IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CENTENNIAL BANK,
an Arkansas state chartered bank,

Plaintiff,

vs. Case No. 8:16-cv-00088-CEH-JSS

SERVISFIRST BANK INC., an Alabama state chartered bank, GREGORY W. BRYANT, an individual, PATRICK MURRIN, an individual, GWYNN DAVEY, an individual, and JONATHAN ZUNZ, an individual,

Defendants.
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CENTENNIAL'S MOTION FOR SANCTIONS
AGAINST SERVISFIRST, DAVEY, AND MURRIN

Pursuant to Rule 37 and the Court's inherent authority, Centennial Bank ("Centennial") moves for sanctions against ServisFirst Bank Inc. ("ServisFirst"), Gwynn Davey ("Davey"), and Patrick Murrin ("Murrin") (collectively, the "Defendants") based on their bad faith spoliation of electronically stored information ("ESI"), willful disobedience of the Court's orders, and contumacious abuse of the judicial process. Centennial requests (1) entry of a default judgment against the Defendants, and (2) payment of Centennial's attorneys' fees and costs incurred as a result of the Defendants' concerted, bad faith conduct.

MEMORANDUM OF LAW

For more than four years, ServisFirst has controlled this litigation. On December 31, 2015, ServisFirst agreed to indemnify Davey and Murrin only if they abided by ServisFirst's instructions. [Doc. 449-3 at pp. 73-74; 75-76; 77-78]. The same day they signed the indemnity

agreements, knowing this litigation would ensue, Davey and Murrin restored their iPhones and, as a result, destroyed the available ESI. Since then, as demonstrated herein and in the affidavit of Centennial's forensic expert Dwayne Denny ("Denny") being filed contemporaneously herewith, as well as in Centennial's previous motions and related filings,[1] the Defendants have continued execute a scheme to intentionally spoliate ESI central to this lawsuit.

On December 17, 2019, the Court warned, "[Y]ou're putting the Court in the unenviable position of having to merit out sanctions and I don't want to be in that position." [Doc. 633 (Dec. 17, 2019 Hrg. Tr.) at 130:17-19]. On March 4, 2020, the Court ordered Davey and Murrin to produce ESI that they had previously withheld. [Doc. 667]. Consistent with their previous conduct, the Defendants have once again chosen to obstruct, lie, disobey, and defy the Court's authority.

I. LEGAL STANDARD

Spoliation is destroying, altering, or failing to preserve evidence "in pending or reasonably foreseeable litigation." Graff v. Baja Marine Corp., 310 F. Appx. 298, 301 (11th Cir. 2009) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir.1999)). "A court does justice by finding truth. That search requires evidence." TLS Mgmt. & Mktg. Services, 2018 WL 3673090 at *1 (S.D. Miss. 2018). "Intentionally destroying evidence, then, is more than a devious litigation strategy. It is a lethal attack on a court's purpose and must be responded to in kind." Id. "Sanctions for spoliation of the evidence 'are intended to prevent

[1] Centennial incorporates its previous arguments. [Docs. 256, 490, Ex. A to 490, 547, 600, 601, 628, 629 and 710].

unfair prejudice to litigants and to ensure the integrity of the discovery process.'" Managed Care Solutions, Inc. v. Essent Healthcare, Inc., 736 F. Supp. 2d 1317, 1323 (S.D. Fla. 2010) (quoting Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir. 2005)).

Rule 37(e) applies when the spoliated evidence was ESI. NITV Fed. Services, LLC v. Dektor Corp., 18-80994-CIV, 2019 WL 7899730, at *2 (S.D. Fla. Sept. 20, 2019). Rule 37(b) applies when a party willfully fails to obey a court's discovery orders. The burden of proof for Rule 37 sanctions is a preponderance of the evidence. Alabama Aircraft Indus., Inc. v. Boeing Co., 319 F.R.D. 730, 739 (N.D. Ala. 2017) (citing Ramirez v. T&H Lemont, Inc., 845 F.3d 772, 777 (7th Cir. 2016)). Independent of Rule 37, the Court has the inherent authority to sanction litigants who engage in bad faith conduct. Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991); PETA v. Dade City's Wild Things, Inc., No. 8:16-cv-2899-T-36AAS, 2020 WL 897988 at *10 (M.D. Fla. 2020) (entering a default pursuant to Rule 37 and inherent authority).

II. Under Rule 37(e), the Defendants' Concerted, Bad Faith Spoliation of ESI and Contumacious Conduct Calls for the Most Serious of Sanctions

Pursuant to the 2015 Amendments to Rule 37(e),[2] the Court may sanction a party who (A) had a duty to preserve ESI, but (B) failed to take reasonable steps to preserve ESI, and, as a result, (C) ESI was lost and cannot be replaced. Where, like here, the context of the spoliation demonstrates "that the party acted with the intent to deprive another party of the information's use in the litigation," the ESI is presumed to have been unfavorable to the spoliating party and

[2] The Advisory Committee's notes to the 2015 amendments explain that the amended Rule 37(e) "forecloses reliance on inherent authority or state law to determine when certain [sanctioning] measures would be used" for the loss of ESI. Rule 37(e) 2015 amen. adv. comm. n. See also Sosa v. Carnival Corp., 2018 WL 6335178 at *9–10 (S.D. Fla. Dec. 4, 2018), reconsideration denied, 2019 WL 330865 (S.D. Fla. Jan. 25, 2019) ("Other district courts in this Circuit have likewise determined that Rule 37(e), and not a court's inherent authority, governs the issue of spoliation sanctions for loss of ESI.") (citing cases).

no further finding of prejudice is required before the imposition of sanctions. Rule 37(e)(2).[3]

A. Defendants Had a Duty to Preserve ESI in 2015

A party must preserve relevant evidence "when litigation is reasonably anticipated." Simon Prop. Grp., Inc. v. Lauria, 2012 WL 6859404 at *6 (M.D. Fla. Dec. 13, 2012). That duty "must be viewed from the perspective of the party with control of the evidence[.]" Alabama Aircraft, 319 F.R.D. 730, 740 (N.D. Ala. 2017) (citing Graff v. Baja Marine Corp., 310 Fed. Appx. 298, 301 (11th Cir. 2009)). "[I]t is an objective standard and considers whether a party should reasonably have anticipated litigation." Nationwide Life Ins. Co. v. Betzer, 2019 WL 5700288 at *6 (M.D. Fla. Oct. 28, 2019) (emphasis added). "Once a party reasonably anticipates litigation, it has an obligation to make a conscientious effort to preserve electronically stored information that would be relevant." United States ex rel. King v. DSE, Inc., 2013 WL 610531 at *7 (M.D. Fla. Jan. 17, 2013). Both "counsel and client must take some reasonable steps to see that sources of relevant information are located." In re Seroquel Products Liab. Litig., 244 F.R.D. 650, 663-664 (M.D. Fla. 2007) (quotation omitted). A party must "suspend its routine…destruction policies and institute a litigation hold to ensure" that relevant documents are preserved. McBride v. Coca-Cola Refreshments, USA, Inc., 2012 WL 12915435 (M.D. Fla. June 20, 2012).

In **2015**, the Defendants knew that this litigation would ensue. With that in mind, they perpetrated a scheme to destroy evidence directly relevant to this lawsuit. On **June 16, 2015**

[3] "Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information…because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position." Rule 37(e)(2) 2015 amend. adv. comm. n. ("subdivision (e)(2) does not require any further finding of prejudice.").

