner D. Chapman, Esq., Commonwealth's Attorney for the City of Charlottesville. And this cause is continued for further action as set forth above.

October 21, 2011

*Final Order*

On the 23rd day of September 2011, came the parties, Isaiah Lester, Administrator of the Estate of Jessica Lynn Scott Lester, by his Counsel, Malcolm P. McConnell, III, Esq., and Defendants Allied Concrete Company and William Donald Sprouse, by their counsel, Benjamin G. Chew, Esq., Rory E. Adams, Esq., John W. Zunka, Esq., and Richard H. Milnor, Esq., and came the beneficiaries, Gary C. Scott and Jeannine Scott, by their counsel, Joseph A. Sanzone, Esq., plus Matthew B. Murray by his counsel, Thomas Williamson, Esq., and Marlina Smith by her counsel, M. Bryan Slaughter, Esq., and Malcolm P. McConnell, Esq., by his counsel, Robert T. Hall, Esq., as well as Allen, Allen, Allen, and Allen, by its counsel, Hugh M. Fain, III, Esq., for an evidentiary hearing pursuant to the Court's Order dated September 1, 2001, granting Defendants' post-trial motions for sanctions

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against Murray and Lester wherein the Court, in addition to hearing arguments of counsel, received testimony of expert witnesses, received memoranda from Defendants, Murray, Lester, and Allen, Allen, Allen, and Allen, and received evidence of billing records reflecting attorneys' fees and expenses incurred by Defendants relating to the spoliation of evidence and other misconduct identified in the aforementioned Order of September 6, 2011; and

Whereas, the Court has subsequently reviewed Defendants' Supplemental and Revised January 18, 2011, Memoranda of Costs and Fees Incurred Related to Motion for Sanctions for Plaintiff's Spoliation of Evidence filed on September 22, 2011, detailing fees and expenses and has also received and reviewed Objections of Matthew B. Murray, Esq., to Defendants' Supplemental and Revised January 18, 2011, Memoranda of Costs and Fees, accompanied by analysis and critique by G. A. "Chip" Kalbaugh, Esq., directed to Thomas W. Williamson, Jr., Esq., dated September 30, 2011; and

Whereas, the Court has carefully considered all of the arguments of Murray and Lester that the fees and expenses sought are excessive, including, but not limited to, contentions that all but a portion of the fees sought were neither reasonable, necessary, nor caused by the sanctioned conduct, that fees sought were in contravention of litigation billing guidelines of the insurance companies, involved too many attorneys and staff, that hourly rates of all attorneys and staff were excessive, that retention of Mr. Roche, plus all local counsel was unnecessary, and that the litigation with Facebook in California was unnecessary, unduly expensive, and time-consuming; and

Whereas, the Court, having reviewed the evidence and arguments of counsel and carefully considered the extensive pattern of deceptive and obstructionist conduct of Murray and Lester resulting in the sanction award, finds that most of the substantial fees and costs expended by Defendants were necessary and appropriate to address and defend against such conduct, with the actions required by Defendants having been accurately summarized under the heading entitled "Timeline of Spoliation Events" set forth on pages 3-6 of Defendants' Rebuttal to Matthew B. Murray's and Plaintiffs' Objections to Defendants' Memorandum of Costs and Fees; and

Whereas, after considering the objections of Murray and Lester as set forth above and after rendering deductions where the Court determined such objections to be well-founded, the Court, having considered the time and effort expended by the attorneys, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate in light of the Court's Order of September 6, 2011, see, e.g., *West Square, L.L.C. v. Communication Techs.*, 274 Va. 425 (2007), finds as follows:

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[redacted]

1. The total of fees and expenses found to be payable to Defendants is $722,000, with the sum of $625,110 due Patton Boggs, L.L.P., and the sum of $96,890 due Zunka, Milnor, & Carter, Ltd.;

2. Of the grand total set forth above, Murray is obligated for, and is hereby ordered to remit to Defendants, the sum of $542,000; and

3. Of the grand total set forth above, Lester is obligated for, and hereby ordered to remit to Defendants, the sum of $180,000; and

There being nothing further remaining for resolution in this case, it is hereby dismissed from the docket of this Court. The Clerk is directed to mail true copies of the foregoing Final Order to all counsel of record. Endorsements are dispensed with pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia.

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**People v Harris** 2012 NY Slip Op 22175 [36 Misc 3d 868] June 30, 2012

Sciarrino Jr., J. Criminal Court Of The City Of New York, New York County

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. As corrected through Tuesday, October 23, 2012

**Criminal Court of the City of New York, New York County, June 30, 2012**

APPEARANCES OF COUNSEL

*Perkins Coie*, Washington, D.C. (*John K. Roche* of counsel), and *Perkins Coie*, New York City (*Jeffrey D. Vanacore* of counsel), for Twitter, Inc., movant. *Cyrus R. Vance, Jr., District Attorney*, New York City (*Lee Langston* of counsel), for plaintiff. *Martin R. Stolar*, New York City, for defendant. *Aden J. Fine*, New York City, *Marcia Hofmann* and *Hanni Fakhoury*, San Francisco, California, and *Paul Alan Levy*, Washington, D.C., for American Civil Liberties Union and another, amici curiae.

{**36 Misc 3d at 869} OPINION OF THE COURT

Matthew A. Sciarrino, Jr., J.

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Twitter, Inc. (Twitter) seeks to quash the January 26, 2012 subpoena issued by the New York County District Attorney's {**36 Misc 3d at 870} Office and upheld by this court's April 20, 2012 order. That order required Twitter to provide any and all user information, including email addresses, as well as any and all tweets posted for the period of September 15, 2011 to December 31, 2011, from the Twitter account @destructuremal, which was allegedly used by Malcolm Harris. This is a case of first impression, distinctive because it is a criminal case rather than a civil case, and the movant is the corporate entity (Twitter) and not an individual (Harris). It also deals with tweets that were publicly posted rather than an email or text that would be directed to a single person or a select few.

On October 1, 2011, the defendant, Malcolm Harris, was charged with disorderly conduct (Penal Law § 240.20 [5]) after allegedly marching on the roadway of the Brooklyn Bridge. On January 26, 2012, the People sent a subpoena duces tecum to Twitter seeking the defendant's account information and tweets for their relevance in the ongoing criminal investigation (CPL art 610; 18 USC § 2703 [c] [2]). On January 30, 2012, Twitter, after conferring with the District Attorney's Office, informed the defendant that the Twitter account @destructuremal had been subpoenaed. On January 31, 2012, the defendant

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notified Twitter of his intention to file a motion to quash the subpoena. Twitter then took the position that it would not comply with the subpoena until the court ruled on the defendant's motion to quash the subpoena and intervened.

On April 20, 2012, this court held that the defendant had no proprietary interest in the user information on his Twitter account, and he lacked standing to quash the subpoena (*see* CPLR 1012 [a]; 1013; *People v Harris*, 36 Misc 3d 613 [Crim Ct, NY County 2012]). This court ordered Twitter to provide certain information to the court for in camera review to safeguard the privacy rights of Mr. Harris.

On May 31, 2012, David Rosenblatt, a member of Twitter's Board of Directors, was personally served within New York County with a copy of this court's April 20, 2012 order, a copy of the January 26, 2012 trial subpoena, and a copy of the March 8, 2012 trial subpoena. Twitter subsequently moved to quash the April 20, 2012 court order. To date, Twitter has not complied with this court's order.

## Discussion

Twitter is a public, real-time social and information network that enables people to share, communicate, and receive news. {**36 Misc 3d at 871} Users

can create a Twitter profile that contains a profile image, background image, and status updates called tweets, which can be up to 140 characters in length on [*2]the website.[FN1] Twitter provides its services to the public at large. Anyone can sign up to use Twitter's services as long as they agree to Twitter's terms. Twitter is a Delaware corporation with its principal place of business in California.

The Stored Communications Act (SCA) (18 USC § 2701 *et seq.*) defines and makes distinctions between electronic communication service (ECS) versus remote computing service (RCS), and content information versus non-content information. ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." (*See* 18 USC § 2510 [15].) RCS is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system." (*See* 18 USC § 2711 [2].) The Wiretap Act (18 USC § 2510 *et seq.*) defines content information as follows: "contents, when used with respect to any wire, oral or electronic communication, includes any information concerning the substance, purport, or meaning of that communication." (18 USC § 2510 [8].) In contrast, logs of account usage, mailer header information (minus the subject line), lists

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of outgoing email addresses sent from an account, and basic subscriber information are all considered to be non-content information.[FN2]

While Twitter is primarily an ECS (as discussed in *Harris*, 36 Misc 3d at 621-622), it also acts as an RCS. It collects and stores both non-content information such as IP addresses, physical locations, browser type, subscriber information, etc. and content information such as tweets. The SCA grants greater privacy protections to content information because actual contents of messages naturally implicate greater privacy concerns than network generated information about those communications.[FN3]

1. Twitter Users and Standing to Challenge Third-Party Disclosure Requests

Twitter argues that users have standing to quash the subpoena. The issue is whether Twitter users have standing to {**36 Misc 3d at 872} challenge third-party disclosure requests under the terms of service that existed during the dates in question. In *Harris* (36 Misc 3d at 623), the New York City Criminal Court held that a criminal defendant did not have standing to quash a subpoena issued to a third-party online social networking service because the defendant has no proprietary interest. The court's decision was partially based on Twitter's then terms of service agreement. After the April 20, 2012 decision, Twitter

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changed its terms and policy effective May 17, 2012. The newly added portion states: "You Retain Your Right To Any Content You Submit, Post Or Display On Or Through The Service." (*See* Twitter, *Terms of Service*, http://twitter.com/tos/ [accessed June 11, 2012].)

[*3]Twitter argues that the court's decision to deny the defendant standing places an undue burden on Twitter. It forces Twitter to choose between either providing user communications and account information in response to all subpoenas or attempting to vindicate its users' rights by moving to quash these subpoenas itself. However, that burden is placed on *every* third-party respondent to a subpoena (*see In re Verizon Internet Servs., Inc.*, 257 F Supp 2d 244, 257-258 [2003]; *United States v Kennedy*, 81 F Supp 2d 1103, 1110 [2000]) and cannot be used to create standing for a defendant where none exists.

The Stored Communications Act (18 USC § 2703 [d]) states: "A court issuing an order pursuant to this section, on a motion made promptly by *the service provider, may quash or modify such order*, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider." (Emphasis added.)

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In the defense motion they also reference a concurrence by Justice Sotomayor who said that "it may be necessary [for the court] to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" (*see United States v Jones*, 565 US —, —, 132 S Ct 945, 957 [2012]). Publication to third parties is the issue. Tweets are not emails sent to a single party. At best, the defense may argue that this is more akin to an email that is sent to a party and carbon copied to hundreds of others. There can be no reasonable expectation of privacy in a tweet sent{**36 Misc 3d at 873} around the world.[FN4] The court order is not unreasonably burdensome to Twitter, as it does not take much to search and provide the data to the court.[FN5] So long as the third party is in possession of the materials, the court may issue an order for the materials from the third party when the materials are relevant and evidentiary (18 USC § 2703 [d]; *People v Carassavas*, 103 Misc 2d 562 [Saratoga County Ct 1980]).

Consider the following: a man walks to his window, opens the window, and screams down to a young lady, "I'm sorry I hit you, please come back upstairs." At trial, the People call a person who was walking across the street at the time this occurred. The prosecutor asks, "What did the defendant yell?" Clearly the answer is relevant and the witness could be compelled to testify. Well today, the

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street is an online, information superhighway, and the witnesses can be the third-party providers like Twitter, Facebook, Instragram, Pinterest, or the next hot social media application. [*4]

2. The Court Order, Federal Law and New York State Law

The second issue is whether the court order was a violation of the Fourth Amendment, the Federal Stored Communications Act, or any other New York law.

The Fourth Amendment

To establish a violation of the Fourth Amendment, the defendant must show either (1) a physical intrusion onto defendant's personal property, or (2) a violation of a defendant's reasonable expectation of privacy. (*See United States v Jones*, 565 US —, —, 132 S Ct 945, 950 [2012]; *Kyllo v United States*, 533 US 27, 33 [2001].) In *Jones* (565 US at —, 132 S Ct at 949), the U.S. Supreme Court held that the government's installation of a Global Positioning System (GPS) tracking device on a target's vehicle to obtain information was a physical intrusion on a constitutionally protected area. In *People v Weaver* (12 NY3d 433 [2009]), the New York Court of Appeals held that the placing of a GPS tracking device inside the bumper of the defendant's {**36 Misc 3d at 874} vehicle, by a

state police investigator, was a physical intrusion. However, in this case there was no *physical* intrusion into the defendant's Twitter account. The defendant had purposely broadcasted to the entire world into a server 3,000 miles away. Therefore, the defendant's account is protected by the Fourth Amendment *only* if "the government violate[d] a subjective expectation of privacy that society recognizes as reasonable." (*See Kyllo v United States*, 533 US 27, 33 [2001], citing *Katz v United States*, 389 US 347, 361 [1967].)[FN6]

The Supreme Court has repeatedly held that the Fourth Amendment does not protect information revealed by third parties. (*See United States v Miller*, 425 US 435, 443 [1976].) Several courts have applied this rationale and held that Internet users do not retain a reasonable expectation of privacy. In *Romano v Steelcase Inc.* (30 Misc 3d 426, 433 [Sup Ct, Suffolk County 2010]) the court held that "users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting."[FN7]

If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world. This is not the same as a private email, a private direct message, a private chat, or any of the other readily available ways to have a private conversation via the Internet that now exist.

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[*5]Those private dialogues would require a warrant based on probable cause in order to access the relevant information.

Interestingly, in 2010, Twitter signed an agreement with the Library of Congress providing that every public tweet from Twitter's inception and beyond would be archived by the{**36 Misc 3d at 875} Library of Congress.[FN8] Also, Twitter's privacy policy states in part:

> "Our Services are primarily designed to help you share information with the world. Most of the information you provide us is information you are asking us to make public. This includes not only the messages you Tweet and the metadata provided with Tweets, such as when you Tweeted, but also the lists you create, the people you follow, the Tweets you mark as favorites or Retweet, and many other bits of information that result from your use of the Services." (*See* Twitter, *Twitter Privacy Policy*, https://twitter.com/privacy [accessed June 11, 2012].)

There is no reasonable expectation of privacy for tweets that the user has made public. It is the act of tweeting or disseminating communications to the public that controls. Even when a user deletes his or her tweets there are search engines available such as "Untweetable," "Tweleted" and "Politwoops" that hold users accountable for everything they had publicly tweeted and later deleted.[FN9]

Therefore, the defendant's Fourth Amendment rights were not violated because there was no physical intrusion of the defendant's tweets and the

defendant has no reasonable expectation of privacy in the information he intentionally broadcasted to the world.

Stored Communications Act

The SCA's requirements for a court order state that

> "[a] court order for disclosure under subsection (b) or (c) . . . shall issue only if the governmental entity offers specific and articulate facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or {**36 Misc 3d at 876} *the records or other information sought, are [*6]relevant and material to an ongoing criminal investigation*" (*see* 18 USC § 2703 [d] [emphasis added]).

The defendant's anticipated trial defense is that the police either led or escorted him onto the non-pedestrian part of the Brooklyn Bridge, a defense allegedly contradicted by his publicly posted tweets around the time of the incident. In *Harris* (36 Misc 3d at 623), the court held that the information sought was relevant. The April 20, 2012 court order was issued to comply with the January 26, 2012 subpoena.

The People are seeking two types of information, non-content information such as subscriber information, email addresses, etc. and content information such as tweets. The SCA protects only private communications[FN10] and allows disclosure of electronic communication when it is not overbroad.[FN11]

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In general, court orders have no limitations on the types of information to be disclosed (18 USC § 2703 [d]). The SCA mandates different standards that the government must satisfy to compel a provider to disclose various types of information (18 USC § 2703). To compel a provider of ECS to disclose the contents of communication in its possession that are in temporary "electronic storage" for 180 days or less, the government must obtain a search warrant (18 USC § 2703 [a]). A court order must be issued to compel a provider of ECS to disclose contents in electronic storage for greater than 180 days or to compel a provider of RCS to disclose its contents (18 USC § 2703 [a], [b], [d]). The law governing compelled disclosure also covers the above-mentioned non-content records. The rules are the same for providers of ECS and RCS and the government can obtain a section 2703 (d) order to compel such non-content information (18 USC § 2703 [c] [1] [B]).

The non-content records such as subscriber information, logs maintained by the network server, etc. and the September 15,{**36 Misc 3d at 877} 2011 to December 30, 2011 tweets are covered by the court order. However, the government must obtain a search warrant for the December 31, 2011 tweets.

[*7]New York State Law

The scope of a subpoena duces tecum is sufficiently circumscribed when: (1) the materials are relevant and evidentiary; (2) the request is specific; (3) the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (4) the party cannot properly prepare for trial without such a production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; and (5) the application is made in good faith and is not intended as a general "fishing expedition" (*People v Carassavas*, 103 Misc 2d 562, 564 [1980], citing *People v Price*, 100 Misc 2d 372, 379 [1979]). The District Attorney seeks the subpoenaed information to refute Harris's anticipated trial defense. In *Harris* (36 Misc 3d at 623), the court agreed that the subpoena duce tecum was sufficiently circumscribed and a court order was issued on April 20, 2012 to comply with the subpoena.

On May 31, 2012, David Rosenblatt, a member of Twitter's Board of Directors, was personally served within New York County with a copy of this court's April 20, 2012 order, a copy of the January 26, 2012 trial subpoena, and a copy of the March 8, 2012 trial subpoena. There are no jurisdictional issues and there are no violations of the New York Constitution.

## Conclusion

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In dealing with social media issues, judges are asked to make decisions based on statutes that can never keep up with technology.[FN12] In some cases, those same judges have no understanding of the technology themselves (Stephanie Rabiner, Esq., Technologist, *Do Judges Really Understand Social Media?*, http://blogs.findlaw.com/technologist/2012/05/do-judges-really-understand-social-media.html [May 9, 2012]). Judges must then do what they have always done—balance the arguments on the scales of justice. They must weigh the interests of society against the inalienable rights of the individual who gave away some rights when entering into the social contract that created our government and the laws that we have agreed to follow. {**36 Misc 3d at 878} Therefore, while the law regarding social media is clearly still developing, it can neither be said that this court does not understand or appreciate the place that social media has in our society nor that it does not appreciate the importance of this ruling and future rulings of courts that may agree or disagree with this decision. In recent years, social media has become one of the most prominent methods of exercising free speech, particularly in countries that do not have very many freedoms at all.

