

4. A report and recommendation from the U.S. District Court for the District of Rhode Island recommending granting Plaintiff's motion for terminating sanctions arising out of Defendants' deletion and withholding of data from an iPad, an iPhone, and a Gmail account.

In *Atalian U.S. New England, LLC v. Navarro*, 2022 WL 2681297 (D.R.I. July 12, 2022), U.S. Magistrate Judge Lincoln D. Almond recommended granting Plaintiff's motion for terminating sanctions arising out of Defendant's alleged deletion and withholding of data from an iPad, an iPhone, and a Gmail account, holding that Defendants James Navarro and Roger Persaud willfully deleted or withheld relevant evidence with the intent to deprive Plaintiff of the information's use in the litigation and to mislead the court.

Plaintiff alleged that Navarro and Persaud committed discovery violations that warranted imposition of default judgment after having a motion for sanctions and default judgment already granted against Defendant Taj Contract Cleaning, LLC. *Id.* at *1. Magistrate Judge Almond opened by noting that the parties were on notice regarding the potential consequences of deleting or withholding evidence based on the court's prior order against Taj, which arose from having intentionally deleted smartphone and laptop data.

Magistrate Judge Almond examined Plaintiff's allegations against each of the two Defendants in turn, beginning with Navarro. Navarro received multiple evidence preservation requests from Plaintiff and was on notice that Plaintiff had already moved for sanctions against Taj. Navarro admitted that he identified relevant documents on his personal iPad at the outset of the litigation and contended that he moved them to the iPad's trash bin and reset the iPad four days before producing it to Plaintiff. Navarro also conceded that he agreed to produce his iPhone but then decided against having it inspected, and now would agree to voluntarily produce the iPhone only if the parties agreed to a protective order. Magistrate Judge Almond pointed out that a stipulated protective order had been in place since June 2020. Navarro claimed he reset and erased his iPad to "shield personal photographs from being produced to Plaintiff" and that his actions were not intentional and at most negligent.

Plaintiff responded to Navarro's arguments with "an abundance of forensic and circumstantial evidence." *Id.* at *2. Plaintiff's expert affidavit detailed the iPad interface and the affirmative steps Navarro was required to take, along with the notices and warnings Navarro would have encountered, before he could have deleted the relevant files. The notices "would have required that he acknowledge the item would be 'deleted immediately' and/or 'recently deleted items may be permanently deleted by your storage provider.'" The process of wiping or performing a factory reset on the iPad would have required Navarro to affirmatively select "Erase iPad" after seeing the notice

that “erasing will sign out of your Apple ID and remove your personal data, so this iPad can be safely traded in or given away” and “Are you sure you want to continue? All media, data, and settings will be erased. This cannot be undone.”

Navarro testified that he moved the files to the iPad trash bin believing they would remain there until he deleted them permanently and that he did not know the iPad’s software would automatically and permanently delete them. Magistrate Judge Almond “flatly rejected” Navarro’s claim as “not credible” that his actions were unintentional given the explicit warnings Navarro would have encountered. Magistrate Judge Almond stated that the deletion was not automatic, and “the only credible conclusion to reach based on this record is that Mr. Navarro intentionally deleted the documents.” Magistrate Judge Almond stated that Navarro’s “credibility is further eroded” by the claim that he was trying to shield his personal photos from disclosure. Plaintiff’s expert demonstrated that Navarro viewed numerous personal photos on his laptop two days after the iPad reset and produced that laptop with the photos included shortly thereafter. Magistrate Judge Almond stated that it made “no sense that he would only be concerned about the disclosure of personal information on one device and not the other.”

Magistrate Judge Almond found Plaintiff’s argument credible that Navarro provided false testimony regarding the lack of relevant information on his iPhone. Plaintiff’s expert provided evidence that shortly after Navarro was served in this case, an iPhone was used to take photos of a MacBook Air screen “displaying relevant business information of Plaintiff and subsequently emailed to an account connected to Mr. Navarro.” Additionally, shortly afterward, a text message conversation related to this lawsuit was screenshotted from an iPhone and emailed to the same email account. These emails were sent from an IP address associated with Navarro’s residence.

Magistrate Judge Almond then turned to his discussion of Persaud, which centered around a personal Gmail account. Plaintiff alleged that Persaud provided false testimony regarding his use and ability to access his personal Gmail account and “unnecessarily caused [Plaintiff] to incur costs and undertake substantial effort to try to access the account and learn the truth about its use.” Persaud testified that he had not accessed the account since November 2019 and was unable to access the account as he forgot the password and did not own a phone with the recovery number.

Plaintiff ultimately requested the relevant information directly from Google at its own expense, and after meetings, subpoenas, and meetings and conferences with Google attorneys, Plaintiff “ultimately obtained limited ‘non-content’ email metadata for the subject account.” This metadata revealed that Persaud’s email account had been used on an ongoing basis after November 2019, and was accessed using either the correct credentials or the password recovery process. Moreover, the IP address where the login took place was in or within close proximity of Persaud’s residence.

Magistrate Judge Almond stated that the content of the emails was not produced, but the metadata demonstrated that Persaud was exchanging relevant emails on a consistent basis. *Id.* at *3. Further, contradicting Persaud’s testimony, Plaintiff reviewed discovery, including emails and invoices, indicating that Persaud was associated with the recovery phone number at various times during his prior employment. The email metadata also contradicted statements made in Persaud’s testimony.

Magistrate Judge Almond then turned to his analysis and recommendation. He stated that spoliation was the “intentional, negligent, or malicious destruction of relevant evidence.” *Id.* (internal marks omitted). He stated that the parties’ admissions, the expert testimony, and circumstantial evidence all established that spoliation occurred.

Magistrate Judge Almond then laid out five factors for courts to fashion an appropriate sanction for spoliation: “1) whether the defendant was prejudiced as a result of [the destruction of evidence]; 2) whether the prejudice can be cured; 3) the practical importance of the evidence; 4) whether the plaintiff was in good faith or bad faith; and 5) the potential for abuse if the evidence is not excluded.” *Id.* (internal marks omitted). Magistrate Judge Almond stated that the court primarily considers the prejudice incurred by the moving party and the degree of fault by the offending party.

Magistrate Judge Almond highlighted the falsehoods presented by Navarro and Persaud and added that he was “frustrated to be faced with additional spoliation” in light of the prior motion for sanctions. He was unpersuaded by Defendants’ arguments that “an adverse jury instruction or some lesser penalty would remedy the discovery violations” as the “only reasonable conclusion to draw from this record is that Mr. Navarro and Mr. Persaud intended, by their respective actions, to deprive Plaintiff of the relevant information.” Magistrate Judge Almond stated that he had the discretion to “presume that the lost information was unfavorable to the party who failed to preserve it; instruct the jury of this adverse presumption; or dismiss the action or enter default judgment.” He noted that the prior sanction of default judgment was unable to deter these Defendants from engaging in the same type of misconduct.

Magistrate Judge Almond stated that it was “nearly impossible, at this point, to attempt to reliably identify the nature of the lost information or to reliably determine what information actually existed during the relevant period.” *Id.* at *4. Therefore, “a default judgment is the only effective sanction to remedy this intentional discovery violation.” Magistrate Judge Almond added that the “interests of justice and upholding the credibility of our civil litigation system dictate the entry of default judgment as the only reasonable sanction on this record.” He therefore recommended that sanction pursuant to Rules 37(b)(2)(A)(vi), 37(c)(1)(C), and 37(e)(2), as well as the court’s inherent power “to protect the integrity of the judicial process.”