– two days before Centennial's acquisition of Bay Cities was announced – Davey sought legal advice about her proposed employment agreement. [Ex. A (Davey Depo. (Feb. 13, 2019)) at 178:6-179:16]. The attorney responded by email and explained that Davey would have to wait a year before taking a position with another bank. [Ex. B (Davey emails (June 16, 2015))]. Davey forwarded the e-mail to Bryant, stating: "Greg, see directly below. This is a big issue, and I want to make sure that we are clear and that there is no confusion among the parties." [Ex. B; Ex. A at 156:19-159:10; 178:6-13]. The next day, Davey, Bryant, and Murrin signed non-compete, non-solicitation agreements with Centennial. [Ex. A at 179:15-16].

Three weeks later, during a **July 9, 2015** meeting scheduled by Bryant, Davey and Bryant met with Fidelity Bank representative Palmer Proctor to propose taking their leadership team and other bank employees to Fidelity after the acquisition. [Ex. A at 179:17:-183:22]. Prior to that meeting, Bryant emailed Murrin, "on Monday I will do battle for your future." [Ex. A at 181:10-182:3, Pl. Ex. 10]. Bryant followed up with Fidelity by sending Centennial's confidential banking information, a list of employees, and a proposal that his team open an LPO office in Pasco County which would morph into a branch office after a year [Ex. A at 201:3-6] – the same proposal that ServisFirst accepted and which underlies the claims in this lawsuit. Bryant even confirmed that his plans for growing Fidelity's business in the Tampa Bay area was centered on his ability to migrate Bay Cities' book of business to Fidelity. [Doc. 405 at pp. 16-20 (Ex. A) (Affidavit of H. Proctor) at ¶18]. The book of business Centennial paid for.

The negotiations with Fidelity failed, as did Bryant and Davey's subsequent negotiations with CenterState Bank.[4] Bryant and Davey made other attempts to no avail until **November 2015**, when they met with ServisFirst representatives. [Ex. A at 230:13-232:8].[5] On **November 25, 2015**, Bryant had a conference with ServisFirst's Vice President of Human Resources Dana Miller and ServisFirst's outside counsel Michael Sansbury ("Sansbury") about the litigation that would ensue when the Centennial team departed to ServisFirst. In e-mails to Davey and Murrin, Bryant explained that Sansbury "said that he and Dana had gone through this several times…[Sansbury] went on to say that sometimes 'a little money changes hands' and Dana didn't blink."[6] In "late November" 2015, Murrin gave ServisFirst a copy of his employment agreement "so they could be familiar with the restrictive covenants in it," after Bryant brought him up to speed regarding his and Davey's plans. [Doc. 38 (Murrin Dec. (Feb. 11, 2016)) at ¶ 15]. Notably, ServisFirst President and CEO Thomas Broughton later testified that, since 2007, Sansbury had represented ServisFirst in allegations of theft of confidential information and violations of non-compete agreements. [Ex. C (Broughton Depo. (Feb. 22, 2019)) at 19:10-29:25].[7] Further, the Indemnity Agreements were drafted by ServisFirst's counsel[8] and required Davey and Murrin to abide by ServisFirst's directions.[9]

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[4] Davey testified that CenterState had reviewed the Centennial's non-compete and determined that the bank could not accept Bryant's proposal for one year. [Ex. A at 227:2-10].

[5] In the meantime, Centennial's acquisition of Bay Cities closed on October 1, 2015 and Davey received $90,000 from Centennial [Ex. A at 140:1-6]. Similarly, Murrin received approximately $968,191.23 from Centennial. [Doc. 199 Ex. 15]

[6] Doc. 601 Ex. A (Bryant email to Murrin (Nov. 27, 2015)). Defendants withheld this email for more than three years. It was not disclosed until May 22, 2019 -- a day before Bryant's long-scheduled deposition and approximately two weeks before the Court-ordered June 7, 2019 close of discovery [Doc. 633 (Dec.17, 2019 Hrg. Tr.) at 32:13-32:21] -- and ServisFirst attempted to claw it back claiming it was protected by attorney-client privilege [Doc. 633 at 32:21-39:18].

[7] Steves and Sons, Inc. v. JELD-WEN, Inc., 327 F.R.D. 96 (E.D. Va. 2018) (Familiarity with the predicates for litigation should have caused Defendant to reasonably anticipate that plaintiff would eventually bring suit for the

On **December 9, 2015**,[10] Davey used her Centennial email to send contacts from Centennial's server to her Gmail [Ex. A at 239:1-4]. On **December 11, 2015**, Davey and Murrin executed employment agreements with ServisFirst [Ex. A at 239:20-241:10; Doc. 38 at ¶ 17]. On **December 18, 2015**, Murrin used his Centennial email to send contacts from Centennial's server to his Gmail. On **December 31, 2015**, in anticipation of this litigation,[11] the Defendants entered into the Indemnification Agreements, in which they agreed to follow each and every one of ServisFirst's instructions in this litigation. [Ex. A at 270:19-25]. On the same day that they agreed to follow ServisFirst's instructions, Davey and Murrin conducted restorations of their iPhones - thereby destroying all stored ESI - and, together with Bryant and Defendant Jonathan Zunz, resigned en masse from Centennial.

On **January 11, 2016**, Centennial issued a preservation letter. [Doc. 601 at Ex. A].[12] On **January 14, 2016**, Centennial filed suit [Doc. 1] and, on **January 18, 2016**, Centennial informed Davey and Murrin, now employees of ServisFirst, that it was reserving its rights to

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conduct alluded to in the e-mail, fact that plaintiff did not initiate litigation for two years was immaterial to analysis).

[8] Sansbury filed declarations by Davey and Murrin wherein they swore that they had signed indemnification agreements "authored by Thomas A. Broughton III, CEO of ServisFirst, on behalf of ServisFirst" [Docs. 122, 123]. Broughton testified that an outside law firm would have drafted the indemnification agreements, and "the overwhelming odds" were that it was Sansbury's firm. [Ex. C at207:6-208:6]. Bryant, Davey, Murrin, Miller and Broughton all testified that they had no recollection of how or why ServisFirst offered the indemnity agreements. Centennial's motions to depose and disqualify Sansbury were denied. [Docs. 463, 544, 666].

[9] Selectica, Inc. v. Novatus, Inc., 2015 WL 1125051 at *4 (M.D. Fla. Mar. 12 2015 (A party has control of discovery "where the party has the legal right, authority, or practical ability to obtain the materials upon demand...such as where there is a contract empowering the party to obtain information from the non-party or where it is customary…For example, an employer may possess power over an employee to obtain data from the employee.").

[10] Two days prior, on December 7, 2015, Davey and Murrin received an additional $30,000 bonus, each, from Centennial. To be sure, this was all part of Bryant's plan, who specifically delayed the orchestrated departure of his team in order to "make certain year-end bonuses get paid out first." [Doc. 199 at Ex. 56].

[11] ServisFirst readily admits that the indemnification agreements were prepared in anticipation of litigation. [Doc. 121 at pp. 8-10]. Defendants used that argument to withhold the agreements for three years, and only produced them after years of unnecessary litigation before the Court.

[12] Davey testified that she had received and read the letter [Ex. A at 254:6-255:9].

pursue litigation against them. Notably, at that time through November 2016,[13] Sansbury represented ServisFirst and its employees, Davey and Murrin. [Doc. 14].[14]

B. The Defendants Failed to Take Reasonable Steps to Preserve the ESI

The Defendants not only "failed to take reasonable steps" to preserve ESI, but they engaged in a concerted scheme to destroy ESI that they were obligated to preserve since 2015. Although each is responsible for their intentional conduct, the course of this litigation was set by Davey and Murrin's employer and indemnitor, ServisFirst. Davey testified under oath that neither Sansbury nor anyone else from ServisFirst[15] told her to stop deleting emails or otherwise preserve ESI relevant to this lawsuit. [Ex. A at p. 253:15-254:5].[16] Davey testified that the first time anything about document preservation was discussed with her was in March 2016, when she was asked only about "confidential" information. [Ex. A at p. 253:15-254:5].[17]

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[13] In November 2016, Davey and Murrin retained their current counsel, who have represented Bryant since the initiation of this litigation. [Docs. 5, 6, 204-209]. Current counsel had no specific information about whether they had explained preservation requirements even to their original client Bryant. [Doc. 633 at 104:17-106:12].