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The world of social media is evolving, as is the law around it. Society struggles with policies, whether they are between student and teacher (New York City Department of Education, NYC Department of Education Social Media Guidelines),[FN13] or the right of a company to examine an applicant's Facebook page as part of the interview process (Bill Chappell, *State Approves Bill to Ban Employers From Seeking Facebook Login Info*, http://www.npr.org/blogs/thetwo-way/2012/04/10/150354579/state-[*8]approves-bill-to-ban-employers-from-seeking-facebook-login-info). As the laws, rules and societal norms evolve and change with each new advance in technology, so too will the decisions of our courts. While the U.S. Constitution clearly did not take into consideration any tweets by our founding fathers, it is probably safe to assume that Samuel Adams, Benjamin Franklin, Alexander Hamilton and Thomas Jefferson would have loved to tweet their opinions as much as they loved to write for the newspapers of their day (sometimes under anonymous pseudonyms similar to today's Twitter user names). Those men, and countless soldiers in service to this nation, have risked their lives for our right to tweet or to post an article on Facebook; but that is not the same as arguing that those public tweets are protected. The Constitution gives you the right to post, but as numerous people have learned, there are still consequences for your public

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posts. What you give to the public belongs to the public. What you keep to yourself belongs only to you.

Accordingly, the motion to quash is granted in part and denied in part. The court finds in favor of the People for all non-content information and content information in ECS and RCS from September 15, 2011 to December 30, 2011. However, ECS content information less than 180 days old (tweeted on Dec. 31, 2011) may only be disclosed pursuant to a search warrant, and {**36 Misc 3d at 879} the court decision in *People v Harris* is so modified. That search warrant should be requested of a judge of competent jurisdiction. However, to avoid any issue of alleged non-impartiality, that warrant should be made to another judge of this court.

Accordingly, it is hereby: ordered, that Twitter disclose all non-content information and content information from September 15, 2011 to December 30, 2011; and it is further ordered, that the materials be provided to this court for in camera inspection. The relevant portions thereof will be provided to the office of the District Attorney, who will provide copies to the defense counsel as part of discovery; and it is further ordered, that the clerk of this court notify the Presiding Judge of Jury 2 of the receipt of the materials.

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## Footnotes

**Footnote 1:** *See* Twitter, *Guidelines for Law Enforcement*, https://support.twitter.com/entries/41949-guidelines-for-law-enforcement/ (accessed May 30, 2012).

**Footnote 2:** Orin Kerr, *A User's Guide to the Stored Communications Act, and the Legislator's Guide to Amending It*, 72 Geo Wash L Rev 1208 (2004).

**Footnote 3:** 36 Misc 3d at 622.

**Footnote 4:** In fact, on August 1, 2012 your tweets will be sent across the universe to a galaxy far, far away (*see* Chris Taylor, Mashable Social Media, *Your Tweets to Be Beamed Across Space. Will ET RT?*, http://mashable.com/2012/06/26/et-rt/ [June 26, 2012]).

**Footnote 5:** The general New York rule is that only the recipient of a subpoena in a criminal case has standing to quash it (*see People v Lomma*, 35 Misc 3d 395, 404-405 [Sup Ct, NY County 2012], citing *People v Doe*, 96 AD2d 1018, 1019 [1st Dept 1983] [banking and telephone records], and *People v Crispino*, 298 AD2d 220, 221 [1st Dept 2002] ["defendant, as a customer, has no proprietary interest" in the defendant's bank account records]).

**Footnote 6:** See also *People v Suleman* (NYLJ 1202499796548 [Crim Ct, NY County, June 22, 2011]) where the court held that the taxicab owner had no reasonable expectation of privacy of the information generated and stored by a GPS device in the cab.

**Footnote 7:** Twitter argues that the court should embrace the holding in *United States v Warshak* (631 F3d 266 [6th Cir 2010]). In *Warshak*, the court found that the defendant had a reasonable expectation of privacy in his emails. However, the *Warshak* case is distinguishable from the case at hand because the former deals with private emails as opposed to public postings. *Warshak* did not address public communications at all; instead the court held only that "email requires

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strong protection under the Fourth Amendment" (*Warshak*, 631 F3d at 286). If such Fourth Amendment protections were to extend to *public* postings, it would undermine the very basis of the *Warshak* holding.

**Footnote 8:** (*See* Matt Raymond, Library of Congress, *How Tweet It Is!: Library Acquires Entire Twitter Archive*, http://blogs.loc.gov/loc/2010/04/how-tweet-it-is-library-acquires-entire-twitter-archive/ [accessed May 30, 2012].) The Twitter community received the initial heads up via their own feed @librarycongress. Twitter has its users' consent for disclosure to the Library of Congress by virtue of its privacy policy. The Library of Congress' archives are not yet available due to its high volume of composition of billions of tweets, and with an estimate of 140 million new tweets per day. (*See* Audrey Watters, *How the Library of Congress is Building the Twitter Archive*, http://radar.oreilly.com/2011/06/library-of-congress-twitter-archive.html [accessed June 11, 2012].)

**Footnote 9:** *See* http://untweetable.com; http://tweleted.com/; http://mashable.com/2012/05/30/politwoops/.

**Footnote 10:** *See Kaufman v Nest Seekers, LLC*, 2006 WL 2807177, *5, 2006 US Dist LEXIS 71104, *15-16 (SD NY 2006) (only electronic bulletin boards which are not readily accessible to the public are protected under the SCA); *Konop v Hawaiian Airlines, Inc.*, 302 F3d 868, 875 (9th Cir 2002) ("The legislative history of the [Electronic Communications Protection Act] suggests that Congress wanted to protect electronic communications that are configured to be private, such as email and private electronic bulletin boards"); *Snow v DirecTV, Inc.*, 450 F3d 1314, 1320-1321 (11th Cir 2006) (holding that the SCA does not apply to material that is readily available to the public).

**Footnote 11:** Orin Kerr, *A User's Guide to the Stored Communications Act, and the Legislator's Guide to Amending It*, 72 Geo Wash L Rev 1208 (2004).

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**Footnote 12:** The SCA was enacted in 1986 and mainly applied to the start of emails. The SCA was enacted long before the creation of Twitter and the concept of blogging which started in 2006.

**Footnote 13:**
Http://schools.nyc.gov/NR/rdonlyres/BCF47CED-604B-4FDD-B752-DC2D81504478/0/DOESocialMediaGuidelines20120430.pdf

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-02560-MSK-MEH

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

WENDY CABRERA,

Intervenor Plaintiff,

v.

THE ORIGINAL HONEYBAKED HAM COMPANY OF GEORGIA, INC.,

Defendant.

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**ORDER ON MOTION TO COMPEL**

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**Michael E. Hegarty, United States Magistrate Judge.**

Before the Court is Defendant HBH's Motion to Compel under Fed. R. Civ. P. 37 [filed September 6, 2012; docket #177 (sealed docket #172)]. The motion is referred to this Court for disposition. (Docket #173.) The matter is fully briefed, and on November 6, 2012, the Court held oral argument. For the reasons that follow, the Court **grants in part** and **denies in part** Defendant's motion.

## I. Background

Plaintiff Equal Employment Opportunity Commission (EEOC) brings claims of sexual harassment and hostile environment and retaliation under Title VII of the Civil Rights Act of 1964, as amended, alleging Defendant subjected a class of female employees (between 20 and 22 persons) to sexual harassment and retaliated against such employees when they complained about the harassment.

In the present motion, Defendant seeks numerous categories of documents designed to

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examine the class members' damages – emotional and financial – as well as documents going to the credibility and bias of the class members. I will address each category below. I need to emphasize that it is my job to ensure production of documents that may lead to the discovery of admissible evidence. I am not determining what is admissible at trial. In addition, Defendant spends significant time addressing what the EEOC has and has not produced. As the EEOC demonstrates in its response brief, some of Defendant's representations in this regard are not accurate. Because of this, and because Defendant's requests are a significant (albeit, as I explain below, in certain respects justifiable) intrusion into the class member's semi-private lives, and because the whole area of social media presents thorny and novel issues with which courts are only now coming to grips, I will not determine this motion or any sanctions based on what should or should not have been provided prior to this Order, nor will I apportion fault in failing to produce documents or information prior to this Order.

## II. Analysis

### A. Full Unredacted Social Media Content, Text Messages, Etc.

Many of the class members have utilized electronic media to communicate – with one another or with their respective insider groups – information about their employment with/separation from Defendant HBH, this lawsuit, their then-contemporaneous emotional state, and other topics and content that Defendant contends may be admissible in this action. As a general matter, I view this content logically as though each class member had a file folder titled "Everything About Me," which they have voluntarily shared with others. If there are documents in this folder that contain information that is relevant or may lead to the discovery of admissible evidence relating to this lawsuit, the presumption is that it should be produced. The fact that it exists in cyberspace on an electronic device is a logistical and, perhaps, financial problem, but not a circumstance that removes



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the information from accessibility by a party opponent in litigation.

To set the playing field, the relief the class members are seeking varies from claimant to claimant but includes (1) back pay; (2) emotional damages[1]; and (3) front pay or reinstatement. The cumulative exposure to the Defendant is most definitely well into the low-to-mid seven-figure range. This is important to note when addressing whether the potential cost of producing the discovery is commensurate with the dollar amount at issue.

There is no question the Defendant has established that the documents it seeks contain discoverable information. Defendant has shown, for example, that Plaintiff-Intervenor Cabrera posted on her Facebook account statements that discuss her financial expectations in this lawsuit[2]; a photograph of herself wearing a shirt with the word "CUNT" in large letters written across the front (a term that she alleges was used pejoratively against her, also alleging that such use offended her)[3]; musings about her emotional state in having lost a beloved pet as well as having suffered a broken relationship[4]; other writings addressing her positive outlook on how her life was post-termination[5]; her self-described sexual aggressiveness[6]; statements about actions she engaged in as a supervisor with Defendant (including terminating a woman who is a class member in this case); sexually

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[1]One item in the record references Plaintiff-Intervenor's hope to recover $400,000, which, given the facts of the case, would consist mostly of compensatory damages.

[2]*Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 125 (2d Cir. 2005) (financial motive relevant).

[3]*Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986) (in sexual harassment case, totality of circumstances including plaintiff's own conduct is potentially relevant).

[4]*Thorsen v. County of Nassau*, 722 F. Supp. 2d 277, 293 (E.D.N.Y. 2010) (discussing impact of non-work related stressors in analyzing award of compensatory damages).

[5]*Id.*

[6]Fed. R. Evid. 412(b)(2) addresses admissibility of this type of evidence, an analysis that Judge Krieger may have to utilize.



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amorous communications with other class members[7]; her post-termination employment and income opportunities and financial condition; and other information. I view each of these categories as potentially relevant in this lawsuit. If all of this information was contained on pages filed in the "Everything About Me" folder, it would need to be produced. Should the outcome be different because it is on one's Facebook account? There is a strong argument that storing such information on Facebook and making it accessible to others presents an even stronger case for production, at least as it concerns any privacy objection. It was the claimants (or at least some of them) who, by their own volition, created relevant communications and shared them with others.

The EEOC raises a valid objection concerning the vagueness of the Defendant's discovery requests, especially insofar as they allegedly seek text messages. Defendant counters that the broad definition of "document" used in the requests is sufficient to cover texts and the other material sought here. I do not believe the proper remedy in this instance is to deny the document request and require Defendant to draft a new one. Defendant's definition of "document" is sufficient to cover text messages, and I believe it would the best course to allow the discovery discussed below.

Given the fact that Defendant has already obtained one affected former employee's Facebook pages, and that those pages contain a significant variety of relevant information, and further, that other employees posted relevant comments on this Facebook account, I agree that each class member's social media content should be produced, albeit *in camera* in the first instance. I do not believe this is the proverbial fishing expedition; these waters have already been tested, and they show that further effort will likely be fruitful. However, I am appreciative of privacy concerns and am not sold on all of Defendant's alleged areas of relevant information, particularly regarding expressions of positive attitude about this or that. Therefore, I will establish a process designed to

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[7] *Id.*



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gather only discoverable information. To accomplish this, I will utilize a forensic expert as a special master as needed. Plaintiff-Intervenor and the class members shall provide the following directly and confidentially to the special master:

1. Any cell phone used to send or receive text messages from January 1, 2009 to the present;
2. All necessary information to access any social media websites used by such person for the time period January 1, 2009 to present;
3. All necessary information to access any email account or web blog or similar/related electronically accessed internet or remote location used for communicating with others or posting communications or pictures, during the time period January 1, 2009 to present.

The parties will collaborate to create (1) a questionnaire to be given to the Claimants with the intent of identifying all such potential sources of discoverable information; and (2) instructions to be given to the Special Master defining the parameters of the information he will collect. These should be provided to the Court no later than **November 14, 2012**. If there are areas of dispute, the parties should provide to the Court a copy of each document, each of which should clearly distinguish between agreed-upon language and disputed language. As to the disputed language, the parties should footnote each area of dispute and briefly state their respective positions. I will review the material, make any necessary decisions, and return the questionnaire by **November 16, 2012**, with the hope that the questionnaire will be given to the Claimants and the requested information returned no later than **November 30, 2012**, at which time the Special Master may begin his work.

The Court will receive in hard copy all information yielded by this process, review the information *in camera* and require the production to Defendant of only that information which the



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Court determines is legally relevant under the applicable rules. The Court will then deliver relevant material to the EEOC, which shall conduct a privilege review, designate the material as appropriate under the Protective Order in this case, then deliver the nonprivileged material to defense counsel along with a privilege log containing any withheld information. All irrelevant material will also be returned to the EEOC. I will provide the EEOC an opportunity to make a record of objections to the material I determine to be relevant.

The cost of forensic evaluation will be borne equally by the Plaintiff/Claimants and the Defendant. I previously considered having the Defendant bear the cost of this effort; however, I do not believe this is consistent with the Federal Rules of Civil Procedure. The information ordered to be produced is discoverable – information which, if it exists, was created by the Claimants. In the event, as the EEOC believes, this effort produces little or no relevant information, I may, upon motion, revisit this allocation and relieve the Plaintiff/Claimants of monetary responsibility.

B. Income Information

In a Title VII case, a plaintiff's financial and income information can be relevant. *E.g.*, *Myers v. Central Florida Investments, Inc.*, 592 F.3d 1201, 1213 (11th Cir. 2010). This includes tax return information, *e.g.*, *Hunter v. General Motors Corp.*, 149 F. App'x 368, 373 (6th Cir. 2005) ("Because Hunter knew that he had received a substantial salary during the relevant tax year, yet failed to claim such a taxable source of income, the return did indeed reflect upon the plaintiff's truthfulness and was, therefore, admissible at trial."), and unemployment benefits, *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1555 (10th Cir. 1988) ("The decision whether to offset unemployment compensation is within the trial court's discretion."). Obviously, a calculation of back pay utilizes subsequent income as a potential mitigation.

Here, Defendant seeks a wide range of financial information to include "bank records" and



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"promissory notes," as well as records of government assistance. I believe this is overbroad, at least at this time. I do not believe a Title VII plaintiff's overall financial condition is relevant. What is relevant for a separated employee (whether by termination or constructive discharge) is income information. I believe tax returns, unemployment compensation, and all information concerning income derived from labor are relevant and subject to discovery. Thus, for each class member and the Plaintiff-Intervenor who seeks to recover back pay in this action, such information for the time period after separation from Defendant should be produced. At the oral argument, Defendant renewed its request that I require production of bank records due to deficiencies in the EEOC's efforts to collect relevant financial information. However, it was clear to me that the interactive process between the EEOC and the Defendant in attempting to obtain this information has not been exhausted. Therefore, the denial of bank record information is without prejudice in the event Defendant establishes at a later date that the EEOC's efforts to obtain income information has been inadequate.

C. Information Concerning Prior Legal Proceedings

Defendant seeks information concerning any other legal proceedings in which a class member or Plaintiff-Intervenor has been involved. Information regarding other lawsuits is at least potentially relevant, *Vance v. Union Planters Corp.*, 209 F.3d 438, 445 (5th Cir. 2000); *Gastineau v. Fleet Mortg. Corp.*, 137 F.3d 490 (7th Cir. 1998), and should be produced. I do not believe this information should be subject to any time limit. In my experience, disclosure of all prior legal proceedings of any kind are typical at the beginning of any deposition. I see no reason why the same cannot be accomplished through written discovery. Like all other information that I am ordering to be produced here, it will be up to Judge Krieger to decide whether it is admitted at trial. In the event the EEOC believes *all* responsive information has been produced, it should so affirmatively



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state in a response to Defendant.

D. Reopening of Cabrera Deposition

Defendant has provided a sufficient ground, on the basis of subsequently acquired evidence, to take an additional two hours of Ms. Cabrera's deposition. The parties shall arrange the deposition at their convenience.

Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** the Defendant HBH's Motion to Compel under Fed. R. Civ. P. 37 [filed September 6, 2012; docket #177 (sealed docket #172)] as set forth herein. In the event the parties believe that a status conference is necessary to clarify or implement this Order, they are directed to contact my chambers for an immediate setting.

Dated at Denver, Colorado, this 7th day of November, 2012.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge



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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DORIS SHENWICK, et al.,

Plaintiffs,

v.

TWITTER, INC., et al.,

Defendants.

Case No. 16-cv-05314-JST (SK)

**ORDER RE JOINT OMNIBUS DISCOVERY LETTER**

Regarding Docket No. 134

The parties filed a letter brief regarding disputes about responses to Plaintiffs' First Request for Production of Documents ("RFPs") and the production of documents responsive to the RFPs. (Dkt. 134.)

**A. Factual Background**

Plaintiffs filed a securities class action under federal law on behalf of all persons who purchased or otherwise acquired common stock of Defendant Twitter, Inc. ("Twitter"), between February 6, 2015 and July 28, 2015 (the "Class Period"). (Consolidated Complaint, Dkt. 81, ¶ 2.) Plaintiffs name Twitter and two individuals as defendants ("Defendants"). (*Id.*, ¶¶ 13-15.) Twitter is "a social media company that provides a platform where any user can create a 'tweet' and any user can follow other users." (*Id.*, ¶ 19) Twitter uses different metrics to show its "financial health and growth prospects": (1) the number of monthly active users ("MAU") – the number of users in a month, (2) daily active users ("DAU") – the users' daily activity (user engagement), and (2) "advertising engagements (the ability of the Company to turn user activity into advertising revenue)." (*Id.*, ¶ 20.)

Defendants filed a motion to dismiss, and the Court granted in part and denied in part the motion. (Dkt. 113.) The remaining allegations of the Consolidated Complaint fall into two general categories: (1) Defendants "misled investors by failing to disclose DAU metrics during

the class period," and (2) Defendants made positive statements about "user engagement trends" that were false and misleading. (*Id.*)

**B. Issues in Dispute**

There are six issues in dispute, discussed in detail below.

**1. Issue #1 – Custodians**

The parties have met and conferred and agreed upon searching files of 25 "custodians" – employees of Twitter. (Dkt. 134.) They have one dispute: whether Defendants should search the files of an additional custodian, Jack Dorsey. Dorsey was a co-founder of Twitter and Chief Executive Officer ("CEO") of Twitter from 2007 to 2008. Dorsey remained as a member of the Board of Directors even after he stepped down from his position as CEO and was the Chair of the Board of Directors during the Class Period. Dorsey then became CEO again on June 11, 2015 – during the Class Period – and he "came clean" about the true state of Twitter's metrics on July 28, 2015. (Dkt. 81, ¶¶ 60-62, 138.)

