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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Democratic Party, et al.,

Plaintiffs,

v.

Michele Reagan, et al.,

Defendants,

No. CV-16-01065-PHX-DLR

PLAINTIFFS' RESPONSE TO DEFENDANTS' AND INTERVENOR-DEFENDANTS' MOTION IN LIMINE ON PLAINTIFFS' SPOLIATION OF ELECTRONIC EVIDENCE

To be certain, after the 2016 election, the Arizona Democratic Party ("ADP") closed the e-mail accounts of ADP's Get-Out-the-Vote ("GOTV") Director, as well as four of ADP's voter protection deputies.[1] [Defendants' and Intervenor-Defendants' Motion in *Limine* on Plaintiffs' Spoliation of Electronic Evidence ("Doc. 352") at 2] As the Plaintiffs affirmatively disclosed to Defendants, these accounts were closed by ADP officials as part of routine close-out operations for the 2016 campaign and during a time of organizational transition at ADP.

Closing these five e-mail accounts was a mistake. But it was nothing more. Defendants point to no evidence, and none exists, that the ADP or any of its staff members deleted these e-mail accounts to intentionally deprive Defendants of their contents' use in this litigation. And this makes sense. ADP had *no* strategic reason for deleting these e-mail accounts, particularly given that they, at most, contained evidence that existed elsewhere and that was likely of marginal relevance to this case.

Nonetheless, Defendants now seek the "extreme sanction" of the imposition of three far-reaching adverse inferences against the ADP. *Moore v. Gilead Scis., Inc.*, No. C 07-03850 SI, 2012 WL 669531, at *5 (N.D. Cal. Feb. 29, 2012). Defendants, however, have not shown, as they must, that this mistake warrants the relief they seek.[2] *See Alvarez v. King Cty.*, No. C16-0721RAJ, 2017 WL 3189025, at *4 (W.D. Wash. July 27, 2017) ("The party requesting sanctions for spoliation has the burden of proof on such a claim."); *see also OmniGen Research v. Yongqiang Wang*, No. 6:16-CV-00268-MC, 2017 WL 2260071, at *3 (D. Or. May 23, 2017) (noting that proof in spoliation motions must be, at a minimum, demonstrated by a preponderance of the evidence).

[1] During the same time period, ADP also closed other e-mail accounts that had been, but were no longer, in use, and would never have been examined as part of this case. [*See* Plaintiffs' Responses and Objections to State Defendants' First Request for Production, Mar. 17, 2017, ("Ex. A") at 2]

[2] Despite having the burden of proof, Defendants have never requested an evidentiary hearing on this issue. Plaintiffs respectfully request that, if the Court is inclined to grant any sanction for the deletion of these accounts, Plaintiffs be permitted to present evidence at a hearing to show, among other things, that ADP did not close any accounts with the intent to deprive Defendants of the information's use in this case.

ARGUMENT

I. RULE 37 GOVERNS.

Whether any sanction is appropriate in this case must be judged according to Federal Rule of Civil Procedure 37(e) and not, as Defendants argue (at 5), imposed as an exercise of this Court's inherent authority. The Ninth Circuit has made clear that "[w]hen there is . . . conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than [its] inherent power." *Ringgold-Lockhard v. Cnty. of Los Angeles*, 761 F.3d 1057, 1065 (9th Cir. 2014).

As amended in 2015, Rule 37(e) expressly provides this Court with a means to address any spoliation of electronically stored information ("ESI"), including e-mails. *See CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 500 (S.D.N.Y. 2016) ("The emails are plainly 'electronically stored information.'"). Specifically, the rule "authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures." Advisory Committee Notes to 2015 Amendment to Rule 37(e). That Rule 37—and not this Court's inherent authority—provides the framework for this Court's analysis is confirmed by the advisory committee note to Rule 37(e), which expressly provides that the rule "*forecloses reliance on inherent authority* or state law to determine when certain measures should be used" to remedy ESI spoliation, including deletion of e-mails.[3] *Id.* (emphasis added).