[14] J.S.T. Corp. v. Robert Bosch LLC, 2019 WL 2324488 at *7, R&R adopted, 2019 WL 2296913 (E.D. Mich. May 30, 2019) (where defendant-company's attorney represented employee, and informed court that it would collect and produce ESI from employee, the defendant company had a duty to ensure that ESI was preserved.

[15] Philips Elecs. N. Am. Corp. v. BC Tech., 773 F. Supp. 2d 1149, 1206–07 (D. Utah 2011) ("[defendant-company] is the party; it has the responsibility; it must follow the court's orders. The justice system would break down if company employees could claim that they did not know about the court orders and simply disregard them.")

[16] For instance, although Davey testified that she had read Centennial's January 11, 2016 Preservation Letter, Davey testified that she deleted January 12, 2016 emails directly relevant to this lawsuit claiming, "I wasn't required at this time to keep this. I wasn't asked to keep this in January of '16." [Ex. A at 253:24-254:01]. Murrin testified under oath that he was told to preserve the data on all of his electronic devices, which he understood to mean that he was not supposed to delete data. [Doc. 603-1 (Murrin Depo. (May 10, 2019)) at 281:16-19:24], and, when asked whether he followed those instructions, Murrin testified "As far as I know I have" [Id. at 281:30-21] -- that was not true.

[17] R.W. Intern. Corp. v. Welch Foods, Inc., 133 F.R.D. 8 (D. Puerto Rico 1990), rev'd on other grounds 937 F.2d 11 ("Where actions by counsel were either willful or total dereliction of professional responsibility, and it is impossible to establish that attorney's action was in fact willful rather than grossly negligent, full range of Rule 37 discovery sanctions may be imposed."); Atlas Res., Inc. v. Liberty Mut. Ins. Co., 297 F.R.D. 482, 492 (D.N.M. 2011) (imposing sanctions were "[i]t is clear that no discovery plan was in place (i.e., developing a systematic approach to document retrieval; identifying and communicating with the client representatives who are responsible for key areas of inquiry; keeping track of documents produced by the client to the attorneys; and

Davey testified under oath that she has continued to delete critical ESI because it was her practice, and her employer, ServisFirst, failed to instruct her to preserve data. Among the emails Davey admitted to deleting was a January 2, 2016 e-mail to Centennial's customers informing them that she had left Centennial and to contact her on her cell. [Ex. A at 251:20-252:9]. Davey testified under oath that she did not think litigation was likely at that time, despite claiming her Indemnification Agreement was protected under the "work product privilege" as they were drafted in anticipation of litigation. [Ex. A at 252:16-253:1]. Davey maintained that position even when confronted with her intentional destruction of other relevant emails,[18] such as January 12, 2016 emails with Centennial customer Chase Stockton and others, none of which was produced and all of which were deleted by Davey from her "Sent" folder. [Ex. A at 251:20-252:9; Pl. Ex. 34; 257:25-258:4; 258:10-259:2; 259:4-20; 259:22-260:5; 253:5-253:19].[19]

In response to March 25, 2016 subpoenas issued to Davey and Murrin, ServisFirst produced only 16 pages of documents: six pages from Davey and ten pages from Murrin.[20] ServisFirst, through Sansbury, stated that Murrin and Davey had committed "e-mail bankruptcy" by deleting all of their e-mails.[21] When Centennial requested that its forensic

producing the documents in a reasonably usable form to opposing counsel). It is also clear that counsel abdicated its responsibility to exercise oversight of the discovery process.").

[18] See also Ex. A at 259:2-260:5: "Q. Gwynndavey@gmail.com, copy to Pat Murrin, and this relates to Natalie. This is one of those people you mentioned that you've done business with since you got to ServisFirst, right, January 12, 2016 e-mail traffic. Any idea why you would not have forwarded us the Love My Dog Resort & Playground P&L and related loan application documents in March of 2016? A. (No response)."

[19] See Betzer, 2019 WL 5700288 at *9 ("The only step necessary to preserve the evidence here would have been for Defendants to merely refrain from using the deletion software.").

[20] ServisFirst was responsible for this production. See Ex. A at 257:21-24 (Davey testifying that anything that was produced in response to the subpoenas was produced by ServisFirst on her behalf); Ex. A at 249:7-250:8 (Davey testifying that she gave her counsel more than six pages in response to subpoena).

[21] See Doc. 121-1 (A. Ghekas Email to M. Sansbury (April 18-20, 2016)) at pp. 2-3, 6.

examiner conduct a search of Murrin and Davey's email accounts to confirm the alleged e-mail bankruptcy, Sansbury responded, "Your understanding of what is recoverable is different from mine" and refused. [Doc. 121-1 at pp. 2-3, 6].[22] Subsequently ServisFirst filed documents with the Court claiming that all responsive discovery had been produced – those documents included sworn declarations by its employees Davey and Murrin, wherein they claimed that they had searched their electronic devices and provided all responsive documents to their counsel (Sansbury).[23] [Docs. 121, 122, 123].

On June 28, 2016, the Court announced that it was granting Centennial's motion to compel, thereafter entering a written Order. [Doc. 165].[24] In that same time frame, ServisFirst hired Adam Sharp ("Sharp"). [Doc. 175]. ServisFirst claimed that it had produced everything that Sharp could recover, and thus there was no need for Centennial's forensic expert.[25] [Doc. 601-1 (Ex. E)]. ServisFirst filed numerous sworn declarations by Sharp in support of its assertions of full compliance - those assertions, however, are false.

C. ESI Has Been Lost and Cannot Be Replaced

As intended by the Defendants, no one will ever know what ESI the Defendants should

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[22] If Sansbury had an "understanding" of what was recoverable, he should have instructed his client's new employees to preserve ESI. Yet all evidence indicates that he engineered the scheme.

[23] See DeCastro v. Kavadia, 309 F.R.D. 167, 184-85 (S.D.N.Y. 2015) (sanctioning attorney with order to pay 25% of fees and costs sanction where attorney "made multiple incomplete or misleading submissions to this Court" about client's discovery compliance, and then failed to correct them, "even after the inconsistencies and apparent errors in his submissions were drawn to his attention"); Commodity Futures Trading Comm'n v. Royal Bank of Canada, 2014 WL 1259773 at *1 (S.D.N.Y. Mar. 28, 2014) (directing defendant and its counsel to reimburse plaintiff for expenses incurred as a result of violation of discovery order).

[24] Defendants not only violated the Court's July 1, 2016 Order, they violated every discovery order thereafter, making their conduct sanctionable pursuant to the provisions of Rule 37(b). See infra Section III.