Defendants argue that the 25 custodians have all the relevant documents, since they constitute all the major decision makers for Twitter. Defendants posit that it is unlikely that Dorsey will have any additional documents. Defendants argue that allowing a search of the "apex" custodian at this time is premature and that any search should be limited in time and scope.

The Court does not agree that Dorsey's involvement is limited, does not agree that he should be excluded as a custodian, and does not agree that any search of his files should be limited in time and scope. Dorsey was the Chair of the Board of Directors during the Class Period and then became CEO during the Class Period. Dorsey is also the person who notified the public of the true state of affairs of Twitter's metrics. The idea that responsive documents will necessarily be found in other custodians' records is not sufficient to defeat a search of his files. It is always possible that one custodian will have a document or documents that other custodians have not retained, or even that one custodian may have created a document, such as handwritten notes, that no other custodian possesses. For these reasons, the Court ORDERS Defendants to include Dorsey's files in the group of records that will be searched from individual custodians.

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**2. Issue #2 – Sources – Direct Messages and Falquora**

**a. Direct Messages**

Plaintiffs request that Defendants search Twitter direct messages that each custodian sent and received. A direct message is a private message through the Twitter platform. Defendants have agreed to provide direct messages for individual defendants Anthony Noto and Richard Costolo only. Defendants argue that the Stored Communications Act, 18 U.S.C. § 2701 *et seq.* prevents the disclosure of direct messages from anyone other than a named individual defendant. The Court agrees.

"The Stored Communications Act prevents 'providers' of communication services from divulging private communications to certain entities and individuals." *Crispin v. Christina Audigier, Inc.*, 717 F.Supp.2d 965, 971-72 (C.D. Cal. 2010). Specifically, the government is limited in its right to compel providers to disclose information belonging to or about its subscribers. *Id.* at 972. The Stored Communications Act contains two categories of providers of: (1) remote computing services ("RCS"), and (2) electronic communication services ("ECS"). Id. (internal citations omitted). The uncontested allegation is that direct messages are private messages. Thus Twitter is an ECS under the Stored Communications Act. *See, e.g., Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 900 (9th Cir. 2008); *Crispin*, 717 F.Supp.2d at 980-82 (finding that Facebook, to extent that it provided private messaging, was an ECS). To the extent that Twitter retains direct messages, it is an RCS. *See, e.g., Crispin*, 727 F.Supp.2d at 987 ("message that have been opened and retained" cause the entity retaining the message to be a RCS).

Courts have held that the Stored Communications Act prevents a court from enforcing a subpoena issued to a third party ECS or RCS for the protected information. *Crispin*, 727 F.Supp.2d at 991; *In re Facebook, Inc.*, 923 F.Supp.2d 1204, 1206 (N.D. Cal.2012). Plaintiffs argue that, although courts cannot compel a third party to divulge this information, the Court can compel the production of this information if issued to a party under Federal Rule of Civil Procedure 34. *See, e.g., Mintz v. Mark Bartelstein & Assocs., Inc.*, 885 F.Supp.2d 987, 994, (C.D. Cal. 2012); *Flagg v. City of Detroit*, 252 F.R.D. 346, 366 (E.D. Mich. 2008).



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Plaintiffs are correct that a court can compel a party to produce information within the party's custody and control, but they confuse the identity of the party with the identity of the individual custodians. Here, for purposes of analysis, the Court will treat Twitter as if it is separate from the individual custodians who have direct messages stored with Twitter. The individual custodians other than Costolo and Noto are not parties. In other words, because Defendants claim, without opposition, that Twitter did not require its employees to use direct messages for communications, the Court must evaluate Twitter separately from the individual custodians who have privacy rights protected by the Stored Communications Act. The two named individual defendants, Costolo and Noto, are allowing discovery of their direct messages, as Plaintiffs can issue to them requests for information pursuant to Rule 34 and obtain their direct messages. Plaintiffs are correct that, as the Court in *Mintz* explained, that a party can obtain text messages from the party – not from the ECS or RCS provider. 885 F.Supp.2d at 994. Here, however, Plaintiffs merge Twitter and its individual custodians' rights. They are not the same. If Plaintiffs issued a third party subpoena to a company – not Twitter – for direct messages that the individual custodians sent and received, there is no question that the Court could not enforce such a subpoena. Under the same reasoning, the Court cannot compel Twitter, a party in this litigation, to produce protected direct messages of individual custodians who are not parties simply because Twitter is also the provider of the direct messaging service.

**b. Falquora**

Plaintiffs request that Defendants produce documents from Falquora, Twitter's internal message board. Defendants argue that Plaintiffs abandoned this issue in the process of meeting and conferring, but Plaintiffs disagree. Given that Defendants have offered to meet and confer on this issue further and given that the parties have not provided sufficient information on this subject for the Court to rule, the Court DENIES Plaintiffs' request WITHOUT PREJUDICE. Plaintiffs may raise this issue again in a joint letter brief with Defendants after meeting and conferring on this issue, and the Court urges them to provide an explanation of this platform and the challenges and solutions for searching this platform.

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### 3. Issue #3 – Redaction for Relevance

Plaintiffs move to compel full copies of documents, which Defendants have redacted on grounds of relevance. Defendants argue that the documents they have produced are highly sensitive and that the Protective Order in this place does not provide sufficient protection for those documents. For those reasons, Defendants propose that redacting based on relevance is appropriate. The Court disagrees.

In general, courts frown upon the practice of redacting irrelevant information from documents based on one party's unilateral assessment of relevance. *See, e.g., Eshelman v. Puma Biotechnology, Inc.*, 2018 WL327559, at *2- 3 (E.D.N.C. Jan. 8, 2018) (citing cases with similar holdings); *Virco Mfg. Corp. v. Hertz Furniture Sys*., 2014 WL 12591482, at *5 (C.D. Cal. Jan. 21, 2014) (noting that protective order can address concerns about confidentiality of non-relevant information); *In re High-Tech Emp. Antitrust Litig*., 2013 WL 12230960 a, at *1 (N.D. Cal. March 15, 2013); *In re Medeva Sec. Litig.*, 1995 WL943468, at *3 (C.D. Cal. May 30, 1995) (noting that unilateral redactions based on relevance creates more work for parties and court).

Here, there is a stipulated Protective Order that all parties submitted to the Court for approval. (Dkt. 128.) Defendants mention concerns about violation of the Protective Order and their concerns that individuals with access to confidential material will disclose that information. Those concerns are inherent in any case involving sensitive documents. The Court is well aware of the need for confidentiality, as this District handles numerous cases involving trade secrets and other financial secrets. The solution to Defendants' concerns about the Protective Order is to move to amend the Protective Order, not to allow parties to make unilateral assessments about redaction based on irrelevance. Therefore, the Court ORDERS Defendants to produce documents in unredacted form.[1]

### 4. Issue # 4 – Documents Containing Terms "DAU" and "MAU"

Plaintiffs seek an order compelling Defendants to produce all documents that are responsive to Plaintiffs' RFPs. It appears that Plaintiffs request all documents responsive to RFPs

[1] Of course, Defendants may continue to redact documents to remove privileged information or information protected by the attorney work product doctrine, subject to a privilege log.

1, 2, 3, and 5. These requests seek "[a]ll documents and communications concerning" several categories: User Engagement, Monthly Active Users, Ad Engagements, and any meetings during which there was a discussion of User Engagement and/or Monthly Active Users. Defendants argue that these requests are so broad that they will be required to produce almost every document at Twitter, since these documents address the core of Twitter's business in increasing users and advertisement. The Court agrees that the RFPS 1, 2, 3, and 5 are overbroad under Rule 26(b)(1) of the Federal Rules of Civil Procedure. However, it is not clear from the Responses and the letter brief what compromises or proposals Defendants have offered to produce targeted documents, other than the general proposition that Defendants will produce relevant information. (Dkt. 134-2.) For that reason, the Court DENIES the motion to compel WITHOUT PREJUDICE. If Plaintiffs are concerned that the other RFPs are not yielding relevant documentation, they may re-file this motion with a more specific, targeted approach.

**5. Issue #5 – Search Terms**

Plaintiffs seek guidance on the search terms for searching electronic data. Although the parties have met and conferred in good faith to agree upon many search terms, they have not agreed on the use of the word "engag*." In this system, the use of the asterisk calls up documents that have the root "engag" but with additional letters after it.

Defendants argue that the use of that term alone yields too many non-responsive documents, such as communications about engagement parties, civic engagement and political engagement. Defendants have suggested that the search for "engag*" but only where that word is within five words of certain terms. For example, in response to RFP 1, Defendant propose that the search for documents containing the word "engag*" only do so for documents where over 20 suggested terms are within five words of "engag*." Plaintiffs are concerned that the use of those limiting terms will cause relevant information to slip through the search, since an experimental search of Twitter's publicly-filed documents shows that the search with those limiting terms will not reveal all relevant documents. Plaintiffs and Defendants raise good points, and there is no perfect solution. However, as a practical compromise, the Court ORDERS that the search with the term "engag*" be conducted for documents with that term within 10 words of certain terms.

Defendants have proposed 20 plus terms (Dkt. 134-7), and Plaintiffs may add an additional 10 terms.

**6. Issue #6 – Litigation Hold Memoranda**

Plaintiffs move to compel documents responsive to RFP 27, documents concerning Defendants' efforts to "maintain, search for and preserve all documents" and things related to this action. Defendants claims that all responsive documents are privileged and that they will not produce them. Defendants are correct that preservation notices, if prepared by counsel and directed to the client, are protected by the attorney-client privilege. *See, e.g.*, *In re eBay Seller Antitrust Litig.*, 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007). Defendants argue, without citation to supporting evidence, that documents responsive to RFP 27 are all privileged. Plaintiffs argue that the threat of spoliation destroys that attorney-client privilege and cite to Twitter's statement that Twitter does not have data to reconcile some figures regarding MAU "[d]ue to our data retention policies." (Dkt. 134-8.) Any concerns that Plaintiffs have about spoliation can be addressed through means other than forcing Defendants to reveal attorney-client privileged documents or documents protected by the work product doctrine. For example, the Court in *eBay Seller Antitrust Litig.* held that, although the "document retention notices" were protected by attorney-client privilege and/or attorney work product doctrine, plaintiffs in that case were "entitled to inquire into the facts as to what the employees receiving the [document retention notices] have done in response; i.e., what efforts they have undertaken to collect and preserve applicable information." 2007 WL 2852364 at *1. In that case, the Court ordered that a deposition of the person most knowledgeable about retention of electronic information and collection efforts take place. *Id.* at * 2.

Defendants are required to provide a privilege log if they withhold documents on the basis of attorney-client privilege or attorney work product doctrine and have the burden of showing that the attorney-client privilege and/or attorney work product apply. It does not appear that Defendants have either provided a privilege log or met their burden, although generally speaking the Court accepts that a memorandum or notice regarding document retention in response to or in anticipation of litigation is protected. Thus, the Court DENIES Plaintiff's motion to compel

documents responsive to RFP 27 WITHOUT PREJUDICE.

* *

Even though the parties have brought six issues to the Court's attention, it is clear that the parties have worked hard in meeting and conferring to narrow the issues of dispute. The Court commends the parties for doing so and for presenting the remaining issues for dispute in a clear and cogent matter. The Court is confident that the parties will continue to meet and confer in good faith, narrow the areas of their dispute, and only present to the Court matters which they cannot resolve and which are significant.

**IT IS SO ORDERED**.

Dated: February 7, 2018

SALLIE KIM
United States Magistrate Judge

| **Forman v Henkin** |
| --- |
| 2018 NY Slip Op 01015 [30 NY3d 656] |
| February 13, 2018 |
| DiFiore, Ch. J. |
| Court of Appeals |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| As corrected through Wednesday, March 28, 2018 |

[*1]

| **Kelly Forman, Respondent,**<br>**v**<br>**Mark Henkin, Appellant.** |
| --- |

Argued January 2, 2018; decided February 13, 2018

*Forman v Henkin*, 134 AD3d 529, reversed.

{**30 NY3d at 659} OPINION OF THE COURT
Chief Judge DiFiore.

In this personal injury action, we are asked to resolve a dispute concerning disclosure of materials from plaintiff's Facebook account.

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Plaintiff alleges that she was injured when she fell from a horse owned by defendant, suffering spinal and traumatic brain injuries resulting in cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation. At her deposition, plaintiff stated that she previously had a Facebook account on which she posted "a lot" of photographs showing her pre-accident active lifestyle but that she deactivated the account about six months after the accident and could not recall whether any post-accident photographs were posted. She maintained that she had become reclusive as a result of her injuries and also had difficulty using a computer and composing coherent messages. In that regard, plaintiff produced a document she wrote that contained misspelled words and faulty grammar in which she represented that she could no longer express herself the way she did before the accident. She contended, in particular, that a simple email could take hours to write because she had to go over written material several times to make sure it made sense.

Defendant sought an unlimited authorization to obtain plaintiff's entire "private" Facebook account, contending the photographs and written postings would be material and necessary to his defense of the action under CPLR 3101 (a). When plaintiff failed to provide the authorization (among other outstanding discovery), defendant moved to compel, asserting that the Facebook material

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sought was relevant to the scope of plaintiff's injuries and [*2]her credibility. In support of the motion, defendant noted that plaintiff alleged that she was quite active before the accident and had posted photographs on Facebook reflective of that fact, thus affording a basis to conclude her Facebook account would contain evidence relating to her activities. Specifically, defendant cited the claims that plaintiff can no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, contending that photographs and messages she posted on Facebook would{**30 NY3d at 660} likely be material to these allegations and her claim that the accident negatively impacted her ability to read, write, word-find, reason and use a computer.

Plaintiff opposed the motion arguing, as relevant here, that defendant failed to establish a basis for access to the "private" portion of her Facebook account because, among other things, the "public" portion contained only a single photograph that did not contradict plaintiff's claims or deposition testimony. Plaintiff's counsel did not affirm that she had reviewed plaintiff's Facebook account, nor allege that any specific material located therein, although potentially relevant, was privileged or should be shielded from disclosure on privacy grounds. At oral argument on the motion, defendant reiterated that the Facebook material was reasonably likely to provide evidence relevant to

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plaintiff's credibility, noting for example that the timestamps on Facebook messages would reveal the amount of time it takes plaintiff to write a post or respond to a message. Supreme Court inquired whether there is a way to produce data showing the timing and frequency of messages without revealing their contents and defendant acknowledged that it would be possible for plaintiff to turn over data of that type, although he continued to seek the content of messages she posted on Facebook.

Supreme Court granted the motion to compel to the limited extent of directing plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages (2014 NY Slip Op 30679[U] [2014]). Supreme Court did not order disclosure of the content of any of plaintiff's written Facebook posts, whether authored before or after the accident.

Although defendant was denied much of the disclosure sought in the motion to compel, only plaintiff appealed to the Appellate Division.[FN1] On that appeal,

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the Court modified by limiting disclosure to photographs posted on Facebook that{**30 NY3d at 661} plaintiff intended to introduce at trial (whether pre- or post-accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident messages, and otherwise affirmed (134 AD3d 529 [2015]). Two Justices dissented, concluding defendant was entitled to broader access to plaintiff's Facebook account and calling for reconsideration of that Court's recent precedent addressing disclosure of social media information as unduly restrictive and inconsistent with New York's policy of open discovery. The Appellate Division granted defendant leave to appeal to this Court, asking whether its order was properly made. We reverse, reinstate Supreme Court's order and answer that question in the negative.

Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." We have emphasized that "[t]he words, 'material and necessary', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening [*3]the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see also*

*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000]). A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary"—i.e., relevant—regardless of whether discovery is sought from another party (*see* CPLR 3101 [a] [1]) or a nonparty (CPLR 3101 [a] [4]; *see e.g. Matter of Kapon v Koch*, 23 NY3d 32 [2014]). The "statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376 [1991]).

The right to disclosure, although broad, is not unlimited. CPLR 3101 itself "establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101 [b]); attorney's{**30 NY3d at 662} work product, also absolutely immune (CPLR 3101 [c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship" (*Spectrum* at 376-377). The burden of establishing a right to protection under these provisions is with the party asserting it—"the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (*id*. at 377).

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In addition to these restrictions, this Court has recognized that "litigants are not without protection against unnecessarily onerous application of the discovery statutes. Under our discovery statutes and case law, competing interests must always be balanced; the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998] [citations and internal quotation marks omitted]; *see* CPLR 3103 [a]). Thus, when courts are called upon to resolve a dispute,[FN2] discovery requests "must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure . . . Absent an [error of law or an] abuse of discretion," this Court will not disturb such a determination (*Andon*, 94 NY2d at 747; *see Kavanagh*, 92 NY2d at 954).[FN3]

Here, we apply these general principles in the context of a dispute over disclosure of social media materials. Facebook is a {**30 NY3d at 663} social networking website "where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking" (*Romano v Steelcase Inc.*, 30 Misc 3d 426, 429 [Sup Ct, Suffolk County 2010]). Users create unique personal profiles, make connections with new and old "friends" and may "set privacy levels to control with whom

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they share their information" (*id*. at 429-430). Portions of an account that are "public" can be accessed by anyone, regardless of whether the viewer has been accepted as a "friend" by the account holder—in fact, the viewer need not even be a fellow Facebook account holder (*see* Facebook, Help Center, *What audiences can I choose from when I share?*, https://www.facebook.com/help/211513702214269?helpref=faq_content [last accessed Jan. 15, 2018]). However, if portions of an account are "private," this typically means that items are shared only with "friends" or a subset of "friends" identified by the account holder (*id*.). While Facebook—and sites like it—offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute.

On appeal in this Court, invoking New York's history of liberal discovery, defendant argues that the Appellate Division erred in employing a heightened threshold for production of social media records that depends on what the account holder has chosen to share on the public portion of the account. We agree. Although it is unclear precisely what standard the Appellate Division applied, it cited its prior decision in *Tapp v New York State Urban Dev. Corp.* (102 AD3d 620 [1st Dept 2013]), which stated: "To warrant discovery,

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defendants must establish a factual predicate for their request *by identifying relevant information in plaintiff's Facebook account*—that is, information that 'contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims' " (*id.* at 620 [emphasis added]). Several courts applying this rule appear to have conditioned discovery of material on the "private" portion of a Facebook account on whether the party seeking disclosure demonstrated there was material in the "public" portion that tended to contradict the injured party's allegations in some respect (*see e.g. Spearin v Linmar, L.P.*, 129 AD3d 528 [1st Dept 2015]; *Nieves v 30 Ellwood Realty LLC*, 39 Misc 3d 63 [App Term, 1st Dept 2013];{**30 NY3d at 664} *Pereira v City of New York*, 40 Misc 3d 1210[A], 2013 NY Slip Op 51091[U] [Sup Ct, Queens County 2013]; *Romano*, 30 Misc 3d 426). Plaintiff invoked this precedent when arguing, in opposition to the motion to compel, that defendant failed to meet the minimum threshold permitting discovery of any Facebook materials.