[3] Without a doubt "[f]ederal courts possess certain inherent power, not conferred by rule or statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (quotation marks omitted). Accordingly a "court may safely rely on its inherent power if, in its informed discretion, neither the statutes nor the rules are up to the task." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). Indeed, the cases cited by Defendants (at 5 n.2) confirm that, in the context of the failure to preserve ESI, a court's reliance on inherent authority is only appropriate, if at all, where Rule 37(e) does not apply. *See, e.g.*, *Ronnie Van Zant, Inc. v. Pyle*, No. 17 CIV. 3360 (RWS), 2017 WL 3721777, at *8 n.16 (S.D.N.Y. Aug. 28, 2017) ("As Rule 37(e) does apply here, however, there is no need to rely on [inherent] powers."); *Hsueh v. N.Y. State Dep't of Fin. Servs.*, No. 15 CIV. 3401 (PAC), 2017 WL 1194706, at *4 (S.D.N.Y. Mar. 31, 2017) ("Because Rule 37(e) does not apply, the Court may rely on its inherent power to control litigation in imposing spoliation sanctions"); *CAT3*, 164 F. Supp. 3d at 497 ("If, notwithstanding this reasoning, Rule 37(e) were construed not to apply to the facts here, I could nevertheless exercise inherent authority to remedy spoliation . . . ."); *see also* Hon. James C. Francis & Eric P. Mandel,

II. NO SANCTIONS ARE WARRANTED UNDER RULE 37(E).

When Rule 37(e)'s requirements are properly applied, it is clear that the closure of these five e-mail accounts at issue warrants neither the adverse inferences sought by Defendants, nor any other measure. Tellingly, Defendants make no attempt to outline Rule 37(e)'s requirements in their brief to this Court.

A. Rule 37's Preliminary Requirements Have Not Been Satisfied.

Under Rule 37(e), a court may apply sanctions *only* if ESI "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." Thus, for sanctions to be authorized under Rule 37(e), (1) the information must be ESI; (2) there must be anticipated or actual litigation; (3) due to that litigation, the information "should have been preserved"; (4) the information has been "lost"; (5) the "party failed to take reasonable steps to preserve it"; and (6) the information "cannot be restored or replaced through additional discovery." *See Snider v. Danfoss, LLC*, No. 15 CV 4748, 2017 WL 2973464, at *4 (N.D. Ill. July 12, 2017), *report and recommendation adopted*, No. 1:15-CV-04748, 2017 WL 3268891 (N.D. Ill. Aug. 1, 2017). In this case, the facts meet the first three requirements but not the last three. As a result, "sanctions cannot be imposed under Rule 37(e)." *Id.*

First, ADP took reasonable steps to preserve the closed e-mail accounts. Rule 37(e)

Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction, 17 Sedona Conf. J. 613, 652 (2016) ("And, as long as inherent authority is used only to fill the interstices in [Rule 37(e)], Federal courts avoid the difficult separation-of-powers issues that arise when judges assert inherent power where Congress has directly addressed an issue through the rulemaking process.").

Even if the exercise of inherent authority were appropriate, sanctions would not be warranted here. As discussed below, the closing of the accounts was a mistake and Defendants have not shown, or even attempted to show, to which claims or defenses the information contained in the accounts was relevant. *See Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1007 (D. Ariz. 2011) (laying out factors for imposition of sanctions under the court's inherent authority). Regardless, courts cannot exercise their inherent authority to impose an adverse inference, where, as here, the deletion at issue was conducted without any intent to deprive the opposing party of evidence. *Limits on Limiting Inherent Authority:* Francis, *supra*, at 660.

"recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection." Advisory Committee Notes to 2015 Amendment to Rule 37. Here, ADP circulated a litigation hold to its senior staff on April, 28, 2016, shortly after this litigation was filed. Unfortunately, however, the individual who directed the closing of the accounts during the close out of the 2016 campaign believes he was unaware of the litigation hold. [Plaintiffs' Responses and Objections to Intervenors' Requests for Production, Mar. 13, 2017 ("Ex. B") at 3] So, while the ADP's steps to preserve documents were not perfect, they were reasonable, particularly given the hectic nature of, and high degree of turnover during, the period immediately following a presidential general election.

Second, no sanctions are warranted because the information contained in the five closed e-mail accounts was "restored or replaced" through additional discovery. Fed. R. Civ. P. 37(e). "Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere . . . ." Advisory Committee Notes to 2015 Amendment to Rule 37(e). Thus, relief is "not . . . available under the amended rule where, for example, e[-]mails are lost when one custodian deletes them from his mailbox but remain available in the records of another custodian." *CAT3*, 164 F. Supp. 3d at 497. Furthermore, courts have suggested that information is sufficiently "restored and replaced" even where "the entirety" of the information is not recovered, but "the content of much of th[e] ESI has been preserved through the preservation and production of other emails." *Snider*, 2017 WL 2973464, at *6.

In this case, most, if not all, of the e-mails from the five closed accounts would have been produced through the records of another custodian. Specifically, the four volunteer voter protection deputies' e-mail accounts were created less than a month before the 2016 general election, and those deputies worked primarily at the direction of and in coordination with Spencer Scharff, ADP's Voter Protection Director. [Ex. A at 3] Plaintiffs have produced responsive, non-privileged documents from Mr. Scharff's ADP e-mail account, and Mr. Scharff believes that, until a week before the election, he would

have been included on all or most of the deputies' communications. [*Id.*] Further, in the week before the election, the deputies' practice was to copy Mr. Scharff on all important e-mails, which he believes would have included any e-mails relating to out-of-precinct provisional voting or ballot collection.[4] [*Id.*]

With respect to the fifth account, the GOTV director worked for ADP from August 2016 to November 2016. [*Id.*] Decisions on issues pertinent to this case would have been group decisions, and the GOTV director believes that one or more individuals whose e-mail accounts have been searched (*e.g.*, Mr. Scharff) would have been included on e-mails relating to such decisions. [*Id.*]

That most of the information contained within the five e-mail accounts was in other e-mail accounts that were searched is supported by the result of Plaintiffs' attempt to recover the documents from the five accounts. Although a limited number of documents were recovered, the documents that were found, except for one document, were either duplicates of documents or different versions of the same documents already produced. At bottom, the records at issue have been "restored and replaced," and sanctions should not be imposed. *See Snider*, 2017 WL 2973464, at *4.

Third, and finally, because the majority of the relevant documents contained in these five e-mail accounts would have been produced through other parties, this information was not "lost." *See Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, No. 14-CV-62216, 2016 WL 1105297, at *5 (S.D. Fla. Mar. 22, 2016) ("In the instant case, it appears that the great majority of Defendant's text messages were provided to Plaintiff by another party. Accordingly, the great majority of Defendant's text messages were not 'lost', and sanctions under Rule 37(e) are simply not available . . . .").

[4] Defendants claim Mr. Scharff testified during his deposition that "he may have no longer been copied on 'important' emails from his voter protection deputies." [352 at 9] That is inaccurate. Mr. Scharff said his understanding was that his deputies were copying him on all "important" e-mails, but it was his deputies' discretion as to when an e-mail was important enough to copy Mr. Scharff. [Scharff Dep., Ex. C at 115:19-116:18]

B. Defendants' Requested Adverse Inferences are Not Authorized under Rule 37(e).

1. No Adverse Inferences Are Appropriate.

Assuming *arguendo* that the facts of this case met the preliminary requirements for the imposition of sanctions under Rule 37(e), an adverse inference still would not be appropriate. Under Rule 37(e), a court may "presume that the lost information was unfavorable to the party" "*only* upon finding that the party acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e) (emphasis added); *see also* Advisory Committee Notes to 2015 Amendment to Rule 37(e) (same).[5]