[25] Joint Stock Co. Channel One Russia Worldwide v. Infomir LLC, 2019 WL 4727537 at *27 (S.D.N.Y. Sept. 26, 2019), aff'd sub nom. Joint Stock Co. "Channel One Russia Worldwide" v. Infomir LLC, 2020 WL 1479018 (S.D.N.Y. Mar. 26, 2020) (finding bad faith where attorneys exercised considerable control over obstinate party and "did not merely look the other way when [client] made factually dubious statements to the Court. In addition to filing [client's] affidavits (which they likely assisted in drafting), counsel amplified, repeated, and affirmatively vouched for his testimony in their own letters, affidavits, and court presentations.").

have preserved and produced.[26] Examples of lost ESI include: (1) Davey and Murrin's December 31, 2015 intentional "wiping" of their iPhones; (2) evidence that Davey and Murrin continued to permanently destroy ESI even after the Court's order compelling them to produce the data; (3) Davey's undisclosed iCloud account; (4) Davey's newly disclosed, and now lost, iPhone 6; (5) Davey's second, undisclosed iPad; (6) the ever-evolving story of Murrin's RR iCloud Account; (7) Davey and Murrin's Apple Device Plists; (8) Sharp's Aid4Mail collection; and (9) E-Hounds lack of "chain of custody forms" and unreliable "log of the dates of Sharp's data preservation and forensic imaging for each device and account, as well as the method used" as ordered by the Court [Doc. 667].[27]

Davey's newly disclosed iPhone 6 is just one recently discovered example of ESI no longer available. On April 29, 2020, Davey filed a declaration admitting that she once possessed an iPhone 6, that she never produced it, and that she had since traded in.[28] [Doc. 696]. It is inconceivable that Davey did not realize until now that the iPhone was relevant to this litigation. It is equally inconceivable that neither her counsel nor her employer,

[26] NITV, 2019 WL 7899730 at *8 ("While [plaintiff] could conceivably attempt to piece together the larger puzzle of what might have been on [defendant's] devices or in his email accounts through other sources, [plaintiff] can never know for sure"); Betzer, 2019 WL 5700288 at *9 (noting it was the Defendants who "did not identify any alternative locations for the data, such as a cloud-based storage device or external hard drive"); HP Tuners, LLC v. Sykes-Bonnett, 2019 WL 5069088 at *4 (W.D. Wash. Sept. 16) (ESI "lost" where the defendant destroyed a flash drive and "there is no way of knowing the extent of the evidence contained on the flash drive and there is nothing in the record to indicate that the information is recoverable").

[27] TLS, 2018 WL 3673090 at *4 (assuming data to be permanently lost and granting a default judgment against defendants where defendants' expert report left "nearly every important question unanswered" and was "wholly inadequate" to rebut plaintiff's forensic evidence of intentional and permanent destruction of data, and the defendants' expert revealed that he had never examined an identified electronic device).

[28] TLS, 2018 WL 3673090 at *3 n.14 ("Defendants claim [Defendant]'s son threw away the computer after it crashed. This is irrelevant. [Defendant] was responsible for preserving the computer, and should have prevented his son from destroying it.")

ServisFirst, advised her on the importance of producing all devices containing ESI.[29] [See Ex. D (Sansbury e-mail (Sept. 14, 2016)) (providing a "detailed explanation" of ServisFirst's ESI preservation)] Additionally, Sharp claimed under oath to have preserved "all available" ESI. [Doc. 192]. Moreover, the vast majority of the ESI litigation in this case has been in regard to Davey and Murrin's failure to preserve and produce ESI. Considering that four-year history, it is implausible that Davey suddenly realized that she had an obligation to disclose the existence of her iPhone 6. Her conduct, which has resulted in the loss of relevant information merits the harshest of sanctions.

Only the Defendants know what they have failed to preserve and, because they have repeatedly refused to comply with the Court's discovery orders, the ESI should be presumed lost. "Remediation under Rule 37 cannot be an endless undertaking." J.S.T. Corp., 2019 WL 2324488 at *9.[30] "Even if the Court could trust the [Defendants'] belated identification … it is reasonable to conclude that at least some of this highly relevant ESI cannot be replaced from additional discovery." CrossFit, Inc. v. Nat'l Strength & Conditioning Ass'n, 2019 WL 6527951 at *7 (S.D. Cal. Dec. 4, 2019).

D. The Defendants Acted Intentionally and in Bad Faith to Prevent Centennial from Obtaining ESI For Use in This Litigation

The Eleventh Circuit recently suggested that the "bad faith" standard and the "intent to deprive" standard in Rule 37(e) are connected. Betzer, 2019 WL 5700288 at *10 (citing ML

[29] In fact, according to Sansbury's email of September 14, 2016, E-Hounds, "inquired about any potential other sources of stored data including older or alternative mobile devices, computers, and email accounts; none were identified."

[30] J.S.T. Corp., 2019 WL 2324488 at *9 (Determining ESI to be lost where defendant "had many months to restore or replace" the ESI but had "failed to attempt to restore or replace proactively upon discovering the deletion" and, even after a motion to compel, "made piecemeal efforts to restore or replace.").

Healthcare Services v. Publix Super Markets, Inc., 881 F.3d 1293, 1308 (11th Cir. 2018).[31] "In making th[e] determination [of whether there is evidence of bad faith in the destruction of evidence], courts necessarily consider the context of the destruction." Betzer, 2019 WL 5700288.[32] "Bad faith is determined by the **when** and **how** of data loss. Bad faith data loss happens when, shortly after receiving a request to protect lawsuit-relevant data, a person destroys many documents that likely contained such data." TLS, 2018 WL 3673090 at *5 (emphasis in original); NITV, 2019 WL 7899730 at *8 (finding bath faith where defendant, while represented by counsel was advised of his duty to preserve, and yet affirmatively caused the loss or destruction of ESI).

The Defendants have refused to comply with the Court's orders and have repeatedly lied under oath. As a result, Centennial has spent more than four years expending resources chasing basic discovery that the Defendants were obligated to preserve, and which the Court ordered them to produce. In the Court's March 4, 2020 Order, the Defendants were ordered to produce previously withheld ESI or explain why it could not be produced. Rather than complying, the Defendants once again elected to defy, obstruct, and lie.

Aid4Mail

The Court ordered Murrin and Davey to direct Sharp to produce his chain of custody

[31] See also Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd., 2016 WL 1105297 at *6 n.6 (S.D. Fla Mar. 22, 2016) ("It appears to this Court that the "intent to deprive" standard in Rule 37(e)(2) may very well be harmonious with the "bad faith" standard previously established by the Eleventh Circuit.").

[32] See also NITV, 2019 WL 7899730 at *3 ("where there is no direct evidence of bad intent, bad faith may be found on circumstantial evidence where: (1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator." (internal quotation omitted)).

forms for all evidence he received and a log listing the dates of preservation, the devices and accounts, and the methods used. [Doc. 667 at p. 21]. On March 16, 2020, Davey and Murrin responded by informing Centennial that they would not produce chain of custody forms because Sharp had not created any. [Ex. E (G. Guerra Ltr. (Mar. 16, 2020)]. The documentation of Sharp's preservation effort is significant to a multitude of ESI issues. One such issue involves Sharp's use of the product Aid4Mail.

On September 14, 2016, Sansbury emailed Centennial's counsel claiming to be providing a "detailed explanation" regarding the steps taken by E-Hounds to preserve ESI from the electronic devices of ServisFirst employees Davey and Murrin. [Ex. D]. Sansbury wrote that the employees' Gmail accounts were collected, "through the 'Google Takeout' service." [Ex. D]. Sansbury went on to provide a thorough description of a Google Takeout. [Ex. D]. Sansbury's explanation was important for two reasons. First, every Google Takeout generates two notification emails - one confirming the request for the Takeout and another notifying the user when the requested data is available. Those notification e-mails are important because they provide a "paper trail" of the steps taken by a forensic examiner in the collection of electronic data. Second, Sansbury's email was important in what it did **not** say; namely, Sansbury never mentioned Sharp collecting emails using Aid4Mail.