Before discovery has occurred—and unless the parties are already Facebook "friends"—the party seeking disclosure may view only the materials the account holder happens to have posted on the public portion of the account. Thus, a threshold rule requiring that party to "identify[ ] relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances,

allowing the account holder to unilaterally obstruct disclosure merely by manipulating "privacy" settings or curating the materials on the public portion of the account.[FN4] [*4]Under such an approach, disclosure turns on the extent to which some of the information sought is already accessible—and not, as it should, on whether it is "material and necessary in the prosecution or defense of an action" (*see* CPLR 3101 [a]).

New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information. Indeed, as the name suggests, the purpose of discovery is to determine if material relevant to a claim or defense exists. In many if not most instances, a party seeking disclosure will not be able to demonstrate that items it has not yet obtained contain material evidence. Thus, we reject the notion that the account holder's so-called "privacy" settings govern the scope of disclosure of social media materials.

That being said, we agree with other courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically{**30 NY3d at 665} discoverable (*see e.g. Kregg v Maldonado*, 98 AD3d 1289, 1290 [4th Dept 2012] [rejecting motion to compel

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disclosure of all social media accounts involving injured party without prejudice to narrowly-tailored request seeking only relevant information]; *Giacchetto*, 293 FRD at 115; *Kennedy v Contract Pharmacal Corp*., 2013 WL 1966219, *2, 2013 US Dist LEXIS 67839, *3-4 [ED NY, May 13, 2013, No. CV 12-2664 (JFB) (ETB)]). Directing disclosure of a party's entire Facebook account is comparable to ordering discovery of every photograph or communication that party shared with any person on any topic prior to or since the incident giving rise to litigation—such an order would be likely to yield far more nonrelevant than relevant information. Even under our broad disclosure paradigm, litigants are protected from "unnecessarily onerous application of the discovery statutes" (*Kavanagh*, 92 NY2d at 954).

Rather than applying a one-size-fits-all rule at either of these extremes, courts addressing disputes over the scope of social media discovery should employ our well-established rules—there is no need for a specialized or heightened factual predicate to avoid improper "fishing expeditions." In the event that judicial intervention becomes necessary, courts should first consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account. Second, balancing the

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potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the court should issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials. In a personal injury case such as this it is appropriate to consider the nature of the underlying incident and the injuries claimed and to craft a rule for discovering information specific to each. Temporal limitations may also be appropriate—for example, the court should consider whether photographs or messages posted years before an accident are likely to be germane to the litigation. Moreover, to the extent the account may contain sensitive or embarrassing materials of marginal relevance, the account holder can seek protection from the court (*see* CPLR 3103 [a]). Here, for example, Supreme Court exempted from disclosure any photographs of plaintiff depicting nudity or romantic encounters.

Plaintiff suggests that disclosure of social media materials necessarily constitutes an unjustified invasion of privacy. We {**30 NY3d at 666} assume for purposes of resolving the narrow issue before us that some materials on a Facebook account may fairly be characterized as private.[FN5] But even private materials may be subject to discovery if they are [*5]relevant. For example, medical records enjoy protection in many contexts under the physician-patient

privilege (*see* CPLR 4504). But when a party commences an action, affirmatively placing a mental or physical condition in issue, certain privacy interests relating to relevant medical records—including the physician-patient privilege—are waived (*see Arons v Jutkowitz*, 9 NY3d 393, 409 [2007]; *Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]). For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information.

Applying these principles here, the Appellate Division erred in modifying Supreme Court's order to further restrict disclosure of plaintiff's Facebook account, limiting discovery to only those photographs plaintiff intended to introduce at trial.[FN6] With respect to the items Supreme Court ordered to be disclosed (the only portion of the discovery request we may consider), defendant more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted "a lot" of photographs showing her active lifestyle. Likewise, given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or

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limitations. The {**30 NY3d at 667} request for these photographs was reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive. It happens in this case that the order was naturally limited in temporal scope because plaintiff deactivated her Facebook account six months after the accident and Supreme Court further exercised its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy.

In addition, it was reasonably likely that the data revealing the timing and number of characters in posted messages would be relevant to plaintiff's claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages. Because Supreme Court provided defendant no access to the content of any messages on the Facebook account (an aspect of the order we cannot review given defendant's failure to appeal to the Appellate Division), we have no occasion to further address whether defendant made a showing sufficient to obtain disclosure of such content and, if so, how the order could have been tailored, in light of the facts and circumstances of this case, to avoid discovery of nonrelevant materials.[FN7]

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In sum, the Appellate Division erred in concluding that defendant had not met his threshold burden of showing that the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to Supreme Court's order were reasonably calculated to contain evidence "material and necessary" to the litigation. A remittal is not necessary here because, in opposition to the motion, plaintiff neither made a claim of statutory privilege, nor offered any other specific reason—beyond the general assertion that defendant did not meet his threshold burden—why any of those materials should be shielded from disclosure.

Accordingly, the Appellate Division order insofar as appealed from should be reversed, with costs, the Supreme Court order reinstated and the certified question answered in the negative. {**30 NY3d at 668}

Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

Order insofar as appealed from reversed, with costs, order of Supreme Court, New York County, reinstated and certified question answered in the negative.

## Footnotes

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**Footnote 1:** Defendant's failure to appeal Supreme Court's order impacts the scope of his appeal in this Court. "Our review of [an] Appellate Division order is 'limited to those parts of the [order] that have been appealed and that aggrieve the appealing party' " (*Hain v Jamison*, 28 NY3d 524, 534 n 3 [2016], quoting *Hecht v City of New York*, 60 NY2d 57, 61 [1983]). Because defendant did not cross-appeal and, thus, sought no affirmative relief from the Appellate Division, he is aggrieved by the Appellate Division order only to the extent it further limited Supreme Court's disclosure order.

**Footnote 2:** While courts have the authority to oversee disclosure, by design the process often can be managed by the parties without judicial intervention. If the party seeking disclosure makes a targeted demand for relevant, non-privileged materials (*see* CPLR 3120 [1] [i]; [2] [permitting a demand for items within the other party's "possession, custody or control," which "shall describe each item and category with reasonable particularity"]), counsel for the responding party—after examining any potentially responsive materials—should be able to identify and turn over items complying with the demand. Attorneys, while functioning as advocates for their clients' interests, are also officers of the court who are expected to make a bona fide effort to properly meet their obligations in the disclosure process. When the process is functioning as it should, there is little need for a court in the first instance to winnow the demand or exercise its in camera review power to cull through the universe of potentially responsive materials to determine which are subject to discovery.

**Footnote 3:** Further, the Appellate Division has the power to exercise independent discretion—to substitute its discretion for that of Supreme Court, even when it concludes Supreme Court's order was merely improvident and not an abuse of discretion—and when it does so applying the proper legal principles, this Court will review the resulting Appellate Division order under the deferential "abuse of discretion" standard (*see e.g. Andon*; *Kavanagh*; *see generally Kapon*).

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**Footnote 4:** This rule has been appropriately criticized by other courts. As one federal court explained,

> "[t]his approach can lead to results that are both too broad and too narrow. On the one hand, a plaintiff should not be required to turn over the private section of his or her Facebook profile (which may or may not contain relevant information) merely because the public section undermines the plaintiff's claims. On the other hand, a plaintiff should be required to review the private section and produce any relevant information, regardless of what is reflected in the public section . . . Furthermore, this approach improperly shields from discovery the information of Facebook users who do not share any information publicly" (*Giacchetto v Patchogue-Medford Union Free Sch. Dist.*, 293 FRD 112, 114 n 1 [ED NY 2013]).

**Footnote 5:** There is significant controversy on that question. Views range from the position taken by plaintiff that anything shielded by privacy settings is private, to the position taken by one commentator that "anything contained in a social media website is not 'private' . . . [S]ocial media exists to facilitate social behavior and is not intended to serve as a personal journal shielded from others or a database for storing thoughts and photos" (McPeak, *The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data*, 48 Wake Forest L Rev 887, 929 [2013]).

**Footnote 6:** Because plaintiff would be unlikely to offer at trial any photographs tending to contradict her claimed injuries or her version of the facts surrounding the accident, by limiting disclosure in this fashion the Appellate Division effectively denied disclosure of any evidence potentially relevant to the defense. To the extent the order may also contravene CPLR 3101 (i), we note that neither party cited that provision in Supreme Court and we therefore have no occasion to further address its applicability, if any, to this dispute.

**Footnote 7:** At oral argument, Supreme Court indicated that, depending on what the data ordered to be disclosed revealed concerning the frequency of plaintiff's post-accident messages, defendant could possibly pursue a follow-up request for

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disclosure of the content. We express no views with respect to any such future application.

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| **Vasquez-Santos v Mathew** |
| --- |
| 2019 NY Slip Op 00541 [168 AD3d 587] |
| January 24, 2019 |
| Appellate Division, First Department |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| As corrected through Tuesday, March 12, 2019 |

[*1]

| **Genaro Vasquez-Santos, Respondent,**<br>**v**<br>**Leena Mathew, Appellant. (And a Third-Party Action.)** |
| --- |

McDonald & Safranek, New York (Kenneth E. Pinczower of counsel), for appellant.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for respondent.

Order, Supreme Court, New York County (Adam Silvera, J.), entered June 7, 2018, which, to the extent appealed from as limited by the briefs, denied defendant's motion to compel access by a third-party data mining company to plaintiff's devices, email accounts, and social media accounts, so as to obtain

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photographs and other evidence of plaintiff engaging in physical activities, unanimously reversed, on the law and the facts, without costs, and the motion granted to the extent indicated herein.

Private social media information can be discoverable to the extent it "contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims" (*Patterson v Turner Constr. Co.*, 88 AD3d 617, 618 [1st Dept 2011]). Here, plaintiff, who at one time was a semi-professional basketball player, claims that he has become disabled as the result of the automobile accident at issue, such that he can no longer play basketball. Although plaintiff testified that pictures depicting him playing basketball, which were posted on social media after the accident, were in games played before the accident, defendant is entitled to discovery to rebut such claims and defend against plaintiff's claims of injury. That plaintiff did not take the pictures himself is of no import. He was "tagged," thus allowing him access to them, and others were sent to his phone. Plaintiff's response to prior court orders, which consisted of a HIPAA authorization refused by Facebook, some obviously immaterial postings, and a vague affidavit claiming to no longer have the photographs, did not comply with his discovery obligations. The access to plaintiff's accounts and devices, however, is appropriately limited in time, i.e., only those items posted

or sent after the accident, and in subject matter, i.e., those items discussing or showing plaintiff engaging in basketball or other similar physical activities (*see Forman v Henkin*, 30 NY3d 656, 665 [2018]; *see also Abdur-Rahman v Pollari*, 107 AD3d 452, 454 [1st Dept 2013]). Concur—Sweeny, J.P., Tom, Kahn, Oing, Singh, JJ.

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF ILLINOIS**

| | |
|---|---|
| **DEON HAMPTON,** | |
| **Plaintiff,** | |
| **v.** | **Case No. 18-cv-550-NJR** |
| **KEVIN KINK, et al.,** | |
| **Defendants.** | |

# MEMORANDUM AND ORDER

**ROSENSTENGEL, Chief Judge:**

This matter is before the Court on motions to compel filed by both Plaintiff Deon Hampton and Defendants. Defendants filed a motion to compel (Doc. 142) seeking Hampton's Facebook posts. Hampton filed a response in opposition to the motion (Doc. 143). Hampton also filed a motion to compel (Doc. 144) seeking Facebook posts. Defendants filed a response (Doc. 145) to that motion. The Court held a hearing on the motions on January 13, 2021.

## Factual Background

Plaintiff Deon Hampton, who was an inmate with the Illinois Department of Corrections ("IDOC") at the time she filed her lawsuit, brings this case pursuant to 42 U.S.C. § 1983 for deprivations of her constitutional rights. Her Second Amended Complaint (Doc. 138) alleges claims for failure to protect, cruel and unusual punishment, and excessive force, all under the Eighth Amendment. She also alleges a claim under the Illinois Hate Crimes Act, 720 ILCS § 5/12-7.1(c), as well as a state law claim for intentional



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infliction of emotional distress. She alleges that while incarcerated she was subjected to physical and verbal abuse and discriminated against. She also alleges that Defendants failed to protect her from abuse and kept her in segregation on false disciplinary tickets which prevented her from receiving proper mental health care.

**A. Defendants' Motion to Compel**

Defendants' motion to compel (Doc. 142) seeks Facebook posts from Hampton, from January 1, 2018 to the present, which reference her litigation with IDOC, her medical and mental health treatment, and her gender identity. Hampton objects on the grounds that the request is not relevant, is unduly burdensome, and is meant to harass her. Defendants argue that the documents are relevant because Hampton's gender identity and her mental and health treatment are a central issue in the case and the posts will show lasting effects of the Defendants' actions as well as how she was treated by Defendants and her vulnerability while in prison.

Hampton argues that the posts related to her gender identity are not relevant because the parties do not dispute her gender identity and the posts occurred after her release from prison and do not relate to the treatment she received in prison. Hampton notes that she is willing to stipulate that she still identifies as female after her release from prison. She argues that the request is overbroad because all of her posts reference her identity, including pictures that show her choice of clothing, accessories, hair, makeup, and voice. She also posted several times a day since her release making the request overly burdensome. She notes that her Facebook page is public, and Defendants are free to sort through the posts for any relevant information.

Hampton also argues that any posts related to her pursuing litigation against IDOC are not relevant and designed only to harass her and dissuade her from speaking publicly about the litigation. She points out that Defendants have not offered any relevance to posts about litigation. Further, Hampton notes that although she has posted new articles about the litigation and mentioned her desire to bring awareness to the injustices in the prison setting, she is not aware of any specific posts about this litigation.

As to the request regarding mental and medical posts, Hampton notes that she is unaware of any posts related to her mental and medical treatment after leaving IDOC custody. Further, she testified that she suffers from post-traumatic stress disorder and Defendants failed to demonstrate that any Facebook post would be relevant in refuting that diagnosis.

**B. Hampton's Motion to Compel**

Hampton seeks posts from Defendants from the Facebook page "Behind the Walls—Illinois Dep't of Corrections", a private group established in 2011 for correctional staff. The group's posts are only available to group members and Hampton received some sample postings from the group through an anonymous source. Those samplings were posts that discussed Hampton and, according to Hampton, were homophobic, racist, transphobic, and demeaning (Doc. 144-1). Hampton requested from Defendants posts from the group page from January 2018 to the present that related to (1) Hampton, (2) transgender prisoners, and (3) posts made by Defendants.

In response to the request, Defendant Burley indicated he was a member of the group and posted about Hampton but did not have possession of those posts (Doc. 144-

3, p. 12). Defendant Kirk also was a member of the group and made posts but did not have access to the posts and had not been on the site in a long time (*Id*. at pp. 4-5). Defendants Gee and Manzano were not members of the group, Defendant Varga simply responded "none," and Defendant Kunde said she had not been on Facebook in five years (*Id*. at pp. 25-26, 28-29, 31-32, and 34-35). Defendant Doering initially responded that he did not post in the group but later testified at his deposition that he was a member of the group (*Id*. at pp. 14-15). He later supplemented his response indicating that he was a member but did not have the two-factor authorization to access the group and could not print anything from the site because he only had access on his phone (*Id*. at p. 17, 21-22). Defendant Burley later indicated that he would search the site for his own posts. Defendants, however, object to searching the site for all of the posts that Hampton seeks (Doc. 144-5). Defendants admit that Doering, Kink, and Burley have access to the group page but object to searching the group for the documents requested by Hampton. This would include any posts that Defendants liked, read, or otherwise had access to.

Hampton argues that the posts are relevant and are limited in time and scope. She specifically seeks posts that were transphobic and discussed the personal and medical information of inmates, including Hampton. She already has a sampling of posts which show that there were posts of a transphobic nature about her as well as other inmates. Hampton believes that similar posts about her and other inmates are on the page. She argues that the posts are from IDOC employees of the prisons at issue in this case, some of which Defendants knew as employees. Some Defendants were also members of the group and admitted reading posts on the page, which Hampton argues indicates that

they participated in those discussions and were aware of the transphobia prevalent among employees. They might have also liked posts, demonstrating their complicity which Hampton argues is key to her failure to protect claim.

Defendants maintain that Burley was able to re-join the group in order to obtain copies of his posts. Doering has not posted on the page and only has access to the page through his phone. Kink retired in December 2018 and only posted condolences on the site. He is no longer a member of the group. Blackburn, Varga, and Gee are not a part of the group and Kunde and Manzano no longer have Facebook accounts. They note that none of the sample postings produced by Hampton show that any of the Defendants made comments on the posts nor is there any reference to them in the posts. They argue that Hampton's request amounts to a fishing expedition as Hampton indicates she wants to see what other guards were saying about her on the page. Although she argues that the posts show a transphobia culture in IDOC and that Defendants were aware of that culture, Defendants argue she has not shown that they were aware of the posts or that the attitudes expressed influenced how inmates were treated.

## ANALYSIS

### A. Defendants' Motion to Compel

The information Defendants seek is relevant to the Eighth Amendment claims in this case. Defendants seek Hampton's Facebook posts from January 2018 to the present that reference her litigation with IDOC, her medical and mental health treatment, and her gender identity. And, with the exception of Hampton's gender identity posts (a request that encompasses all content on her Facebook page), Defendants' request is not overly



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burdensome. Given that Hampton's Facebook page is available for viewing by the general public, counsel for both parties agree that Plaintiff need only provide Defendants with her Facebook "handle" to satisfy their production request. Accordingly, Hampton is ordered to produce her Facebook handle to Defendants within seven days.

**B. Hampton's Motion to Compel**

Hampton requests an order compelling Defendants to produce Facebook posts/comments/reactions pertaining to Hampton, transgender inmates, or made by Defendants Burley, Kink, and Doering from the private Facebook page, "Behind the Walls—Illinois Dep't of Corrections." Hampton also seeks an order compelling Defendants to produce the same information from their personal Facebook accounts, to include posts/comments/reactions pertaining to Hampton and transgender inmates and related activity logs dating back to January 2018. With regard to both requests, Hampton seeks an order compelling counsel for Defendants to conduct the search of electronically stored information (ESI) on behalf of Defendants and determine what information is subject to this order before producing the same.

In support of this request, Hampton cites *Brown v. City of Chicago*, Case No. 19-cv-4082 (N.D. Ill.), a case in which counsel was ordered to complete an ESI search on behalf of their clients and determine what information was subject to the discovery request. The information Hampton now seeks is relevant to her Eighth Amendment claims, and counsel for Defendants shall be required to produce this information to Hampton within thirty days.



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**DISPOSITION**

Defendants' motion to compel (Doc. 142) is **GRANTED**, and the Court **ORDERS**: on or before **January 20, 2021**, Hampton shall produce to Defendants the name of her Facebook handle. Counsel for Defendants shall use this information to access and review Hampton's Facebook page and search for information relevant to this case. Should any issue arise accessing relevant information, counsel should attempt to resolve the issue informally before seeking the Court's intervention.