Neither in their Motion, nor at any time since Plaintiffs affirmatively disclosed this issue to Defendants, have Defendants pointed to *any* evidence that ADP intended to deprive Defendants of the information contained in the five deleted e-mail accounts for its use in this litigation.[6] Defendants have thus failed to carry their burden of proving that the ADP acted with the requisite intent to warrant the imposition of an adverse inference.[7]

In fact, there is no such evidence. All evidence indicates that the deletion of these e-mails was a mistake. For instance, the ADP generally, and Mr. Williams specifically, closed other non-relevant, inactive e-mail accounts at the same time he closed the five accounts at issue in an effort to wind down ADP's activities after the 2016 election. [Ex. A at 2] These five accounts were not singled out for closure. Additionally, had ADP intended to deprive the Defendants of information, deleting the accounts of four volunteer

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[5] This requirement is consistent with the common law rationale for adverse inferences, which "were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise a reasonable inference that the evidence was unfavorable to the party responsible for the loss or destruction of the evidence." Advisory Committee Notes to 2015 Amendment to Rule 37(e).

[6] Defendants argue that "[t]he remedy of an adverse inference sanction is particularly warranted, as Plaintiffs' intentional acts deprived both the Defendants and the Court of the opportunity to review the information during this litigation." [352 at 1 (citing Fed. R. Civ. P. 37(e)(2)(B) and noting that "upon finding that the party acted with 'intent to deprive' court may presume 'that the lost information was unfavorable to the party'")]. This misreads Rule 37(e)(2)(B). Intentional *acts* do not trigger the imposition of adverse inferences, but rather acts done with the intent "*to deprive* another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2)(A)-(B) (emphasis added).

[7] Because Defendants seek to show that the ADP had bad intentions, this showing should be made by "clear and convincing evidence." *CAT3*, 164 F. Supp. 3d at 499.

voter protection deputies and one coordinated campaign GOTV director was an incredibly ineffective way to do so. In marked contrast to ARP's initial production of seven documents in this case, ADP has produced over a thousand documents.

At bottom, the facts here do not permit a sanction under Rule 37(e)(2). *See, e.g.*, *Snider*, 2017 WL 2973464, at *8 (holding that when e-mails were deleted pursuant to a company policy, there was "no evidence" that the emails were destroyed with an intent to deprive the other party of ESI); *Virtual Studios, Inc. v. Stanton Carpet Corp.*, No. 4:15-CV-0070-HLM, 2016 WL 5339601, at *11 (N.D. Ga. June 23, 2016) (noting that while the spoliating party "could have taken greater care to preserve the information at issue, and its IT practices appear to leave much to be desired[,]" at most the evidence indicated that it was negligent or careless, which was insufficient to permit a sanction under subsection (e)(2)). Accordingly, the adverse inferences that Defendants request (at 10) should not be imposed.

2. Even if an Adverse Inference Were Appropriate, Defendants' Requested Inferences are Too Broad.

Defendants' requested adverse inferences also should not be imposed because they are impermissibly broad. [8] As relevant here, where the requisite intent is found, Rule 37(e) authorizes a court to "presume that the lost information is unfavorable to the party" or "instruct the jury that it may or must presume the information was unfavorable to the party." But "[b]efore an adverse inference may be drawn, there must be some showing that there is in fact a nexus between the proposed inference and the information contained in the lost evidence." *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 76 (S.D.N.Y. 1991); *Anderson v. Prod. Mgmt. Corp.*, No. CIV.A.98-2234, 2000 WL 492095, at *5 (E.D. La. Apr. 25, 2000) (same).

[8] Furthermore, given the marginal relevance of the information contained in these e-mail accounts, even if Defendants had carried their burden of showing the requisite intent, an adverse inference would not be warranted. Severe measures, such as adverse inferences "should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss." Advisory Committee Notes to 2015 Amendment to Rule 37(e).