When Centennial's forensic expert Denny conducted his forensic analysis of Murrin's filtered data, he did not locate any Google notification emails. That demonstrates that Murrin intentionally deleted the emails, and Denny documented the deletions in his affidavit dated August 9, 2019. [Doc. 490]. On September 6, 2019, Sharp filed a sworn declaration seemingly providing an explanation for the missing Google notification emails. [Doc. 528]. Sharp

asserted under oath that E-Hounds "did not initially use Google takeout to extract Murrin's emails. Instead it used a program called Aid4Mail.[33] Id. at 3. That was the first disclosure of Sharp utilizing Aid4Mail to "extract" Murrin's Gmail emails.

On March 16, 2020, pursuant to the ESI Compel Order, Davey and Murrin produced certain documents. Although the Court ordered Davey and Murrin to produce "a log of the dates of Sharp's data preservation and forensic imaging for each device and account, as well as the method used," Davey and Murrin failed to produce any log or other evidence reflecting Sharp's use of Aid4Mail. On March 21, 2020, Centennial began discussions with Murrin and Davey in an attempt to resolve deficiencies in their production. [Ex. G (Counsel email exchange (Mar. 21-25, 2020)]. On April 1, 2020, Centennial sent an email specifically addressing the missing documentation relating to Aid4Mail. [Ex. H (Counsel email exchange (Mar. 27-Apr. 9, 2020)]. The email exchange led to a telephone conference, which led to an April 10, 2020 email from Defendants' new counsel and ESI expert Robert Stines ("Stines"). [Ex. I (Counsel e-mail exchange (Mar. 27-Apr. 22, 2020]. In that email, Stines asserted, "Mr. Sharp never did, and is not required to, generate or maintain [an automatically generated] report. We can only provide you with the report that Sharp generated at the time of his collection and preservation in 2016." [Ex. I]. Centennial responded that the Court's Order required Sharp to produce a log, regardless of whether he had failed to create one when he

[33] Importantly, Centennial now knows that Sharp's purported explanation, in fact, explained **nothing** because Centennial now knows the real date of the E-Hounds Google Takeout. According to the E-Hounds Inventory Report, produced as a result of ESI Compel Order, E-Hounds' Google Takeout took place on July 21, 2016. [Ex. F (E-Hounds Inventory Report (Mar. 12, 2020))]. As a result, the Google notification emails should have been present in Murrin's Gmail emails when Denny conducted his Google Takeout on October 26, 2016 regardless of whether E-Hounds "initially" used Aid4Mail. Sharp's "explanation" is yet another example of the Defendants' dishonest misrepresentations and the fraud the Defendants have perpetrated on the Court.

obtained Defendants' devices and accounts. [Ex. I]. On Wednesday, April 22, 2020, Stines responded restating his objection but including a template of a basic log. [Ex. I].[34] Nearly two weeks went by without a response. On May 5, 2020, Centennial emailed Stines reminding him that no log referencing Aid4Mail had been produced; Stines responded that one was forthcoming. [Ex. J (Counsel email exchange (Mar. 27-May 6, 2020)]. On May 6, 2020, the Defendants produced a log (the "Preservation Log"). [Ex. K (Log of the Dates of e-Hounds Data Preservation for Murrin and Davey) (Apr. 28, 2020)]. Significantly, even after the lengthy delay, the purported Preservation Log failed to comply with the Court's order. Conspicuously absent from the log were certain known applications used by Sharp, and dates for those applications, including: (i) Oxygen Forensic Analyst to the Murrin and Davey devices; (ii) Sumuri Recon 3.1.2 two Murrin's MacBook Pro; (iii) FTK Imager 3.12 Murrin's MacBook Pro; (iv) Oxygen Forensic to the mobile devices; (v) Forensic Explorer 3.6.2/5582 to "computers"; and (vi) Vound Intella Software 1.9.1 to "computers," "emails" and "all additional data retrieved through Google Takeout." [Ex. D].

Moreover, in his 2016 email, Sansbury had specifically referenced, twice, the processing of "computers." Sansbury's use of "computers" (plural) is significant because, in 2016, Davey claimed she did not own a computer and Murrin initially produced only one computer only to later admit that he owned but had not produced a Windows-based computer. Murrin declared under oath that he had not understood that he had was obligated to the produce the Windows computer to Centennial, and he had not cherry-picked which devices to disclose.

[34] Centennial acquiesced to the suggested template and requested that the log be produced expeditiously. [Ex. I]. Notably, at that point, Defendants' production was five weeks past the March 16, 2020 Court-ordered deadline.

[Doc. 407]. Sansbury's use of "computers" (plural) suggests that the Defendants provided more than one computer to E-Hounds in 2016. It is impossible for Centennial to determine one way or the other, however, because Defendants failed to include any description for several items listed in the E-Hounds Inventory Report. Defendants claim the descriptions constitute attorney work product. [Ex. I].[35]

Sharp's Preservation Log also revealed for the first time that Sharp had utilized Aid4Mail for Davey's Gmail emails – not just Murrin's Gmail emails as Sharp had previously revealed. [Ex. K]. For Murrin, Sharp utilized Aid4Mail two days prior to initiating a Google Takeout; for Davey, Sharp utilized Aid4Mail eight days prior. [Ex. K at p. 2]. This is significant for two reasons. By 2016, Google offered Google Takeout as a built-in service for users to compile and preserve their data. Sharp was clearly aware of Google Takeout, as evidenced by his use of it. Aid4Mail, on the other hand, primarily was used only if data needed to be immediately obtained and a user could not wait for Google Takeout's delivery time, or if their goal was to migrate (not preserve) data. Thus, under the circumstances here, it appears Sharp utilized Aid4Mail either to let the Defendants know what data was available, or as a migration tool to manipulate data that the Court ordered to be produced.

Notably, Sharp failed to include any Aid4Mail **collection** on his E-Hounds Inventory Report Form. [Ex. F]. Because, according to Davey and Murrin's counsel, Sharp does not utilize chain of custody of forms [Ex. E] and an entry on an E-Hounds Inventory Report is the only way that Sharp documents evidence that he receives and preserves, it would seem

[35] That claim is suspect, particularly given the Defendants' past conduct of withholding their Indemnity Agreements for three years based on an unsupported claim of privilege. The reasonable conclusion is that the Defendants are attempting to disguise their past transgressions and untruthful assertions to the Court, including whether Defendants provided E-Hounds with more than a single computer four years ago.

critically important for Sharp to ensure that the Inventory Report is complete and accurate. Yet, despite the critical importance of the Inventory Report, as Sharp's only means of documenting evidence, Sharp failed to document any **collection** of Murrin and Davey's Gmail emails using Aid4Mail. [Ex. F]. The logical conclusion is that Sharp did not include Aid4Mail collections on the Inventory Report because he did not utilize it to **collect** emails; he used it to identify the emails or migrate them, thereby allowing Murrin and Davey to maintain a full set of their emails while producing only selected emails for the subsequent Google Takeouts.

PLISTS

Pursuant to the ESI Compel Order, Murrin and Davey were required to produce PLIST logs for all Apple mobile devices that Sharp obtained. PLIST files contain very little personal information as they are primarily text files containing the list of application preferences in Apple devices. Thus, the files can provide valuable information without risk of violating a user's privacy. For instance, PLIST files contain information regarding backups, email services, and cloud-based storage services. Additionally, PLIST files are easy to produce and require very little time commitment or effort. The ESI Compel Order was clear and unambiguous - Murrin and Davey were to produce "the plist logs for all Apple mobile devices Sharp obtained from Murrin and Davey." [Doc. 667 at p. 21]. Despite this simple command, after weeks of making piecemeal productions, Davey and Murrin have unilaterally decided that they are not required to comply.