Hampton's motion to compel (Doc. 144) is **GRANTED**, and the Court **ORDERS**: on or before **February 16, 2021**, Defendants, by and through counsel, must perform a search of electronically stored information (ESI) contained on the private Facebook page, "Behind the Walls—Illinois Dep't of Corrections," which can be accessed by Defendants Doering, Kink, and Burley, and produce any posts: (1) mentioning Hampton; (2) mentioning any transgender prisoner or transgender prisoners in general; or (3) posted by any Defendant. By the same deadline, Defendants, by and through counsel, must perform an ESI search of each Defendant's Facebook page and produce any posts or comments from January 2018 through the present mentioning: (1) Hampton; or (2) any transgender prisoner or transgender prisoners in general. Counsel also must search each Defendant's activity log and produce a list of any activity (posts, comments, reactions, etc.) pertaining to Hampton or transgender prisoners from January 2018 through the present.

**All information produced pursuant to this Order is subject to a conditional protective order. Should any party deem it necessary or warranted to make any of the**

**information part of the public record, that party must first file a written motion with the Court, and the opposing party shall have an opportunity to respond before the Court decides the matter.**

Finally, the Scheduling Orders (Docs. 120 and 136) are **AMENDED** as follows: Dispositive motions are now due on or before **March 12, 2021**.

**IT IS SO ORDERED.**

**DATED: January 13, 2021**

**NANCY J. ROSENSTENGEL**
**Chief U.S. District Judge**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF GEORGIA**
**SAVANNAH DIVISION**

| | | |
|---|---|---|
| JOHN BROWN, JR., and JAVONNA BROWN, | ) | |
| Plaintiffs, | ) | |
| v. | ) | CV419-303 |
| SSA ATLANTIC, LLC, | ) | |
| Defendant. | ) | |

**ORDER**

This personal injury case was removed from the State Court of Chatham County, Georgia. *See* doc. 1 (Notice of Removal). Before the Court is defendant SSA Atlantic, LLC's (SSA) Motion for Sanctions for plaintiff John Brown, Jr.'s alleged spoliation of electronically stored evidence, specifically his social media accounts. *See* doc. 30.

Before discussing the issues implicated by the motion, the Court must address the briefing. If the briefing proves nothing else, it shows that the attorneys in this case are frustrated with each other. As both note, the tone of their respective briefs is, to say the least, testy. *See*, *e.g.*, doc. 38 at 2 (stating that the defendant's motion was motivated by a concern that "[t]he chance to distract with conspiracy theories and

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innuendo might be lost or destroyed."); doc. 41 at 2 (noting that plaintiff's brief is "indignant," and "angry"). Of particularly dubious distinction in this regard is SSA's otherwise inexplicable discussion of plaintiff's criminal history. *See* doc. 30 at 3. While the adversarial system is a fundamental, and often salutary, element of American civil justice, it can have unintended, less salutary, consequences. The briefing here is a lamentable example of the latter.

## I. BACKGROUND

This case arises out of a vehicle collision. Plaintiffs' Amended Complaint alleges:

> On August 13, 2019, Plaintiff John Brown, Jr. was assigned to drive a jockey truck by his employer . . . . The assigned jockey truck was parked in a parking space . . ., and as Plaintiff . . . was entering the cab through its back doors . . . , an employee of Defendant . . . attempted to pass the vehicle. [That employee], misjudging his clearance and traveling at an excessive speed, struck the flatbed trailer which was attached to Plaintiff['s] jockey truck. As a result of the tremendous impact, Plaintiff . . . , was ejected through the back doors of the jockey truck cab, ultimately landing on the flatbed trailer.

Doc. 14 at 2, ¶ 7. As a result of the collision, John Brown allegedly sustained injuries. *Id.*, ¶ 8. Plaintiffs have asserted various tort claims, based on a theory of *respondeat superior*, against SSA, including



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negligence, negligence *per se*, and loss of consortium on behalf of plaintiff Javonna Brown. *Id.* at 3–4.

The parties conducted discovery; as relevant to this motion plaintiff John Brown[1] responded to defendant's requests for production of documents, *see* doc. 30-2, and defendant deposed plaintiff John Brown, *see* doc. 30-1. *See generally* doc. 30 at 1. In both the deposition and written discovery responses, Brown disclosed one Facebook account. *See* doc. 30 at 1; *see also* doc. 30-1 at 12 (plaintiff refers to a singular Facebook "account"); doc. 30-2 at 7 (plaintiff's response, subject to his objection, discloses a "Facebook account" that was deactivated). In his written response plaintiff claimed he had deactivated the account before the collision occurred, but in his deposition, he conceded it was deactivated after the collision. *See* doc. 30-1 at 12 (plaintiff's statement that he "deactivated [his Facebook] account" and that he deactivated it after the "incident" at issue in the lawsuit); doc. 30-2 at 7 (plaintiff's response, subject to his objection, that "his Facebook account was deactivated prior to the subject incident," to the requested production of Facebook account

[1] The requests and responses refer to plaintiff John Brown exclusively. *See* doc. 30-2 at 1. Since the discovery at issue relates solely to plaintiff John Brown, the Court's references to "plaintiff" or "Brown" refer to him alone.

data "for the period of January, 2018 through present"). Defendant also alleges that it has discovered Plaintiff has at least two other Facebook accounts, and possibly four, that were undisclosed. Doc. 30 at 11. Plaintiff's response effectively concedes that he had no fewer than three "burner" accounts. *See* doc. 38 at 8–9. Defendant requests that Plaintiff's complaint be stricken as a sanction for the alleged spoliation, or, alternatively the jury should be instructed to draw an adverse inference. *Id.* at 2. Failing either of those sanctions, SSA requests that plaintiff be ordered to produce the requested account information. *Id.* at 2–3.

Plaintiff objects that defendant failed to seek an informal resolution of this issue before filing its motion. *See* doc. 38 at 9–12. He also responds with the suggestion that the Facebook information may yet be retrievable, if he "reactivated" his account. *See id.* at 13. SSA replies that motions for spoliation sanctions are not governed by the provisions of the Federal Rules related to discovery, and so they are subject to neither the Rules' requirement of attempts at informal resolution nor the requirements of the undersigned's standing order. *See* doc. 41 at 3–4.

As discussed more fully below, the Court ultimately agrees with both parties. SSA is correct that plaintiff's discharge of his discovery



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obligations has been woefully deficient. Plaintiff is correct that the discovery-dispute procedures would have provided a more appropriate avenue to raise the issue. What plaintiff, unfortunately, fails to appreciate is that SSA's failure is, at most, a procedural gaffe. His own conduct, as SSA points out perhaps too emphatically, is much more troubling.

As this Court has previously been compelled to explain, "litigation is not an exercise in catching one's opponent in some technical misstep to secure advantage. It is a search for truth and justice. The procedural rules should facilitate that search, not impede it." *Higgins v. City of Savannah, Georgia,* 2018 WL 777164, at * 5 (S.D. Ga. Feb. 8, 2018). Then, as now, "[t]his Court will not abide *any* party or counsel's attempt to reduce its procedures to a game of 'Gotcha!'" *Id.* Plaintiff's response appears to be little more than an attempt to hide a substantive mountain behind a procedural molehill. If that was his intent, it has failed. Given the Court's broad discretion to manage discovery, *see, e.g.*, *Perez v. Miami-Dade Cnty.*, 297 F.3d 1255, 1263 (11th Cir. 2002), and the Federal Rules' injunction that procedure should be administered "to secure the just, speedy, and inexpensive determination of every action and proceeding," Fed. R. Civ. P.



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1, the Court will endeavor to resolve the discovery dispute without further delay.

## II. ANALYSIS

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Brown v. Chertoff*, 563 F. Supp. 2d 1372, 1377 (S.D. Ga. 2008). The Court has "broad discretion" to impose sanctions as part of its "inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases." *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). Spoliation sanctions may include dismissal, exclusion of testimony, or an instruction to the jury to presume that the evidence would have been unfavorable to the spoliator. *Id.*

Plaintiff makes much of SSA's failure to engage in informal discovery dispute processes. *See e.g.*, doc. 38 at 10 (referring to the failure to engage in informal resolution of the dispute as "inexcusable"). However, SSA plausibly argues that motions for spoliation sanctions are treated differently than other discovery disputes. *See* doc. 41 at 3. As SSA's brief points out, *see* doc. 41 at 3, courts have not treated motions



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alleging spoliation of evidence exclusively under the Federal Rules of Civil Procedure. *See, e.g., Sosa v. Carnival Corp.*, 2018 WL 6335178, at * 8 (S.D. Fla. Dec. 4, 2018) ("A district court's power to sanction a party for spoliation of evidence derives from two sources: (1) the Federal Rules of Civil Procedure and (2) the court's inherent power to control the judicial process and litigation." (citations omitted)); *see also McLeod v. Wal-Mart Stores, Inc.*, 2012 WL 2930769, at * 3 (S.D. Ga. July 18, 2012) ("Federal courts have broad discretion to impose spoliation sanctions against litigants as part of their inherent power to manage their own affairs."). To the extent that such a motion invokes the Court's inherent power, and not the Federal Rules, it is, at best, unclear whether the Rules-derived requirement of a conference applies; regardless of whether that requirement is imposed by the Rules themselves or from the Court's orders invoking them. *Cf.* doc. 5 at 5 (imposing discovery dispute resolution procedures to "any motions filed pursuant to Title V of the Federal Rules of Civil Procedure").

The Court does, however, agree that SSA's presentation of this issue as a motion for spoliation sanctions, pursuant to the Court's inherent power, is perhaps not the most natural. In the first place, despite the



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defendant's characterization, it is not clear that any evidence has been *spoliated*, as opposed to withheld. Defendant's brief explains the distinction between "deactivating" and "deleting" a Facebook account. *See* doc. 30 at 6 n. 4 (quoting *Bruner v. City of Phoenix*, 2020 WL 554387, at * 3 n. 6 (D. Ariz. Feb. 4, 2020). As the Court in *Bruner v. City of Phoenix* explains, "deactivation" primarily prevents third-party access to the Facebook account, and "reactivation" remains possible. *Bruner,* 2020 WL 554387, at * 3 n. 6. "Deletion," in contrast, "is a much more permanent step, and it means that the account information will be erased from the site completely." *Id.* SSA does not dispute that, based on the information currently available, Brown has only "deactivated" and not "deleted" his Facebook account(s). *See, e.g.,* doc. 30 at 4–6.

Despite recognizing the distinction between deactivation and deletion, SSA contends "[d]eactivation of Facebook accounts during discovery constitutes spoliation." Doc. 30 at 13. The cases it cites do not, however, suggest that deactivation amounts to spoliation, as opposed to a more generalized discovery violation. In *Bruner,* the principal case cited, the court cites to discovery rules—Rules 37 and 26, *see* 2020 WL 554387, at *6 (D. Ariz. Feb. 4, 2020)—but never once mentions "spoliation."



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Moreover, the motions at issue were brought pursuant to Rule 37. *See Bruner*, CV218-664, doc. 86 at 1 (D. Ariz. July 11, 2019), doc. 99 at 1 (D. Ariz. Aug. 20, 2019). Finally, *Bruner* involved allegations of deletion of data, not merely deactivation of the account. *See Bruner*, 2020 WL 554387, at * 2 (discussing the court's finding that one of the plaintiff's deleted at least one Facebook post). The other cases cited recite similar information. *See D.O.H. v. Lake Central School Corp.*, 2015 WL 736419, at * 3, * 9 (N.D. Ind. Feb. 20, 2015) (considering sanctions pursuant to Rule 37 and noting the party's admission "that he deleted some posts from his Facebook account on the day of the assault and acknowledged that he possibly deleted other posts prior to the court order requiring the preservation of evidence."); *see also* doc. 30 at 14-15 (quoting *Painter v. Atwood*, 2014 WL 1089694, at * 9 (D. Nev. Mar. 18, 2014) (noting "the deletion of a Facebook comment is an intentional act")). None of those cases, then, stand for the proposition that "deactivating" a Facebook account, without concomitant destruction or irremediable alteration, amounts to spoliation.

To the extent that court-ordered production of the material remains as a potential form of relief, Rule 37 appears to be a more natural

procedure. *See* Fed. R. Civ. P. 37(a)(3)(B)(iv) (motion to compel production of documents). Indeed, even if plaintiff's conduct were sufficiently willful to warrant sanctions, Rule 37 includes applicable provisions. *See* Fed. R. Civ. P. 37(a)(4) (evasive or incomplete responses are to be treated as failures to respond); (d) (motion for sanctions for failure to respond to request for production of documents). Finally, Rule 37(e) includes specific procedures applicable "[i]f 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." Fed. R. Civ. P. 37(e). Given the facts as they currently appear, SSA might have used those procedures to secure the relief it seeks.

However, the Court, and possibly the parties, simply can't tell from the pleadings whether information has, even allegedly, been irretrievably lost. *See, e.g.*, doc. 41 at 8 ("There is no way to determine, without the account information that was originally requested in discovery, whether Brown has postings he shares with "Friends" but not with the general public, or whether he has deleted information."). If the information has not been *destroyed*, but "only" withheld, Rule 37, with its attendant

prerequisites, provides a more appropriate procedure. In the absence of a clear showing that information has been destroyed or significantly altered, the Motion for Spoliation Sanctions is **DENIED, in part**. Doc. 30.

Although the Court disagrees with SSA's procedural choice, the substance of its motion is spot on. Brown's alleged conduct related to the social media discovery, which he never really disputes, is troubling. The defense of his objection to the written request is dubious, at best.[2] *See* doc. 38 at 8. Although he tries to brush off the issue as harmless, plaintiff

[2] This Court has specifically rejected the argument that discovery of social media accounts amounts to a "fishing expedition." *See Bryant v. Perry*, 2010 WL 11590650 at * 1 (S.D. Ga. Apr. 22, 2010). It has also specifically rejected the argument that a party seeking to discover social media posts must make a threshold relevance showing to do so. *See Jacquelyn v. Macy's Retail Holdings, Inc.*, 2016 WL 6246798 at * 7 (S.D. Ga. Oct. 24, 2016) (the Westlaw citation misstates the case name of *Orr v. Macy's Retail Holdings, LLC*, CV416-052 (S.D. Ga.), for clarity the Court refers to the case by the Westlaw name). *Jacquelyn* expressly considered, and rejected, the approach of the Eastern District of Michigan in *Tompkins v. Detroit Metro Airport* that plaintiff relies upon. *See* doc. 38 at 8; *Jacquelyn*, 2016 WL 6246798 at * 7 (discussing *Tompkins*, 278 F.R.D. 387 (E.D. Mich. 2012), declaring itself "unconvinced" of its merits, and requiring disclosure of Facebook data). *Jacquelyn* also explains the presumptive relevance of social media data in a personal injury case. *See id*. (noting that the plaintiffs' "physical condition and . . . quality of life are both at issue in this case, [cit.], plaintiffs' Facebook postings reflecting physical capabilities and activities inconsistent with their injuries are relevant and discoverable," and collecting cases). Similarly, here, John Brown's "physical and mental pain and suffering and permanent impairment" are expressly listed as elements of his damages. Doc. 14 at 2, ¶ 8; *see also id*. at 4, ¶ 21. Given this Court's prior treatment of arguments virtually identical to plaintiff's objection, it cannot agree with his contention that those objections are "well founded." Doc. 38 at 8. However, as discussed below, plaintiff's evasive and incomplete response to the request waives any objection, rending its merits, if any, moot.

concedes that his response was inaccurate when it was provided. *See id.* at 8 (conceding that plaintiff created other Facebook accounts "years ago," *i.e.* before he disclosed his, singular, deactivated "Facebook account"). The concluding contention that "there are appropriate procedures" SSA could have used to gain access to the deactivated Facebook account, *see id.* at 13, is particularly brazen, given that the original discovery request seems like *exactly* the "appropriate procedure," which Brown's inadequate response obstructed. Even if a conference was technically required, *plaintiff* might have mooted the issue by producing the requested material when the motion was filed or initiating the meet-and-confer process himself. Despite his response effectively conceding that his original discovery response was defective, plaintiff *still* does not propose to make good his failure. *See* doc. 38 at 13; *see also* doc. 41 at 8 (stating that plaintiff "never produced his Facebook materials" (emphasis omitted)). In the absence of any indication that he—or perhaps more accurately his attorneys—took any of those good-faith steps, the brief's indignation rings particularly hollow.

Although the Court cannot find that any evidence has been spoliated, under the circumstances it need not wait to rectify the situation. Since



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plaintiff's brief effectively concedes that his response to the written discovery request was "evasive or incomplete," his objection is deemed waived.[3] *See Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 617 (5th Cir. 1977) ("[S]ince an evasive or incomplete answer is equated with failure to answer, the [responding party] did, under the law, fail to answer, thus waiving any objections to [the discovery request].")[4] The Court, therefore, **GRANTS** SSA's alternative request to compel production of the Facebook data. *See* doc. 30 at 2–3.

Brown is **DIRECTED** to produce account data for the period of January 2018 through the present for *each* Facebook account he maintains or maintained, whether the account is "deactivated" or not, to SSA by no later than seven (7) days after the entry of this Order. SSA's request for attorneys' fees, doc. 30 at 3, however, is **DENIED**. *See* Fed. R. Civ. P. 37(a)(5)(A)(i). If, upon review of the material produced, SSA concludes

[3] The response clearly states that plaintiff's "Facebook account was deactivated *prior* to the subject incident." *See, e.g.*, doc. 38 at 7 (quoting doc. 30-2 at 7). However, plaintiff's response brief concedes that the chronology was inaccurate. *See id.* at 8. He also concedes that it was incomplete in failing to identify his other Facebook accounts. *See id.* at 9. Whether or not the response was willfully deceptive, it is clearly not what the Federal Rules require.

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions that were handed down prior to the close of business on September 30, 1981.



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that additional, limited-purpose, discovery is necessary, the Court will consider modification of the Scheduling Order. If SSA concludes that substantive information was, in fact, lost or destroyed because of the "deactivation," it is free to renew its motion for spoliation sanctions.

## III. Potentially Improper Certification of Discovery Responses

Although the Court cannot find that spoliation sanctions are appropriate, plaintiff's own argument exposes a deeper problem that the Court cannot ignore. The Federal Rules of Civil Procedure impose a duty on attorneys to sign discovery responses, certifying them. *See* Fed. R. Civ. P. 26(g). Certification implicitly imposes a duty upon the signing attorney to make "a reasonable inquiry into the factual basis of his response, request, or objection." *In re Delta/AirTran Baggage Fee Antitrust Litigation*, 846 F. Supp. 2d 1335, 1350 (N.D. Ga. 2012) (internal quotation marks and citation omitted). Where such a reasonable inquiry is not conducted, Rule 26(g) *requires* appropriate sanctions be assessed against "the signer, the party on whose behalf the signer was acting, or both." Fed. R. Civ. P. 26(g)(3); *see also id.* (if it determines that a discovery response has been certified in violation of the Rule, "without substantial



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justification, the court, on motion or on its own, *must* impose an appropriate sanction" (emphasis added)).