Defendants' proposed inferences bear *no* relationship to the information possibly contained in the five deleted e-mail accounts. First, Defendants request an "adverse inference" that "the emails' contents would have supported [a] finding[]" that "Plaintiffs have failed to meet their burdens to prove a discriminatory effect and a severe burden from the challenged election law and procedure." [Doc. 352-2] But these five e-mail accounts, four of which were created less than a month before the 2016 general election, did not and would not have contained *any evidence* that Plaintiffs failed to meet critical evidentiary burdens in this case. Moreover, the e-mails from these selected accounts would not necessarily contain the best evidence of burden on voters.

Second, Defendants request an "adverse inference" that "the emails' contents would have supported [a] finding[]" that as to HB 2023, "Plaintiffs have further proven neither a discriminatory purpose, nor that the statute was enacted with discriminatory intent." [Doc. 352-2] Again, it cannot be, and Defendants have not alleged, that these e-mail accounts have *any* information related to the intent with which HB 2023 was enacted in March 2016, months before *any* of the deleted e-mail accounts were even created. Further, any information about Defendants' intent and conduct, by definition, would not be proven or disproven by Plaintiffs' e-mails. Finally, Defendants request an "adverse inference" that "the emails' contents would have supported [a] finding[]" that "no voter sought the assistance of Plaintiffs in returning an early ballot." [Doc. 352-2] Perhaps these e-mails could have contained no evidence that a voter asked *these five individuals* for assistance in returning an early ballot, but it is highly improbable that they could have contained evidence showing that no one asked *others* at ADP, or with any of the other Plaintiffs in this case, for assistance.

C. No Other Sanctions Are Warranted under Rule 37.

Defendants have not specifically asked for any sanctions other than the previously mentioned adverse inferences. [Doc. 352-2] For this reason alone, the Court should not impose any other type of sanction. Regardless, Rule 37(e) does not authorize any other sanctions here.

Where the preliminary requirements for the imposition of sanctions have been satisfied *and* there was prejudice to the opposing party, a court may, in its discretion, "order measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1). But, in this case, no such prejudice occurred and, thus, no measures are necessary to cure it. Indeed, apart from vague and sweeping allegations of prejudice (at 1, 9), Defendants point to no *specific* evidence that was allegedly or likely contained in the five deleted e-mail accounts that "would have been helpful in proving [their] claims or defenses." *Best Payphones, Inc. v. City of New York*, No. 1-CV-3924 (JG) (VMS), 2016 WL 792396, at *6 (E.D.N.Y. Feb. 26, 2016).

That some of these accounts would have contained "responsive" documents to the discovery requests is not enough. [Doc. 352 at 8] "Proof of relevance does not necessarily equal proof of prejudice." *Id.* Moreover, in this case, "an abundance of preserved information" is "sufficient to meet the needs of all parties." Advisory Committee Notes to 2015 Amendment to Rule 37(e). Again, Mr. Scharff believes that, until a week before the election, he would have been included on all or most of the deputies' communications. [Ex. A at 3] Further, in the week before the election, the deputies' practice was to copy Mr. Scharff on all important e-mails, which he believes would have included any e-mails relating to out-of-precinct provisional voting or ballot collection. [*Id.*] Additionally, the GOTV director believes that one or more individuals whose e-mail accounts have been searched (*e.g.*, Mr. Scharff) would have been included on his e-mails relating to decisions on issues pertinent to this case. [*Id.*] As a result, Defendants have not suggested or shown, as they must, that any curative measures are necessary. Advisory Committee Notes to 2015 Amendment to Rule 37(e).

CONCLUSION

For the reasons stated above, Defendants' request for sanctions should be denied.

Dated: September 25, 2017

s/ Amanda Callais

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2017, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and a Notice of Electronic Filing was transmitted to counsel of record.

s/ Amanda Callais

General Information

Court	United States District Court for the District of Arizona; United States District Court for the District of Arizona
Federal Nature of Suit	Civil Rights - Voting[441]
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