On March 16, 2020, Murrin and Davey produced **some** PLIST files; the metadata had

been altered.[36] Centennial pointed out that the all of the PLIST files reflected a "last modified" date of March 16, 2020 (the date of production). On April 16, 2020, **exactly one month after the production was due**, Murrin and Davey again purported to produce the PLIST files – that production contained six missing PLIST files which **all corresponded to Murrin's mobile devices**. Centennial again requested that all files be produced in a logical forensic image. [Ex. L]. Once again, Murrin and Davey obstructed. First, they argued that the Federal Rules of Civil Procedure did not require that files be produced in a logical forensic image. Despite Centennial pointing out that creating the forensic image was simple, and served to eliminate ongoing distrust, Murrin and Davey responded by requesting that **Centennial identify the six missing files**.[37] [Ex. M (Counsel e-mail exchange (Mar. 4-Apr. 18, 2020)]. On April 22, 2020, Davey and Murrin, for a third time, purported to produce the PLIST files but this time unilaterally decided to omit any PLIST files stored in subfolders.[38] On April 24, 2020, Centennial informed Davey and Murrin that their third production was once again deficient.

[36] Although it is possible that that the metadata was inadvertently altered by someone attempting to "zip" the folder for transmission, it is a dubious mistake from anyone with even limited knowledge of how to handle forensic digital data – such as Stine and Sharp.

[37] See Stewart v. Belhaven Univ., 2017 WL 3995989 at *3 (S.D. Miss. Sept. 8, 2017), aff'd, 717 Fed. Appx. 497 (5th Cir. 2018) ("Stewart denies that her conduct is sanctionable. She blames opposing counsel for not getting stored copies of her text messages from her iCloud account or her new phone. She also says that opposing counsel failed to try and recover the phone directly from the AT&T store. Stewart even has the gall to ask the Court to award her attorney's fees for having to respond to Belhaven's motion. These arguments are inexcusable. Stewart and her attorney had the duty to preserve her phone. When they failed to do so, they should have attempted to recover stored messages from iCloud, the new phone, and the AT&T store. This kind of deflection has no defense.")

[38] As previously noted, valuable forensic digital data is contained in the PLISTS stored in subfolders. For example, if a device has been backed-up, a PLIST containing information regarding that backup will be stored in a subfolder. Likewise, if a device had been restored from iCloud that restoration would be reflected in a PLIST file stored in a subfolder. It is noteworthy that, in 2019, Centennial discovered that Murrin had restored an iPhone with IMEI ending in 0622 from its review of PLIST folders stored in subfolders produced by Murrin as part of the ESI Production. In fact, that ESI production included 947 PLIST files, largely stored in subfolders. It appears that after learning what Centennial discovered from its review of PLIST folders in 2019, Davey now wants to prevent similar damaging discovery by unilaterally refusing to produce the PLIST stored in subfolders despite this Court's unambiguous Order.

[Ex. N (Counsel e-mail exchange (Apr. 22-24, 2020)]. In response, Murrin and Davey raised the argument, for the first time, that such a production would trigger "proportionality" concerns. Centennial again pointed to the Court's unambiguous directives and explained that producing all PLIST files, including those stored in subfolders, would take approximately 30 seconds. In other words, the amount of effort required to obey the ESI Compel Order was exactly the same amount of effort it took to disobey it. [Ex. O M (Counsel e-mail exchange (Apr. 22-25, 2020)].[39]

Murrin RR iCloud Account

On April 24, 2020, Murrin filed a sworn declaration asserting a new explanation for the iCloud account associated with his email address pmurrin1@tampabay.rr.com (the "Roadrunner email" and "Roadrunner iCloud account"). [Doc. 694 (Murrin Decl. (Apr. 24, 2020)]. Although Murrin's ever-fluid explanations about the Roadrunner iCloud account began with him unequivocally denying that any such account ever existed, Murrin has now asserted that he did set up an iCloud account using his Roadrunner email address, and he simply changed the email address that he used as his Apple ID; i.e. that the Roadrunner iCloud account is one and the same as the iCloud account he disclosed. Murrin's sworn assertion is perjurous and another attempt at perpetrating a fraud upon this Court.

The history of the discovery of Murrin's Roadrunner account is well documented in Centennial's previous motions. On September 26, 2016, Murrin was ordered to provide access

[39] To illustrate, Centennial had Denny create a video clip of how to create a forensic logical image with all subfolders, and emailed it to Davey and Murrin. [Ex. P (screen shots) (video available at https://youtu.be/CK48-eNbbow)]. Davey and Murrin never responded.

to all of his iCloud accounts [Doc. 192]. Murrin provided Denny with access to one iCloud account – an account associated with the Apple ID pmurrin51@gmail.com ("the Gmail email address" and "the Gmail iCloud account"). On May 10, 2019, Murrin was deposed. During his deposition, Murrin was specifically asked, "Have you ever set up any iCloud accounts using the Roadrunner account?" Murrin responded unambiguously, "No." [Doc. 603-1 (Murrin Depo) at 310:7-9].[40]

On August 9, 2019, Denny filed an affidavit wherein he explained that, through his forensic analysis of Murrin's MacBook Pro, he had discovered that Murrin had utilized a Roadrunner iCloud account. [Doc. 490 at pp. 31-32]. Denny also noted that Murrin used the Roadrunner email address as his "recovery" email address for both the Roadrunner iCloud account and the disclosed Gmail iCloud account. [Id.] In response, on September 6, 2019, Murrin filed a sworn declaration by Sharp wherein Sharp asserted that Murrin's Roadrunner email address was "nothing more than an auxiliary method of resetting this one password from the actual account. It is not a secondary 'concealed account.'" [Doc. 528 at ¶ 19].[41]

Centennial was again forced to seek the Court's intervention. On October 21, 2019, Centennial moved the Court to compel Murrin to provide access to the Roadrunner iCloud account. [Doc. 600]. On November 11, 2019, Murrin responded in opposition, continuing to

[40] Significantly, Murrin **never** mentioned that he had used the Roadrunner email address as his Apple ID, and Murrin **never** mentioned that he had changed his Apple ID from the Roadrunner email address to the Gmail email address. If that explanation was truthful, a lot of Centennial's time and resources could have been saved. Murrin would simply have had to explain that he had changed the email associated with his Apple ID. Without qualification, Murrin denied that he had ever used the Roadrunner email address to set up an iCloud account.

[41] Sharp's September 6. 2019 Declaration provided Murrin with the perfect opportunity to explain that he had simply changed the email address associated with his Apple ID. Surely Sharp would have been told that Murrin had originally set up his iCloud account using the Roadrunner email address; and surely Sharp, recognizing how such a simple act could create the appearance of a concealed iCloud account, would have taken the opportunity to promptly explain. Yet, **no such explanation was put forth**.

deny that he **ever** had a RoadRunner iCloud account. [Doc. 612]. Section II of Murrin's response was captioned:

> **MURRIN IS NOT AWARE OF ANY ICLOUD ACCOUNT ASSOCIATED WITH THE TAMPA BAY RR EMAIL ADDRESS**

[Doc. 612 at 8]. Murrin argued that Centennial's motion was "based on speculation and conjecture." [Id.]. Without qualification, Murrin represented that he was "not aware of any such account, and he and his counsel have expressed that fact to Centennial and the Court on multiple occasions." [Id. (emphasis added)]. [42]

On March 4, 2020, the Court ordered Murrin to provide access to the Roadrunner iCloud account within ten days. [Doc. 667 at p. 20]. Despite his litany of prior denials, on March 13, 2020, Murrin informed Centennial for the first time that he actually had set up his iCloud account using his Roadrunner email address, and he had simply changed the email address associated with the account to his Gmail email - in other words, the Gmail iCloud account he disclosed was the same as the RoadRunner account that Centennial had believed he had concealed. Notably, Murrin's attorney George Guerra ("Guerra") explained Murrin's revelation to Centennial during a call scheduled so that Guerra could explain why Murrin would not be providing Centennial with access to his Roadrunner iCloud account. [See Ex. Q (Counsel e-mail exchange (Mar. 4-16, 2020)]. That telephone conversation was memorialized in emails dated March 13, 2020 and March 16, 2020. [Ex. Q]. Significantly, in the March 16, 2020 email, Guerra asserted that Murrin had offered to call Apple and allow Denny "to sit in

[42] Murrin's opposition provided him with yet **another** opportunity to explain that he had simply changed his Apple ID from his Roadrunner e-mail address to his Gmail e-mail address. It is **inconceivable** that a reasonable person, intent on being truthful, would have failed to mention that fact in response to a motion to compel.

so that if he has a better way to articulate the request or to make an alternative request he believes will resolve this or any other pending issue, Mr. Denny can help correct it on the spot." [Ex. Q (emphasis added)]. Guerra continued, "This would be the most expeditious way to make sure the plaintiff and Mr. Denny obtain the information sought but if you have a better idea, I am open to it." [Ex. Q (emphasis added)].