Plaintiff's brief argues that his undisclosed, so-called "burner," Facebook accounts did not need to be disclosed because they were available "in a publicly viewable location on the internet for anyone to see; identified using John Brown's own name (and for two of [the additional accounts], a picture of his face)." If those profiles were so obvious and easy to discover, the Court must inquire why they were not revealed by plaintiff's counsel's required inquiry and identified notwithstanding the objection. *See* Fed. R. Civ. P. 34(b)(2)(C) ("An objection must state whether any responsive materials are being withheld on the basis of that objection"); *In re Delta/AirTran Baggage Fee Antitrust Litigation*, 846 F. Supp. 2d at 1350 (imposing sanctions under Fed. R. Civ. P. 26(g) where late disclosure of documents demonstrated the responding party "did not conduct a reasonable inquiry into the factual basis for its implicit representations" and, thereby, "falsely certified that its discovery responses were correct and complete."); *see also Venator v. Interstate Resources, Inc.*, 2016 WL 1574090, at * 8 –* 13 (S.D. Ga. Apr. 15, 2016) (discussing then "reasonable

inquiry" requirement and the respective duties of parties and their counsel).

"'The decision whether to impose sanctions under Rule 26(g)(3) is *not discretionary*," and '[o]nce the court makes the factual determination that a discovery filing was signed in violation of the rule it must impose 'an appropriate sanction.'" *Kipperman v. Onex Corp.*, 260 F.R.D. 682, 698 (N.D. Ga. 2009) (quoting *Chaudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1372 (11th Cir. 1997)) (alteration in original) (emphasis added). However, the Rule only mandates sanctions when the violating certification lacks "substantial justification." Fed. R. Civ. P. 26(g)(3). It may well be that such justification exists in this case. In order to determine whether the omitted disclosure of the existence of the "publicly viewable" Facebook accounts was substantially justified, notwithstanding the reasonable-inquiry requirement, plaintiff and the attorney who signed the responses, R. Brian Tanner, are **DIRECTED** to respond within thirty days of the date of this Order and **SHOW CAUSE** why sanctions, pursuant to Rule 26(g)(3), should not be imposed.



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## IV. CONCLUSION

In order to get this case back on track, defendant's motion is **GRANTED, in part**, and **DENIED, in part**, without prejudice to refiling. Doc. 30. Plaintiff is **DIRECTED** to produce data from his Facebook account(s) for the period of January, 2018 through the present, as requested in Request No. 16 of Defendant's First Request for Production of Documents, *see* doc. 30-2 at 7, no later than seven (7) days from the date of this Order. Further, plaintiff and attorney R. Brian Tanner are **DIRECTED** to respond to this Order within thirty days and **SHOW CAUSE** why sanctions should not be imposed, pursuant to Federal Rule of Civil Procedure 26(g).

**SO ORDERED**, this 15th day of March, 2021.

CHRISTOPHER L. RAY
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA



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

| | | |
|---|---|---|
| PAUL TORGERSEN,<br><br>Plaintiff,<br><br>v.<br><br>SIEMENS BUILDING TECHNOLOGY, INC.; SIEMENS INDUSTRY, INC.; SIEMENS CORPORATION; and SIEMENS ENERGY & AUTOMATION, INC.,<br><br>Defendants. | ) | Case No. 19-cv-4975<br><br>Magistrate Judge Cox |
| SIEMENS INDUSTRY, INC.,<br><br>Third-Party Plaintiff,<br><br>v.<br><br>LLD ELECTRIC CO.,<br><br>Third-Party Defendant. | ) | |

**MEMORANDUM OPINION AND ORDER**

On April 1, 2021, Siemens Industry, Inc.[1] and Third-Party Defendant LLD Electric Company ("LLD") filed what was essentially a motion to compel and for sanctions, styled Defendants' Motion for Evidentiary Hearing Regarding Discovery Violations and Spoliation of Evidence. [Dkt. 77.] On April 13, 2021, the Court held a motion hearing on Defendants' motion, where the motion was granted in part and taken under advisement in part. [Dkt. 81.] The Court also set a briefing schedule related to the facts and circumstances surrounding the deletion of Plaintiff's Facebook page because Defendants had articulated a credible allegation with respect to the spoliation of that evidence. *Id.* Briefing is now complete on that issue, and the remainder of Defendants' motion is ripe for disposition.

[1] Siemens Industry Inc. has represented it is the successor by merger to Siemens Building Technology, Inc.; Siemens Energy & Automation, Inc.; and Siemens Corporation. [Dkt. 77, p. 1.]

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This case involves an alleged construction site fall accident that occurred June 14, 2017, at Adlai E. Stevenson High School in Illinois. [Dkt. 1-1 at ¶ 1.] Plaintiff is seeking damages for personal injury and past and future lost earnings and wages. [Dkt. 1-1 at ¶ 10.] Plaintiff alleges an electrocution and fall, resulting in a left shoulder injury. [Dkt. 77 at ¶ 1.] At issue in the instant motion is Plaintiff's Facebook account, which Defendants contend "demonstrated recreational activities, golf trips, and other physical activities [which] would tend to show that the Plaintiff had not lost a normal life, and contrary to his claims was capable of using his shoulder and potentially returning to work." [Dkt 87, p. 4.]

At some point, Plaintiff Paul Torgersen had a publicly viewable Facebook page. [Dkt. 77, ¶¶ 13, 15.] Upon discovering the page, on July 13, 2020, Third-Party Defendant LLD served written discovery on Plaintiff asking about social media accounts including, specifically, the Facebook account. [Dkt. 77, ¶ 14.; Dkt. 87-7.] On or about August 31, 2020, Plaintiff deleted his Facebook account. [Dkt. 83, ¶ 1.] At some point between July 13, 2020 (the day Defendants' interrogatories were served) and August 31, 2020 (the day of deletion), Plaintiff's counsel communicated with Plaintiff not to delete his Facebook page. [Dkt. 83, ¶ 1.] Plaintiff claims he did not remember this directive at the time he deleted his account. *Id.* Facebook's policies state that a deleted Facebook page is permanently deleted after only 30 days. [Dkt. 87-4.] Facebook also takes the position that the Stored Communications Act, 18 U.S.C. 2701 exempts Facebook from a civil subpoena. [Dkt. 87-5.] Therefore, it appears the information contained on Plaintiff's Facebook page cannot be recovered for purposes of this litigation.[2]

Three months after service of LLD's discovery, Plaintiff finally answered the discovery, objecting that a disclosure of the once publicly viewable Facebook page "[u]nnecessarily invades Plaintiff's privacy."

[2] Plaintiff has since opened a new Facebook page [dkt. 83, ¶ 14], but this new page would not have the relevant historical information sought by Defendants. The Court considers Plaintiff's new Facebook page irrelevant for purposes of the instant motion. Unless otherwise noted, whenever the Court refers to Plaintiff's Facebook page, it is to the Facebook page Plaintiff deleted on or about August 31, 2020 (Plaintiffs have identified the subject Facebook page as https://www.facebook.com/paul.torgersen.9 [Dkt. 77, ¶ 13]).

[Dkt. 77, ¶ 15.] As an initial matter, the Court overrules this objection.[3] While a person generally has a reasonable expectation of privacy in the contents of their own computer, there is no such expectation "when a computer user disseminates information to the public through a website," such as Plaintiff did on his Facebook page. *Palmieri v. United States*, 72 F. Supp. 3d 191, 210 (D.D.C. 2014). Plaintiff has knowingly exposed this information to the public by posting it to Facebook.

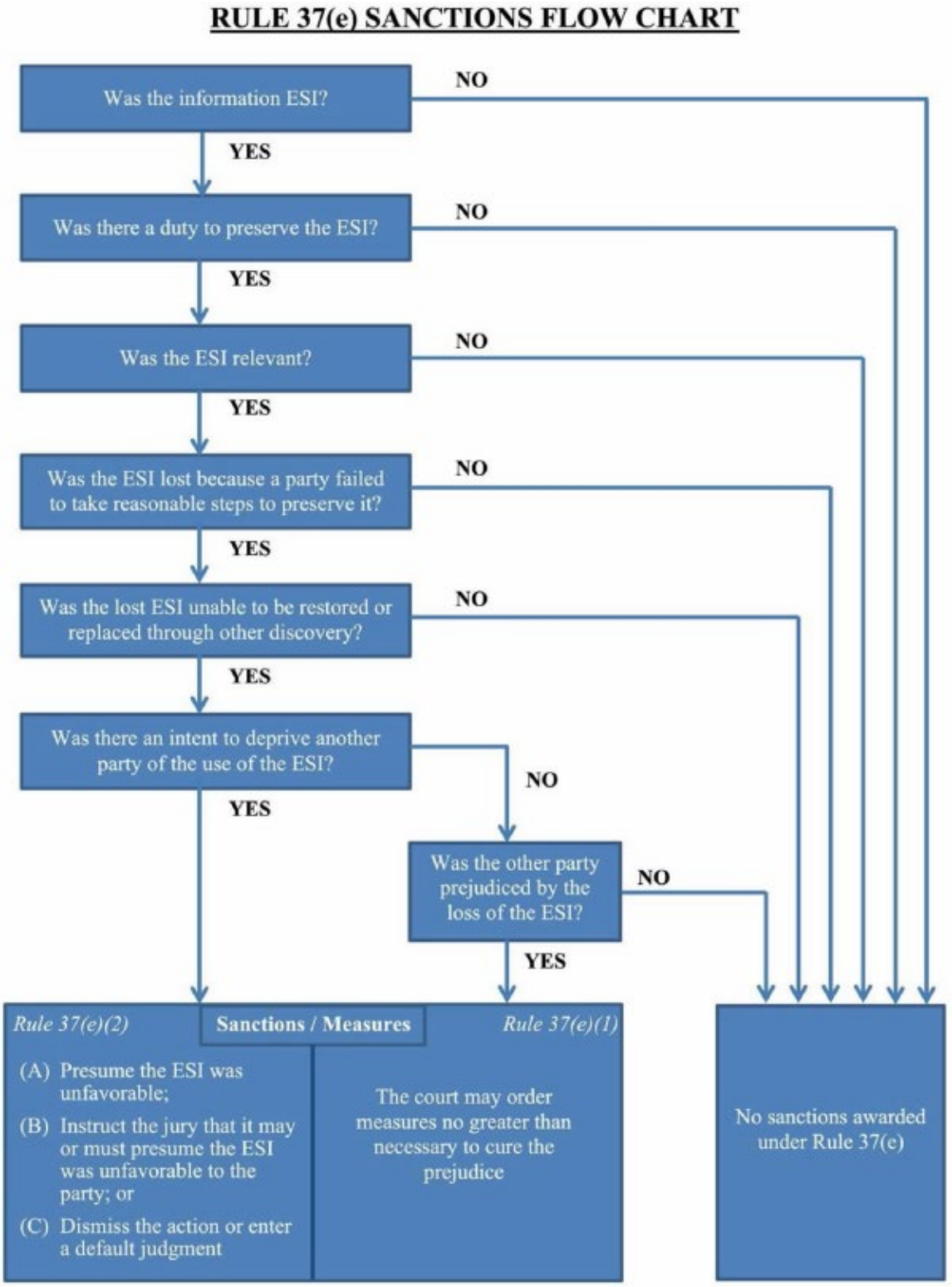
Defendants have also moved for sanctions under Federal Rule of Civil Procedure 37(e). [Dkt. 77.] Federal Rule of Civil Procedure 37(e) provides the following:

> **(e) Failure to Preserve Electronically Stored Information.** 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:
>
> **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> **(A)** presume that the lost information was unfavorable to the party;
>
> **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> **(C)** dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e). When determining whether to impose sanctions for spoliation of evidence, "Rule 37(e) provides the sole source to address the loss of relevant ESI that was required to be preserved but was not because reasonable steps were not taken, resulting in prejudice to the opposing party." *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 2021 WL 185082, at *75 (N.D. Ill. Jan. 19, 2021) (citing *Snider v. Danfoss, LLC*, 2017 WL 2973464, at *3-4 (N.D. Ill. July 12, 2017)). Federal Rule of Civil Procedure 37(e) contemplates the following: that the lost information (1) must be electronically stored information ("ESI"), (2) existing during anticipated or actual litigation, (3) which "should have been preserved" because it is relevant; (4) was "lost because [] a party failed to take [] reasonable steps to preserve it" and

[3] Plaintiff also objects that the request is overly broad. The Court finds LLD's request to be narrowly tailored in that it only sought information since the date of the occurrence. [Dkt. 77-1, p. 21.] This objection is also overruled. Likewise, the Court also overrules the fact that "Plaintiff objects to giving restricted access to his social media accounts," as this is not a legally cognizable objection (and it is nonsensical). *Id.*

(5) cannot be restored or replaced through additional discovery. Moreover, "[i]f any of these five prerequisites are not met, the court's analysis stops, and sanctions cannot be imposed under Rule 37(e)." *Snider*, 2017 WL 2973464 at 4. A "decision tree" of this Rule 37(e) analysis can be visualized as follows:



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*DR Distributors*, 2021 WL 185082, at *75 (citing Hon. Iain D. Johnston & Thomas Y. Allman, *What Are the Consequences for Failing to Preserve ESI: My Friend Wants to Know*, Circuit Rider 57-58 (2019)).

In the instant matter, **(1)** the Court finds Plaintiff's Facebook page constitutes ESI. Next, **(2)** the Court finds Plaintiff had a specific duty to preserve this information (*i.e.*, the Facebook page) from the moment it was sought by LLD on July 13, 2020. [Dkt. 87-7.] He obviously knew this information was sought when he discussed the discovery requests with his counsel, and has admitted as much ("Plaintiff acknowledges receiving a communication from the Law Firm of GWC Injury Lawyers regarding not deleting social media account…"). [Dkt. 83, ¶ 2.] Even if he hadn't specifically been on notice, Plaintiff had a duty to preserve this information in anticipation of litigation even before it was sought by Defendants. This court has stated that the anticipation of litigation means "a substantial and significant threat of litigation," not just the expectation that a suit is likely to be filed. *Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.,* 145 F.R.D. 84, 87 (N.D.Ill.1992). This suit was filed on June 12, 2019 [dkt 1-1], and the Court can reasonably infer that Plaintiff anticipated doing so at least some months prior to that point. Therefore, Plaintiff's Facebook page should have been preserved as early as 2019.

Next, **(3)** Plaintiff made no relevancy objection to the request for his Facebook page. Nor would have such an objection been sustained. The relevance standard is extremely broad; Federal Rule of Civil Procedure 26 allows for discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case," and Federal Rule of Evidence 401(a) states that evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence." "The scope of relevance for discovery purposes is far broader than for evidentiary purposes." *Bailey v. Meister Brau, Inc.*, 55 F.R.D. 211, 214 (N.D. Ill. 1972). It seems undeniable to the Court that evidence known to Plaintiff at the time he filed his complaint (*i.e.*, his Facebook page) that supports or refutes his factual allegations would have a tendency to make those facts more or less probable. The Court agrees with Defendant's articulation of the Facebook page's relevance:

The Facebook page, which demonstrated recreational activities, golf trips, and other

> physical activities would tend to show that the Plaintiff had not lost a normal life, and contrary to his claims was capable of using his shoulder and potentially returning to work. The Facebook page would have made the claims of damage less probable than without the evidence.

[Dkt. 87, p. 4.] Thus, the Court finds Plaintiff's Facebook page to be relevant.

Under the next step, the Court asks whether the Facebook page was lost because Plaintiff failed to take reasonable steps to preserve it. Plaintiff has admitted to the spoliation of his Facebook page: "Plaintiff acknowledges deleting his Facebook account," and he did not consult with his counsel concerning his intent to delete the page. [Dkt. 83, ¶¶ 1, 5.] Therefore, **(4)** Plaintiff not only failed to preserve this information, but he affirmatively caused its spoliation (tangentially close to the time it was requested by Defendants).

According to Facebook's own policies, there seems to be no way to recover this information for purposes of the instant civil suit. *See*, p. 2, s*upra*. Plaintiff has offered access to his new Facebook page in lieu of the old one, but the Court has already addressed the fact that this new page would have none of the relevant information sought by Defendants. *See* fn. 2, *supra*. Plaintiff has also provided Defendants with a download of all the photographs within his cell phone/Android ("a scattershot of six hundred some photographs," according to Defendants [dkt. 87, p. 7]) because when he made a Facebook post, "it would have been a photo/image in his cell phone/Android." [Dkt. 83, ¶ 11.] However, this PDF dump is not the panacea Plaintiff hopes. These undated photographs depict vacations, golf trips, motorcycle riding, and physical activities. [Dkt 87, p. 7.] Yet, the information and comments surrounding these nondigital "posts" cannot be retrieved; Plaintiff has not provided any metadata associated with these images because they were provided as PDFs rather than in their native format. [Dkt. 87, p. 8.] Moreover, apparently Plaintiff has produced what he claims is a sampling of photographs that were on his phone, with no indication which of these photographs were actually posted on Facebook or when.[4] *Id.* In their

[4] Plaintiff claims he produced all the photographs on his cell phone [dkt. 83, ¶ 11], but Defendants maintain Plaintiff produced a sampling of the photographs [dkt. 87, p. 8]. The Court has no way to reconcile this discrepancy at the current juncture, but it is not germane to the rulings made herein.

native Facebook format, not only would the photographs show a date and potentially a geolocation tag, but captions, comments, and tags of the individuals in the photos can (and often do) accompany the images.[5] The PDF images are devoid of this additional informational content. Therefore, the PDF production is not an acceptable substitute for Plaintiff's Facebook page.[6] Thus, the Court finds **(5)** the destroyed ESI cannot be restored or replaced through additional discovery.

Now the Court must turn its attention to the issue of intent to deprive. Defendants need only demonstrate intent by a preponderance of the evidence. *Williams v. Am. Coll. of Educ., Inc.*, 2019 WL 4412801, at 11 (N.D. Ill. Sept. 16, 2019) ("To prevail under Rule 37(e)(2) or the court's inherent authority, [movant] must show by a preponderance of the evidence that [destroying party] engaged in spoliation with the requisite intent."). "Intentional destruction and bad faith may be proved inferentially and with circumstantial evidence, and this Court need not leave experience and commonsense at the courthouse door when making its determination." *Sonrai Systems, LLC v. Anthony Romano, et al.*, 2021 WL 1418405, at 13 (N.D. Ill. Jan. 20, 2021) (citations and signals omitted).