Following numerous emails, on April 8, 2020, Denny and counsel for both Centennial and Murrin had a call to discuss how to confirm Murrin's explanation. Denny explained that, around 2018, Apple introduced its "Apple Privacy Download" as a method for customers to download their data directly from Apple (the "Apple Download"). Denny explained that Murrin could simply and efficiently confirm the change of his Apple ID by downloading three spreadsheets: Apple ID Account Information, Apple ID Device Information, and Apple ID Sign-On Information. In a series of emails following that call, Centennial repeatedly requested Murrin's Apple Download; Murrin refused to provide a straight-forward response until April 11, 2020, when counsel indicated that Murrin was not inclined to acquiesce but agreed to "explore this issue with Apple and with Mr. Sharp to determine whether it will be valuable." [Ex. L].[43]

When Murrin filed his **April 24, 2020** sworn declaration, he revealed that he had obtained his Apple Download long before the **April 8-11, 2020** discussions with Centennial. [Doc. 694]. Murrin's declaration incorporated an email exchange with Apple that began on

[43] Guerra wrote, "[T]hese are not Mr. Murrin's records and were not even previously available to the public (before 2018 I believe). That presents a series of concerns which I don't think need to be addressed here. Nonetheless, I will explore this issue with Apple and with Mr. Sharp to determine whether it will be valuable." [Ex. L]. It is difficult to understand why Murrin would offer to have Denny sit in on a phone call with Apple) but refuse to provide his Apple Download – both methods would involve the same records and it would seem preferable to rely on documentary evidence rather than the collective memory of participants in a phone call.

March 11, 2020 when Murrin requested that Apple "confirm in writing" information that he purportedly had verbally received the day before. [Doc. 694-3 at p. 4]. In a **March 13, 2020** exchange, Apple directed Murrin to the Apple Download service and Murrin responded, "I **previously obtained a copy of my data from Apple** but it did not include confirmation of what I was told verbally when I called Apple." [Doc. 694-3 at 3 (emphasis added)]. Apple replied on March 19, 2020 by specifically directing Murrin to the **same three spreadsheets** that Denny would later propose on April 8, 2020. Id.

Despite having obtained his Apple Download (and thus the three spreadsheets identified by both Apple and Denny), when Murrin filed his April 24, 2020 sworn declaration to the Court purporting to explain the change of his Apple ID, he inexplicably failed to include a critical spreadsheet; namely, his Apple ID Account Information spreadsheet. [Doc. 694-2]. Instead, as Exhibit B to his sworn declaration, Murrin provided the Court with what appears to be a compilation of two other Apple Download spreadsheets - an AppleCare Device Details spreadsheet and a Customer Device History – Push Authorization spreadsheet. [Id.]. Moreover, Murrin unilaterally decided to redact his Apple ID Number from the spreadsheets.[44] [Id.]. Neither of those spreadsheets confirm changes to a user's Apple ID; rather, that is provided in the Apple ID Account Information spreadsheet. Despite having full knowledge that the filed spreadsheets provided no information confirming his most recent explanation, Murrin nevertheless declared under oath that the change of his Apple ID was "reflected in the privacy download. The redacted relevant portion is attached hereto as Exhibit B." [Id. at ¶ 7].

[44] An Apple ID number is a unique identifying number that Apple assigns to an iCloud account. That number remains constant even when the Apple ID is changed. Murrin unilaterally chose to redact the Apple ID number and claimed it was "confidential information not relevant to this matter." Doc 694 at p. 2.

To ensure that Centennial's understanding was accurate (that Murrin's purported change of his Apple ID would be reflected in his Apple ID Account Information spreadsheet), counsel for Centennial, Rachel May Zysk, agreed to request her Apple Download. Ms. Zysk created her Apple ID in 2010 when she worked at the law firm of Carlton Fields. In 2016, after leaving her employment with Carlton Fields, Ms. Zysk changed her Apple ID from her Carlton Fields email address to her Suarez Law Firm email address – just as Murrin claims he did with his RoadRunner and Gmail email addresses. As demonstrated in the attached Exhibit "R", Ms. Zysk's change of her Apple ID is clearly reflected in her Apple ID Account Information spreadsheet. [Ex. R (Zysk Apple ID Account Information Spreadsheet)].

On May 4, 2020, in a good faith effort to resolve what plausibly could have been an innocent mistake, Centennial emailed counsel for Murrin and pointed out that neither of the spreadsheets in Murrin's Exhibit B contained the relevant information, and requested that Murrin provide the Apple ID Account Information spreadsheet with the Apple ID numbers unredacted.[45] [Ex. S (Counsel email exchange (Mar. 4-May 5, 2020))]. Murrin's counsel responded, "[W]e do not intend to produce the referenced spreadsheet. Our position is that Mr. Murrin has not only fully complied with Judge Tuite's order but gone beyond what was required by the order as described in his declaration and the associated exhibits." [Ex. S]. Thus, despite Apple's suggestion and Centennial's request, Murrin explicitly refused to produce the one spreadsheet that would confirm his new explanation.

The only logical conclusion for Murrin's conduct is that he perjured himself again,

[45] As reflected in her Apple ID Account Information Spreadsheet, Ms. Zysk's Apple ID **Number** did not change when she changed her Apple ID and the email associated with her Apple ID. [Ex. R]. Because Murrin unilaterally redacted his spreadsheets, it is unknown what the Apple ID Number would reflect.

defied yet another order, and continued to execute the Defendants' concerted scheme to prevent Centennial from obtaining discovery they were ordered to produce in 2016. Even now, despite numerous warnings, Defendants continue to perpetrate a fraud upon this Court.[46]

E. No Lesser Sanction Than a Default Judgment is Sufficient

Terminating sanctions are appropriate "where the party's conduct amounts to 'flagrant disregard and willful disobedience' of the court's discovery orders." Hashemi v. Campaigner Publications, Inc., 737 F.2d 1538, 1539 (11th Cir. 1984) (citing Phillips Insurance Company of North America, 633 F.2d 1165, 1167 (5th Cir.1981) (affirming dismissal where litigant's "recalcitrance...was not based on factors beyond his control")). "[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of a deterrent." Nat'l Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (affirming dismissal based on litigants' "flagrant bad faith" and counsel's "callous disregard" of their obligations). "Circumstances in which a terminating sanction may be warranted include egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence." R.F.M.A.S., Inc. v. So, 271 F.R.D. 13, 25 (S.D.N.Y. 2010), opinion adopted, 271 F.R.D. 55 (S.D.N.Y. 2010) (internal quotation omitted). "[I]t is not a party's negligence - regardless of how careless, inconsiderate, or understandably exasperating - that makes conduct contumacious; instead, it is the **stubborn**