Plaintiff's destruction of his Facebook was intentional and occurred while on notice to preserve the same. Plaintiff's explanation for what happened here is balderdash. Plaintiff allegedly "deleted his account solely for reasons related to ever increasing online threats and intimidating communications including threats of physical violence related to his political expressions that he posted on the subject Facebook account." [Dkt. 83, ¶ 3.] The Court has been provided no details of these alleged threats and has no way to verify the veracity of this statement. However, as the Court noted, during the April 13,

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[5] Alarmingly to the Court, several of these PDF photographs allegedly show the subject VAV box involved in the occurrence, which had apparently never been produced prior to this PDF dump. [Dkt. 87, p. 8.] If these VAV photos were indeed posted to Plaintiff's Facebook page, not only would the contemporaneous data accompanying them be invaluable to Defendants, but these posts likely would have constituted a statement/admission by a party opponent (which has now been deleted). *United States v. McGee*, 189 F.3d 626, 632 (7th Cir. 1999) (holding that admissions by party-opponents under Federal Rule of Evidence 801 need not be inculpatory: "[a]dmissions by a party-opponent are usually contrary to a position that the declarant is taking at the trial in which it is introduced….The party's statement need not have been against interest when made….") (citation omitted).

[6] The Court does not believe producing these images in their native format would be an acceptable substitute either, as they would still be devoid of the additional information that accompanies them when they get posted to Facebook (*e.g.*, date, geolocation tag, captions, comments, and tags of the individuals in the photos).

2021 hearing on this matter, "…if he wanted to delete political posts, he could have done that. You don't have to take your whole Facebook page down to do that. People delete stuff all the time. Instead, what he did was he took the whole thing down, and he was on notice that it had been requested of him." [Dkt. 87-1, 18:18-22.] Not only that, if Plaintiff felt physically threatened or intimidated on Facebook, Facebook gives specific instructions on how to handle such harassment: "If you see something that goes against the Facebook Community Standards, please let us know. You can also unfriend or block someone if they're bothering you." [Dkt. 87, p. 5; https://www.facebook.com/help/592679377575472.] Additionally, Facebook allows a user to implement certain privacy settings (*i.e.*, a variety of options for who can see what on a user's page), which Defendant alleges Plaintiff has taken advantage of on both his newest and prior Facebook pages. [Dkt. 87, p. 5.] At any point, Plaintiff could have simply blocked or restricted the politically topical content from the alleged harasser(s), leaving the remainder of the requested content accessible. Essentially, Plaintiff claims that in August 2020 he was the target of online harassment and threats to his safety, yet by March 2021, approximately seven months later, those threats had apparently abated to the point where he no longer felt in any danger, so he made a new Facebook page. The Court finds this claim incredible.

Further casting doubt on the veracity of Plaintiff's tale of online harassment are (1) the shifting explanations about whether and when Plaintiff's counsel notified Plaintiff his social media accounts were being sought and to preserve the same (including his Facebook page); (2) the tangential timing of Plaintiff's deletion of his Facebook page so soon after LLD's request for the same; and (3) Plaintiff's evasion in answering the discovery after his page had been deleted. The objective evidence reveals that on July 13, 2020, Third-Party Defendant LLD served written discovery on Plaintiff requesting information about his Facebook page. [Dkt. 77, ¶ 14; Dkt. 87-7.] At some point between July 13, 2020 and August 31, 2020, Plaintiff's counsel communicated with Plaintiff not to delete his Facebook account.[7]

[7] Casting further doubt on the veracity of this entire tale is Plaintiff's counsel's representation in open Court that he never told Plaintiff that Defendants had requested his Facebook information. [Dkt. 87-1, p. 20:2-5; *see also* 21:16-22:2

[Dkt. 83, ¶ 1-2.] Nonetheless, at some point less than 49 days after Defendant requested it, Plaintiff deleted his Facebook account anyway. [Dkt. 83, ¶ 1.] Plaintiff claims not to remember this directive at the time he deleted his account. [Dkt. 83, ¶ 2.] Compounding this error, approximately 43 days after deleting his Facebook page, Plaintiff refused to disclose the page at all. [Dkt. 77-1, p. 21.]

At this point, under the Rule 37(e) decision tree, the Court need not address the issue of prejudice because it has determined Plaintiff's conduct to be an intentional act designed to deprive Defendants of relevant ESI. However, as Defendants have articulated, without the deleted Facebook page, they will be unable to "thoroughly investigate claims of nature and extent of [Plaintiff's] claimed injury, loss of normal life, and permanent disability." [Dkt. 87, p. 2.] The Court agrees and finds Defendants have indeed been prejudiced by the destruction of Plaintiff's Facebook page.

In light of these facts, the Court will not leave experience and commonsense at the courthouse door. *Sonrai Systems*, 2021 WL 1418405, at 13. The objective evidence in this case leads the Court to conclude Plaintiff's deletion of his Facebook page was in response to Defendant LLD's discovery request for the same so that Defendants would not be able to access any posts which could potentially cast doubt on the seriousness of his claimed physical injuries related to the instant lawsuit. The Court agrees with Defendants that when "[t]aken as a whole, the conduct of the Plaintiff far exceeds inadvertence or mistake and demonstrates disrespect for the Court and an intentional abuse of the discovery process." [Dkt. 87, p. 12.] This is more than a preponderance of evidence. *Williams*, 2019 WL 4412801, at 11. Moreover, the Court does not find Plaintiff's explanation of his conduct to be "substantially justified." Fed. R. Civ. P. 37(c) (courts need not impose sanctions if, in addition to the non-compliant party's position being "substantially justified," the violation was "harmless.") Thus, sanctions are appropriate.

"In determining the appropriate sanctions to impose, 'the district court should consider the egregiousness of the conduct in question in relation to all aspects of the judicial process.'" *Fuery v. City of*

(Court comments about how incredulous this is); 23:11-15 (same).] This representation conflicts with Plaintiff's later assertion he was told to preserve his Facebook page. [Dkt. 83, ¶ 2.]

*Chicago*, 2016 WL 5719442, at *2 (N.D. Ill. Sept. 29, 2016) (quoting *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003)). While Defendants urge dismissal as the appropriate sanction here, dismissal of this matter is not an appropriate remedy in the Court's mind. While a reasonable jurist could rightfully impose that sanction, "there are certainly less drastic sanctions available that will remedy the prejudice to [Defendants] and allow the case to be heard on the respective merits." *DR Distributors*, 2021 WL 185082, at *97. In this case, the sanctions the Court has fashioned are tailored toward Plaintiff's discovery violations because the Court finds the spoliated information, while relevant to damages, does not go to the question of negligence which is the main question the finder of fact will be asked to resolve. *Id.* ("Court must also explain, even briefly, why it chose not to impose certain sanctions in its discretion.") Much like *DR Distributors*, "[t]he Court's decision not to default [Plaintiff] and dismiss [his claims] was not made lightly. Instead, the decision was discretionary based on all the facts of the case." *Id.*

Rather than dismissal as a sanction for his conduct, the Court believes jury instructions are the appropriate remedy here in response to Plaintiff's intentional act. The Court will instruct the jury that it can consider the evidence of Plaintiff's behavior resulting in the loss of the Facebook ESI along with all the other evidence in making its decision. Fed. R. Civ. P. 37(e)(1). The jury will be instructed that Defendant LLD requested the spoliated Facebook page; that the spoliated Facebook page contained information and images relevant to the claims and damages in the case; that Plaintiff had a duty to preserve the spoliated Facebook page; that Plaintiff was told to preserve his Facebook page by his attorneys once it was sought by Defendant LLD; that Plaintiff affirmatively deleted his Facebook page shortly after it was requested by Defendant LLD in connection with this lawsuit; and that the information on the spoliated Facebook page cannot be recovered. *Id.* Plaintiff will also be precluded from asserting that he deleted his Facebook page for political reasons. Finally, the Court will issue an adverse inference instruction to the jury, whereunder the jury must presume the information contained on Plaintiff's

Facebook page (*i.e.*, the spoliated ESI) was unfavorable to Plaintiff's claims in the instant lawsuit.[8, 9] Fed. R. Civ. P. 37(e)(2)(B). These remedies are not only proper in response to Plaintiff's intentional ESI destruction, but they attempt to alleviate the harm Defendants incurred because of the destruction of Plaintiff's Facebook page.

In conclusion, the remainder of Defendants' Motion for Evidentiary Hearing Regarding Discovery Violations and Spoliation of Evidence [dkt. 77] is GRANTED to the extent specified herein. The parties failed to file an updated joint status report on 5/17/2021 as ordered. [Dkt. 75.] Therefore, the parties are to file an updated joint status report on 5/31/2021 detailing the discovery that remains to be completed before the 10/29/2021 fact discovery deadline. *Id.* The parties should also specify whether they are interested in a settlement conference, keeping in mind that the Court will not hold a settlement conference (or recruit a colleague to hold such a conference) if not all parties want to participate in the settlement process. The Court again reminds the parties that no further extensions of the fact discovery deadline will be granted. *Id.*

**ENTERED: 5/24/2021**

Susan E. Cox,
United States Magistrate Judge

[8] The Court will craft the appropriate verbiage of these instructions closer to the pretrial conference in this matter, but the Court anticipates they will be substantially similar to what has been laid out in this paragraph.

[9] The Court is also mindful of Defendants' concern that Plaintiff not be able to craft answers to minimize or thwart any adverse inference instruction. [Dkt. 87, p. 13.] To that end, Defendants implore that "Plaintiff should not be allowed to explain away the photographs that depict him performing various activities contrary to his injury claims when he is responsible for deleting the information that would contradict any future explanations that he might provide in discovery or before a jury." *Id.* The Court agrees and will also take appropriate steps to ensure the jury does not hear from Plaintiff any benign explanations (rather than facts) that would minimize the extent of the activities depicted in any photographs. To this end, Defendants may consider asking Plaintiff questions about relevant photographs during his deposition so everyone involved will have a preview of what Plaintiff's trial testimony is likely to be, and Defendants can notify the Court of any potential issues ahead of time rather than conduct a trial by surprise.



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**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 2022-NMSC-014**

**Filing Date: June 16, 2022**

**No. S-1-SC-38769**

**STATE OF NEW MEXICO,**

Plaintiff-Petitioner,

v.

**JESENYA O.,**

Child-Respondent.

**ORIGINAL PROCEEDING ON CERTIORARI**
**Donna J. Mowrer, District Judge**

Hector H. Balderas, Attorney General
Benjamin L. Lammons, Assistant Attorney General
Santa Fe, NM

for Petitioner

Liane E. Kerr, LLC
Liane E. Kerr
Albuquerque, NM

for Respondent

**OPINION**

**ZAMORA, Justice.**

**{1}** This appeal calls upon us to consider issues relating to the authentication of social media evidence. Specifically, we are asked to review a determination by the Court of Appeals that the district court abused its discretion in authenticating screenshots of Facebook Messenger messages allegedly initiated by Jesenya O. (Child) in the near aftermath of the events giving rise to the underlying delinquency proceeding. *State v. Jesenya O.*, 2021-NMCA-030, ¶ 29, 493 P.3d 418. As part of this inquiry, we consider as a matter of first impression whether admissibility of such evidence should be governed by the traditional authentication standard set out in Rule 11-901 NMRA or by a heightened standard that seeks to account for the possibility that

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communications issued on social media platforms may be especially susceptible to fraud or impersonation.

**{2}** We agree with the Court of Appeals that the traditional authentication standard set out in Rule 11-901 provides the appropriate legal framework for authenticating social media evidence. *Jesenya O.*, 2021-NMCA-030, ¶ 21. But we disagree with the conclusion reached by the Court of Appeals that the State failed to meet the threshold for authentication established under that rule, much less that the district court abused its discretion in finding the State had met its burden. *Id.* ¶ 29. We hold the State's authentication showing was sufficient under Rule 11-901 to support a finding that, more likely than not, the Facebook Messenger account used to send the messages belonged to Child and that Child was the author of the messages. Accordingly, we reverse the Court of Appeals and reinstate Child's delinquency adjudications.

## I. FACTUAL AND PROCEDURAL BACKGROUND

**{3}** Child, then age seventeen, became Facebook friends with a former schoolmate, Jeremiah Erickson (Erickson), then age nineteen. Over the next several weeks, the two conversed primarily, if not exclusively, through their respective Facebook[1] Messenger accounts. Facebook Messenger is an instant messaging service which allows users to communicate with one another from within Facebook or via a stand-alone application. *See Messenger From Meta*, https://about.facebook.com/technologies/messenger/ (last visited June 1, 2022). Facebook users may access the application from a variety of devices, including desktop computers, mobile phones, and tablets. *Id.* On two occasions, Child and Erickson used Facebook Messenger to arrange in-person meetings, during which Erickson drove to Child's house to pick her up and drive her somewhere to "hang out."

**{4}** It was the second of these meetings that gave rise to the events leading to Child's adjudication. Both Erickson and Child testified to the jury that their get-together on the night of February 24, 2020, did not end well, although each provided a different narrative as to what unfolded. According to Erickson, Child had acted "weird" at the get-together and appeared to be high or drunk. He testified that, while he was driving Child home, she asked him to park his vehicle near a home located on an alley behind a furniture store, which he did, leaving the engine running and the driver's side door open. According to Erickson, after the two exited the car to say good night, Child pushed him out of the way, assumed control of the vehicle, and drove off by herself, crashing through a chain-link fence, striking a dumpster, and driving the car out of Erickson's sight.

**{5}** Child's testimony painted a different picture. According to Child, Erickson was drunk and driving recklessly on the way to her home. She testified that he made advances toward her and that he stopped the car in the alley after she rejected them.

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1Facebook changed its company brand to "Meta" in 2021. *See Introducing Meta: A Social Technology Company*, https://about.fb.com/news/2021/10/facebook-company-is-now-meta/ (last visited June 1, 2022). Throughout this opinion, we refer to the company name in use when the messages at issue were allegedly sent, i.e., Facebook.

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According to Child, both parties exited the vehicle, Child asked if she could drive the vehicle, Erickson refused, and Child then told Erickson she would not get back in the car with him. Child began to walk down the alley with Erickson following her. Child testified she ran away from Erickson in fear and walked the rest of the way home alone. On cross-examination, Child claimed she did not have her phone with her after leaving Erickson's vehicle.

**{6}** At Child's adjudication, the State sought to introduce evidence of communications between Child and Erickson the State alleged took place on Facebook Messenger the day after the incident involving Erickson's vehicle. The evidence was proffered in the form of two screenshots (hereinafter "the February 25 messages") showing communications between a user identified as Erickson and a user identified by name and photograph as Child. The messages reflected the following exchange:

> [Child]: Your car!!
>
> [Child]: I was drunk as fuck
>
> [Child]: I'm so sorry.
>
> [Child]: Did u call the cops on me
>
> [Erickson]: Had to.
>
> [Child]: And u gave them my name?
>
> [Erickson]: Had to. What you did was beyond fucked up.
>
> [Erickson]: And now I'm in deep shit for it.
>
> [Child]: I'm IN DEEP SHIT
>
> [Child]: I was completely drunk I don't know what I was doing
>
> [Erickson]: Well we're both fucked.
>
> [Child]: Yeah no kidding.
>
> [Child]: I'm going to jail
>
> [Erickson]: I can't believe you took my car to Clovis and totaled it.
>
> [Child]: I was drunk.

**{7}** The State sought to authenticate the February 25 messages through Erickson's testimony as to his personal knowledge of both the accuracy of the screenshots and his

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history of Facebook Messenger communications with Child, as well as through the contents of the messages themselves. Child's trial counsel objected to the authentication of the exhibits, arguing the screenshots did not show with certainty that the messages were sent from Child's Facebook account and emphasizing what counsel characterized as the inherent difficulty in "lay[ing a] foundation on Facebook Messenger messages because anybody can have access to somebody's phone or Facebook account." The district court overruled the objection, and the evidence was admitted. Child was subsequently adjudicated delinquent and appealed the district court's judgment and disposition to the Court of Appeals.

**{8}** On appeal, Child challenged the foundation laid by the State for the screenshots of the February 25 messages. The Court of Appeals reversed based solely on the authentication issue. *Jesenya O.*, 2021-NMCA-030, ¶¶ 29, 36. It concluded that, while communications arising on social media platforms are subject to the same authentication requirements as other evidence subject to Rule 11-901, the State had failed in its burden to properly authenticate the messages. *Jesenya O.*, 2021-NMCA-030, ¶¶ 24-29. In so holding, the Court of Appeals focused in part on the fact that the content of the messages was not "sufficiently confidential to establish that *only* Child could have authored the messages." *Id.* ¶ 28 (emphasis added). The Court concluded the error in admitting the messages for the jury's consideration was not harmless, vacated Child's adjudications, and remanded for a new hearing. *Id.* ¶¶ 30-36, 68.

**{9}** We granted the State's petition for certiorari review of whether the Court of Appeals imposed the correct standard for authenticating the messages at issue and whether it applied the appropriately deferential standard of review to the district court's decision to admit the messages as evidence. We conclude that the Court of Appeals properly relied on the traditional standard under Rule 11-901 as the framework for assessing the authenticity of the February 25 messages, but that it misapplied the provisions of Rule 11-901(B)(1) and (B)(4) to the facts and circumstances of this case and failed to afford proper deference to the district court.

## II. DISCUSSION

### A. Standard of Review

**{10}** We "generally review evidentiary matters for an abuse of discretion." *State v. Montoya*, 2014-NMSC-032, ¶ 15, 333 P.3d 935. "An abuse of discretion occurs when the [evidentiary] ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the [district] court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." *State v. Sanchez*, 2020-NMSC-017, ¶ 21, 476 P.3d 889 (internal quotation marks and citation omitted). In the authentication context, "there is no abuse of discretion when the evidence is shown by a preponderance of the evidence to be what it purports to be." *State v. Jimenez*, 2017-NMCA-039, ¶ 18, 392 P.3d 668 (internal quotation marks and citation omitted). However, we review de novo the threshold legal question as to the proper framework within which to analyze a particular evidentiary issue. *See State v. Carrillo*, 2017-NMSC-023, ¶ 26, 399 P.3d 367 ("[T]he threshold question of whether the

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trial court applied the correct evidentiary rule or standard is subject to de novo review on appeal.").

### B. The Traditional Standard Applied Under Rule 11-901 Provides the Proper Framework for Authenticating Evidence From Social Media Platforms

**{11}** For evidence to be properly authenticated under Rule 11-901 there must be a showing "sufficient to support a finding that the item is what the proponent claims it is." Rule 11-901(A). "The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances" may be considered in determining whether evidence has been adequately authenticated. Rule 11-901(B)(4). The foundation required to authenticate an item of evidence "goes to conditional relevancy," *State v. Arrendondo*, 2012-NMSC-013, ¶ 9, 278 P.3d 517, and triggers "a two-step procedure; the [trial] judge initially plays a limited [but important], screening role, and the jury then makes the final decision on the question of fact," ultimately determining the weight of the evidence. Edward J. Imwinkelried, *Evidentiary Foundations* § 4.01[1], at 43 (Matthew Bender 11th ed. 2020).

**{12}** With the increased use of social media evidence in litigation, courts nationwide have grappled with the question of whether the authenticity of evidence from social media platforms is properly measured under the traditional rules of authentication found in Federal Rule of Evidence 901 and its many state counterparts, including our own, or, instead, whether judicial concerns over the increased dangers of falsehood and fraud posed by the relative anonymity of social media evidence warrant the adoption of heightened authentication standards. There are two opposing lines of authority on this issue.

**{13}** Among the cases widely cited as embracing a heightened standard of authentication for social media evidence is *Griffin v. State*, decided by the Maryland Court of Appeals. 19 A.3d 415 (Md. 2011). In *Griffin*, a murder prosecution, the state sought to authenticate a redacted printout of a MySpace page allegedly belonging to the defendant's girlfriend. *Id.* at 418-19. The printout included information about the user's username, location, birthdate, and a profile photo depicting a couple embracing. *Id.* at 418. It also included this post: "FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!" *Id*. The state sought to authenticate the printouts through the testimony of the lead investigator in the case, who testified that he was able to determine that the MySpace page belonged to the defendant's girlfriend because the user's profile photograph depicted her with the defendant, the birth date matched that of the defendant's girlfriend, and the content of the message referred to the defendant, whose nickname was "Boozy." *Id*. The trial court admitted the MySpace evidence. *Id.* at 419.

**{14}** The *Griffin* Court, over a two-judge dissent, concluded that the trial court "abused [its] discretion in admitting the MySpace profile [under Maryland Rule of Evidence] 5-901(b)(4)." *Griffin*, 19 A.3d at 423-24. It concluded that the display of the girlfriend's picture, "coupled with her birth date and location, were not sufficient[ly] 'distinctive characteristics' on a MySpace profile to authenticate its printout, given the prospect that

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someone other than [the defendant's girlfriend] could have not only created the site, but also posted the 'snitches get stitches' comment." *Id.* In so holding, the Court declined to endorse the traditional authentication approach and instead applied heightened scrutiny to social media evidence "because of the heightened possibility for manipulation by other than the true user or poster." *Id.* at 424.[2]

**{15}** The *Griffin* Court acknowledged that its holding did not mean "that printouts from social networking [web]sites should never be admitted." *Griffin*, 19 A.3d at 427. The Court suggested the party proffering the evidence would be well advised to (1) "ask the purported creator if she indeed created the profile and also if she added the posting in question," (2) "search the computer of the person who allegedly created the profile and posting and examine the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question," or (3) "obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it." *Id.* at 427-28.

**{16}** While many courts have expressed similar concerns about fraudulent authorship of social media communications, few have adopted the heightened requirements for a prima facie showing announced in *Griffin*. Instead, they have endorsed the view that the traditional authentication standard is adequate to the task of vetting social media evidence. *See generally Tienda v. State*, 358 S.W.3d 633, 638-642 (Tex. Crim. App. 2012) ("Courts and legal commentators have reached a virtual consensus that, although [electronic media present] new . . . issues with respect to . . . admissibility . . . , the rules of evidence already in place for determining authenticity are at least generally adequate to the task." (internal quotation marks and citation omitted)).

**{17}** The traditional authentication approach is reflected in *Tienda*, *id.*, an oft-cited case from the Texas Court of Criminal Appeals. In *Tienda*, the defendant challenged the admission into evidence of several MySpace pages that tended to implicate him in a gang-related murder, including posts, photos, and instant messages. *Id.* at 634-37. The state relied primarily upon testimony by the victim's sister to authenticate the posts, which she found by searching MySpace. *Id.* at 635. The defendant objected, arguing

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2The Maryland Court of Appeals (consolidating three cases to address authentication of social media) has since endorsed the traditional approach. *Sublet v. State*, 113 A.3d 695 (Md. 2015). While not formally overruling *Griffin*, the *Sublet* Court adopted the reasoning of the Second Circuit in *United States v. Vayner*, 769 F.3d 125 (2d. Cir. 2014) and held that, "in order to authenticate evidence derived from a social networking website, the trial judge must determine that there is proof from which a reasonable juror could find that the evidence is what the proponent claims it to be." *Sublet*, 113 A.3d at 698. Once this threshold showing has been made, the evidence is admissible, and it is the fact-finder who determines whether the evidence is reliable and, ultimately, authentic. *See Sublet*, 113 A.3d at 715-16 (stating that authentication of evidence "merely renders [it] admissible, leaving the issue of its ultimate reliability to the jury."). Nevertheless, *Griffin* remains "one of the key cases" in the development of this area of the law, cited for the proposition that social media evidence should be subjected to a heightened degree of scrutiny for authentication purposes. *See* 2 Robert P. Mosteller et al., *McCormick on Evidence* § 227, at 108-09 & n.25 (8th ed. 2020); *see also State v. Hannah*, 151 A.3d 99, 104-05 (N.J. Super. Ct. App. Div. 2016) (describing the "Maryland approach" as "requir[ing] greater scrutiny than letters and other paper records" (internal quotation marks and citation omitted)).

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that MySpace accounts could easily be created or accessed by someone other than the purported author. *Id.* at 636. The trial court admitted the evidence, and the Texas Court of Criminal Appeals affirmed. *Id.* at 637. Though acknowledging "the provenance" of social media evidence "can sometimes be open to question—computers can be hacked, protected passwords can be compromised, and cell phones can be purloined," *id.* at 641, the *Tienda* Court determined that "the internal content of the MySpace postings—photographs, comments, and music—was sufficient circumstantial evidence to establish a prima facie case such that a reasonable juror could have found that they were created and maintained by the [defendant]." *Id.* at 642. In so holding, the *Tienda* Court made clear that the state, as the proponent of the evidence, was not required to remove all doubt over the posts' provenance; this was a question for the jury to decide. *Id.* at 645-46 (recognizing that the "possibility that the [defendant] was the victim of some elaborate and ongoing conspiracy" to impersonate him on social media was a scenario for the jury to assess once the state had made a prima facie showing of authenticity).

**{18}** Today we clarify that, in New Mexico, the authentication of social media evidence is governed by the traditional authentication standard set out in Rule 11-901, which requires the proponent to offer "evidence sufficient to support a finding that the [evidence] is what the proponent claims it is." *See State v. Imperial*, 2017-NMCA-040, ¶ 28, 392 P.3d 658 (quoting Rule 11-901(A)). We reiterate that, in meeting this threshold, the proponent need not demonstrate authorship of the evidence conclusively; arguments contesting authorship go to the weight of the evidence, not its admissibility. *See State v. Jackson*, 2018-NMCA-066, ¶ 19, 429 P.3d 674 (holding that the fact that text messages could have been authored or received by someone other than the defendant did "not negate the admissibility of the text messages, but rather present[ed] an alternative to the State's suggested inferences," which would be for the jury to assess).

**{19}** Two considerations inform our decision. First, we agree with courts in other jurisdictions that the authentication challenges arising from the use of social media evidence in litigation are not so different in kind or severity from the challenges courts routinely face in authenticating conventional writings. As one court persuasively put it in analogous circumstances,

> Rule 901 . . . does not care what form the writing takes, be it a letter, a telegram, a postcard, a fax, an email, a text, graffiti, a billboard, or a Facebook message. All that matters is whether it can be authenticated, for the rule was put in place to deter fraud. The vulnerability of the written word to fraud did not begin with the arrival of the internet, for history has shown a quill pen can forge as easily as a keystroke, letterhead stationery can be stolen or manipulated, documents can be tricked up, and telegrams can be sent by posers.

*State v. Green*, 830 S.E.2d 711, 714-15 (S.C. Ct. App. 2019) (citation omitted), *aff'd as modified*, 851 S.E.2d 440 (S.C. 2020). We are not convinced that the authentication of messages passed between Facebook users poses unique obstacles when compared to the authentication of evidence from other electronic sources, such as text messages

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sent between mobile devices. *See Jackson*, 2018-NMCA-066, ¶¶ 17-18 (concluding that the state's circumstantial evidence regarding the activity of two phone numbers was sufficient to authenticate an exhibit with information regarding the phone numbers).

**{20}** Second, the application of more demanding authentication requirements in the social media realm—such as those propounded in *Griffin* involving testimony from the purported author of social media postings, as well as evidence gathered from the user's computer or the social media network itself—would too often keep from the fact-finder reliable evidence based on an artificially narrow subset of authentication factors. *See* Brendan W. Hogan, *Griffin v. State: Setting the Bar Too High for Authenticating Social Media Evidence*, 71 Md. L. Rev. Endnotes 61, 85-86 (2012) (observing that the authentication methods outlined in *Griffin* "are unnecessarily specific and fail to discuss other traditional methods of authentication"). Cabining a district court's authentication analysis in this way would ultimately serve to hinder the truth-seeking process, with no discernible benefit. *See generally State v. Trujillo*, 2002-NMSC-005, ¶ 16, 131 N.M. 709, 42 P.3d 814 (discouraging a reading of our rules of evidence that "would deprive the jury of reliable . . . evidence relevant to the jury's truth-seeking role"). We decline to impose additional authentication requirements for evidence that may be adequately vetted using the gatekeeping tools already at hand.

**{21}** Having determined that the traditional authentication standard arising under Rule 11-901 provides the appropriate framework for evaluating the authenticity of the February 25 messages, we next turn to the question of whether the Court of Appeals properly applied that framework in determining whether the district court abused its discretion in admitting the State's exhibits.

### C. The Court of Appeals Erred in Concluding That the District Court Abused Its Discretion in Admitting Evidence of the February 25 Messages

**{22}** In reviewing Child's claim that the district court abused its discretion in admitting the February 25 messages, the Court of Appeals correctly held that "our rules for authentication provide an appropriate framework for determining admissibility." *Jesenya O.*, 2021-NMCA-030, ¶ 21. However, the Court then applied an unduly exacting standard in concluding that, because Child denied sending the messages, the State failed to proffer business records connecting the messages to Child, and the communications themselves failed "to establish that only Child could have authored [them]," "the district court abused its discretion in admitting the [evidence]." *Id.* ¶¶ 26-29.

**{23}** "Rule 11-901(B) provides a non-exhaustive list of examples of evidence that satisfy the authentication requirement." *Salehpoor v. N.M. Inst. of Mining and Tech.*, 2019-NMCA-046, ¶ 27, 447 P.3d 1169. For instance, evidence may be authenticated by a witness with knowledge "that an item is what it is claimed to be." Rule 11-901(B)(1). The authentication of evidence may also be "based on distinctive characteristics [such as] appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." *Salehpoor*, 2019-NMCA-046, ¶ 27 (internal quotation marks and citation omitted).

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**{24}** Here, the State proffered several indicia of Child's authorship of the disputed messages, including the presence of Child's name and profile photo on the exchanges, testimony from Erickson, the person who received the messages, and strong contextual clues as to authorship revealed in their content. This evidence was sufficient to support the district court's finding that a reasonable juror could determine that Child authored the messages and that the exhibits displaying the messages were what the State claimed them to be. *See* Rule 11-901(A) (providing that the authentication requirement is satisfied if the proponent "produce[s] evidence sufficient to support a finding that the item is what the proponent claims it is").

**{25}** We start by acknowledging that the presence of what appear to be Child's name and photo on the February 25 messages was, standing alone, insufficient to establish that the messages were issued by Child or from her account. *See State v. Acosta*, 489 P.3d 608, 625 (Or. Ct. App. 2021), *appeal dismissed and opinion vacated on other grounds,* 504 P.3d 1178, (Or. 2022) (concluding that the appearance of Facebook messages that seemingly were sent from "an account that bore [the] defendant's name and included pictures that matched [the] defendant's physical appearance," were "not dispositive" of the issue of authentication). However, evidence of the appearance of social media messages, including usernames and profile pictures, may be probative circumstantial evidence of authentication when considered in conjunction with additional factors of relevance. *See id.* at 625-26 (identifying "[a] Facebook account matching [the] defendant's name and profile picture" as one of several factors that could prompt a reasonable person to conclude that "it was [the] defendant and not one of [his cohorts] who was sending messages from the [defendant's] profile"); *Parker v. State*, 85 A.3d 682, 688 n.43 (Del. 2014) (noting that a photo and profile name appearing on the printout of a Facebook page "are certainly factors that [a] trial court may consider" in its authentication analysis).

**{26}** Here, the State provided additional foundational support through Erickson's undisputed testimony that he and Child had relied heavily, if not exclusively, on the Facebook Messenger platform in conversing with each other during the weeks leading up to the incident at issue here. As an active participant in those earlier Facebook message exchanges, as well as the critical February 25 message exchange, Erickson was clearly "a witness with knowledge" of the Facebook messages within the meaning of Rule 11-901(B)(1). As such, he was well positioned to provide direct testimony that the State's exhibits accurately depicted the screenshots of the messages he received not long after the incident. *See Kays v. Commonwealth*, 505 S.W.3d 260, 269 (Ky. Ct. App. 2016) (upholding the authentication of Facebook messages attributed to the defendant where each message was introduced through and identified by the person who sent or received it and "each one [was] *linked* to the witness introducing it by personal knowledge").

**{27}** Not only did Erickson provide unchallenged testimony concerning his prior course of dealing and history of communication on Facebook with Child, he also testified that he continued to follow postings made by Child on the same Facebook account in the months between the car incident and the adjudicatory hearing. Thus, Erickson's testimony tended to establish that it was Child—and not someone posing as

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Child—who communicated with Erickson in the February 25 messages. To the extent that Child suggested in her testimony that someone else may have had access to her phone and authored the messages at issue, this was an assertion to be weighed by the jury in its consideration of the evidence and not a bar to its admissibility. *See Jackson*, 2018-NMCA-066, ¶ 19 (holding that the fact that text messages could have been authored or received by someone other than the defendant did "not negate the admissibility of the text messages, but rather present[ed] an alternative to the State's suggested inferences," which would be for the jury to assess).

**{28}** Finally, the content and substance of the February 25 messages evince "distinctive characteristics" offering foundational support for their authenticity. *See* Rule 11-901(B)(4) (including "distinctive characteristics" among examples of what will satisfy the authentication requirement). As we have said, a proponent of evidence need not demonstrate authorship conclusively to satisfy the authentication requirement; to require otherwise would be to impose a heightened standard of admissibility on this type of evidence. *See State v. Candelaria*, 2019-NMCA-032, ¶ 55, 446 P.3d 1205 (concluding that evidence was admissible because it was "sufficient to permit a reasonable jury to believe" that it was what it purported to be and stating that arguments weighing against authenticity "went to the weight of the evidence, not its admissibility"). In keeping with this principle, courts and commentators widely agree that for a writing, digital or otherwise, to be sufficiently distinctive for authentication purposes, "[t]he knowledge [of its contents] need not be uniquely held by the purported signer [or sender], but the smaller the group of persons with such knowledge, the stronger the desired inference of authorship." 2 Robert P. Mosteller et al., *McCormick on Evidence* § 224, at 93 (8th ed. 2020). Thus, social media communications whose contents are known or knowable by only a handful of persons are routinely recognized as qualifying for authentication on the basis of their distinctive characteristics. *See, e.g.*, *Sublet v. State*, 113 A.3d 695, 720-21 (Md. 2015) (upholding the authentication of Twitter messages that "referenced a plan" for retaliation "that had . . . been created in response to events occurring that same day" and was known by "only a small pool of [seven] individuals," including the defendant); *see also Acosta*, 489 P.3d at 625 (concluding that the trial court erred in excluding Facebook messages that "included substance that was uniquely associated with [the] defendant" or only a very small group of people who were using the account at the time).

**{29}** The exclusive focus of the messages at issue here was the car incident of the previous night, with the person using Child's profile initiating the discussion by expressing remorse for actions that night and asking Erickson whether he had reported the incident to the police. Given the short amount of time between the incident and the Facebook Messenger exchange, a reasonable juror could have determined that the number of parties in possession of the information revealed in the communications was very small.

**{30}** The Court of Appeals concluded that the State's circumstantial evidence of authenticity was inadequate, in part because the content of the messages was not "sufficiently confidential to establish that *only* Child could have authored the messages." *Jesenya O.*, 2021-NMCA-030, ¶ 28 (emphasis added). This test applied by the Court of

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Appeals is at odds with the flexible approach that the authentication process envisions, under which the genuineness of a particular document—whether conventional or digital—is assessed through reliance on reasonable inferences, not absolute certainty. *See Jackson*, 2018-NMCA-066, ¶¶ 17-19 (concluding that the state's circumstantial evidence regarding the activity of two phone numbers was sufficient to authenticate an exhibit with information regarding the phone numbers); *see also State v. Smith*, 181 A.3d 118, 136 (Conn. App. Ct. 2018) (rejecting the view that "the state bore the insurmountable burden of ruling out any possibility that the [Facebook] message was not sent by the defendant"); *Acosta*, 489 P.3d at 625-26 ("Even if it were *possible* that someone else sent the messages from the profile matching [the] defendant's name and picture, the evidence was sufficient for a reasonable person to be satisfied that it was, in fact, [the] defendant who sent them."); *cf. State v. Romero*, 2019-NMSC-007, ¶¶ 41-44, 435 P.3d 1231 (concluding that the "totality of the circumstances" surrounding a recording of an inmate's phone call was sufficient to authenticate a detective's identification of the defendant as the inmate on the call). Equally as important, such an approach fails to afford due deference to the discretion of the district court, which is charged with determining whether a preponderance of the evidence supports a finding of authenticity. *See Jimenez*, 2017-NMCA-039, ¶ 18 ("[T]here is no abuse of discretion when the evidence is shown by a preponderance of the evidence to be what it purports to be." (internal quotation marks and citation omitted)).

**{31}** Where, as here, a proper foundation has been established under Rule 11-901, it is for the jury to decide whether a particular person or entity was the author or recipient of a given digital communication. In this regard, we endorse the authentication procedures previously outlined by our Court of Appeals in *Jackson*, a case involving an exhibit displaying cellular text messages. 2018-NMCA-066, ¶¶ 18-19. The *Jackson* Court, faced with a defense argument that it was "possible" that persons other than the defendant authored the text messages in question, said:

> It was for the jury to decide whether [the d]efendant was the author or recipient of the text messages in the exhibit. . . . [The d]efendant's argument that the text messages in the exhibit could have been authored or received by someone else, does not negate the admissibility of the text messages, but rather presents an alternative to the State's suggested inferences.

*Id.* ¶ 19. As *Jackson* instructs, Child's argument, premised on the possibility that others could have sent the February 25 messages, went to the weight of the evidence, not its admissibility. *Id.* Accordingly, it was for the jury to assess that argument in determining, as an ultimate matter, whether the communications were authentic.

**{32}** We hold the appearance of the messages, the disputants' frequent prior Facebook Messenger communications, and the content of the messages, when taken together and viewed in combination, were sufficient to support a finding that the screenshots of those messages were, more likely than not, what they purported to be. Given the highly deferential nature of abuse of discretion review, there was no cause to disturb the ruling made by the district court.

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## III. CONCLUSION

**{33}** Because we hold the district court reasonably could find that the State met its low threshold of proof in establishing prima facie the authenticity of the February 25 messages, we reverse the Court of Appeals' determination on that issue and reinstate Child's delinquency adjudications.

**{34}** **IT IS SO ORDERED.**

**BRIANA H. ZAMORA, Justice**

**WE CONCUR:**

**C. SHANNON BACON, Chief Justice**

**MICHAEL E. VIGIL, Justice**

**DAVID K. THOMSON, Justice**

**JULIE J. VARGAS, Justice**

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