[46] The actual truth is clear and supported by Denny's forensic examination of Murrin's MacBook Pro. Just as Denny opined in August 2019 [Doc. 490 at pp. 31-32], Murrin used the concealed RoadRunner iCloud account to back up his data. Murrin's RoadRunner iCloud account is no longer accessible because Murrin deleted it.

resistance to authority which justifies a dismissal with prejudice." McNeal v. Papasan, 842 F.2d 787, 792 (5th Cir. 1988) (emphasis added) (internal quotation omitted).[47]

III. Under Rule 37(b) Defendants Must Pay for Their Disobedience

Rule 37(b)(2)(A) provides that if a party does not obey an order to provide or permit discovery, a court "may issue further just orders," including: "dismissing the action or proceeding in whole or in part; rendering a default judgment against the disobedient party; or treating as contempt of court the failure to obey any order[.]" Further, "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). It is now clear that the Defendants have willfully disobeyed every discovery order entered by this Court, and they must pay for their defiance.[48]

IV. The Court Should Invoke its Inherent Authority and Sanction the Defendants for Abusing the Judicial Process and Perpetrating a Fraud Upon the Court

Alternatively, and independently of Rule 37, the Court should issue sanctions against the Defendants pursuant to its inherent authority "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R. Co., 370 U.S. 626, 630–

[47] See also Swisher Hygiene Franchise Corp. v. Clawson, 2018 WL 8642738 at *14 (D. Ariz. Oct. 15, 2018) ("While less drastic sanctions are always available (and would be available in nearly all conceivable cases) the Court finds that Defendants' and counsels' on-going deceptive and misleading conduct warrants the Court striking Defendants' Answer (Doc. 22) and entering a default judgment in Plaintiffs' favor. While this Court takes its obligation to exercise restraint and discretion before imposing such severe sanctions, Defendants' and counsels' ongoing deceptive and misleading conduct warrant this result.")

[48] See,e.g., Betzer, 2019 WL 5700288at *24 ("The failure to timely disclose the documents led to considerable additional expense, including motion practice and reopened depositions ... The Court has no trouble concluding that [plaintiff] is entitled to reasonable attorney's fees and costs associated with Defendants' failure to timely produce the documents.);

631 (1962).[49] The rules and statutes governing sanctions "are not substitutes for the [Court's] inherent power." Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991) (courts' inherent authority "is both broader and narrower than other means of imposing sanctions" depending on the circumstances). Whereas a sanction issued under the Rules "reaches only certain individuals or conduct" (e.g. a litigant disobeying a specific discovery order), the Court's "inherent power extends to a full range of litigation abuses." Id. The Court may invoke its inherent authority to punish and deter conduct that threatens the sanctity and integrity of the judicial system. Id. at 47. When, like here, litigants' bad faith conduct permeates the proceedings or it comes to light that a litigant or attorney has attempted to perpetrate a fraud on the court, a court should rely on its inherent authority in issuing sanctions. Id. at 45-46.[50]

A. Defendants' Conduct Calls for a Default Judgment

A default judgment under the Court's inherent authority is appropriate where, like here, as a result of repeated discovery abuses and false statements to the Court, lesser sanctions "would neither ensure this Plaintiff's basic right to a fair trial nor provide a truly meaningful deterrent to future acts of willful disregard for our rules of discovery." Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 110 (S.D. Fla. 1987). Such is the case when "[n]either [Plaintiff] nor the Court nor the public can trust the veracity of further discovery collected from [Defendant]." CrossFit, 2019 WL 6527951 at *19. A history of disobedience demonstrates that "[l]esser sanctions would not establish deterrence some litigants need regarding this

[49] See also Anderson v. Dunn, 19 U.S. 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.")

[50] See also Purchasing Power, LLC v. Bluestem Brands, Inc., 851 F.3d 1218, 1223 (11th Cir. 2017) ("The key to unlocking a court's inherent power is a finding of bad faith.").

behavior, especially as it relates to ESI." Philips Elecs., 773 F. Supp. 2d at 1213.;S. New England Tel. Co., 251 F.R.D. at 96 ("In light of the defendants' history of violations … the court finds that lesser sanctions would not deter the defendants from further delaying discovery in this case. Indeed, the court has little confidence that the discovery sought continues to exist."). "[C]ourts have recognized that if parties are willing to take the risk and balance destroying evidence against turning over the proverbial smoking gun, knowing that the destruction will not result in the ultimate judgment, destruction of important evidence will occur." Id. Most importantly, "[i]f parties could ignore court orders without suffering the consequences, then the district court cannot administer orderly justice, and the result would be chaos." Id.

B. A Blanket Award of Attorney's Fees is Appropriate

The United States Supreme Court has explained that there are circumstances when "requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves." Chambers, 501 U.S. at 50-51 (emphasis added). Where, like here, parties' conduct throughout the course of litigation is "part of a sordid scheme to defeat a valid claim," the "but-for standard" is appropriate. Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1187–88 (2017). That standard "permits a trial court to shift all of a party's fees, from either the start or some midpoint of a suit, in one fell swoop." Id. "[I]f a court finds that a lawsuit, absent litigation misconduct, would have settled at a specific time -- for example, when a party was legally required to disclose evidence fatal to its position --

then the court may grant all fees incurred from that moment on." Id. (emphasis added); see also Chambers, 501 U.S. at 40, 54 (affirming district court award of sanctions "in the form of attorney's fees and expenses totaling $996,644.65, which represented the entire amount of NASCO's litigation costs paid to its attorneys" for fraud perpetrated on court and bad faith throughout course of litigation); Sciarretta v. Lincoln Natl. Life Ins. Co., 778 F.3d 1205, 1212 (11th Cir. 2015) (affirming sanction of $850,000 in attorney fees for bad faith conduct); CrossFit, 2019 WL 6527951 at *24 (awarding blanket costs and fees in the amount of $3,997,868.66 for bad faith conduct).

CONCLUSION

Defendants' egregious, contumacious abuse of the judicial process and utter disregard and defiance of the Court's authority is beyond the pale. Nothing short of a default judgment and an award of attorney fees will adequately punish the litigants and attorneys deeply entrenched in this misconduct, nor deter others from doing the same, nor provide adequate redress to Centennial. As aptly stated by a district court faced with like circumstances:

> Defendants knew they had data relevant to this lawsuit, and spent years resisting its discovery. Resistance failing, they systematically destroyed places that data was stored. Defendants took extraordinary steps to disguise that destruction, including lying under oath and permanently erasing data. This is more than ordinary wrongdoing. It is unacceptable. It is an assault on this Court's ability to find truth, to do justice. **The sanctions imposed here have been earned.**

TLS, 2018 WL 3673090 at *8 (emphasis added) (entering a default judgment).

CERTIFICATE OF GOOD FAITH CONFERENCE

Counsel for Centennial has conferred with counsel for the Defendants in compliance with Middle District of Florida Local Rule 3.01(g), who oppose the relief requested.

REQUEST FOR ORAL ARGUMENT UNDER LOCAL RULE 3.01(j)

Due to the complexity of the matters presented, oral argument would likely be helpful to the Court. Centennial estimates a need for three to four hours.

WHEREFORE, Centennial moves this Honorable Court for the (1) entry of a default judgment against the Defendants and (2) payment of Centennial's attorneys' fees and costs incurred as a result of their sanctionable conduct.

Dated this 29th day of May, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on May 29th, 2020, I filed the foregoing with the Clerk of this Court using the CM/ECF system, which will provide electronic notice to all counsel of record.

/s/ Rachel May Zysk
Attorney