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

TIMOTHY W. DEEGAN

Plaintiff,

v.

Case No.: 3:14-CV-1419-J-39PBD

NEXSTAR BROADCASTING, INC.,

Defendant.
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DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS

Pursuant to *M.D. Fla. L. R.* 3.01(b) and this Court's Order [D.E. 68], defendant NEXSTAR BROADCASTING, INC. d/b/a INERGIZE DIGITAL hereby submits its memorandum of law in opposition to the motion for sanctions by plaintiff TIMOTHY W. DEEGAN. [D.E. 66]

1. Plaintiff has filed a motion for sanctions claiming spoliation of evidence that Plaintiff contends was crucial to prove his case, destroyed in bad faith by Defendant, and subsequently deceptively covered up in a Watergate-type conspiracy. A close examination of the undisputed facts and testimony, however, definitively refutes these accusations.

2. Doug Ware testified that the publication at issue was a mistake, and that he obtained Plaintiff's November 2013 DUI mug shot from a Google Images search. After learning of the mistake, Nexstar General Manager Jason Gould also ran a Google Images search, which yielded only the Plaintiff's mug shot.

3. Tangible evidence of Ware's Google Images search, if it ever existed, likely already was unrecoverable prior to the earliest point that a duty to preserve arose, and

certainly by the time Ware's hard drive was re-purposed in the normal course of business. Neither Ware nor Gould had a duty to discontinue use of their computers immediately after conducting their searches, which arguably is the only way that the identical image search results potentially could have been retrieved.

4. Moreover, tangible evidence of Ware's and/or Gould's search results is not crucial to proving plaintiff's *prime facie* case because neither is relevant to whether Ware acted with actual malice (*i.e*., what Ware *saw* at the time he made the error).

5. For these same reasons, the subsequent re-purposing of Ware's computer by a Utah television station employee who had no knowledge of any potential relevance (or even the lawsuit itself) fails to establish bad faith. And Defendant did not deceptively conceal any information. Rather, Defendant timely responded to all of Plaintiff's discovery requests pursuant to applicable rules; has produced large volumes of electronic evidence that was preserved; and has undertaken extensive and costly investigations about what information is recoverable from both hard drives.

Undisputed Relevant Events on June 16, 2014

6. On June 16, 2014 at 12:59 p.m. Central Daylight Time (CDT), Ware posted Plaintiff's DUI mugshot with an Associated Press story concerning the arrest of a Gainesville accountant with the same name. The news article, which was an update from an earlier version at 12:41 p.m. with no photograph, was published to websites subscribing to Inergize's national news feed service -- including ActionNewsJax.com.[1]

[1] *See* DEF 000022, a copy of which is attached as **Exhibit A**. Defendant additionally has separately filed excerpts of depositions transcripts in support of this opposition. *See* Douglas Ware Dep. 203-205 (April 10, 2015)("Ware Dep.") and Exh. 35 (DEF 22); Michael Tholkes Dep. 28 (April 9, 2015)("Tholkes Dep."); Jason Gould Dep. 28-29 (April 9, 2015)("Gould Dep.").

7. Ware was physically located at Nexstar's television station in Salt Lake City, Utah (KTVX).[2] Just prior to the publication at issue, he ran a Google Images search (the exact terms of which he does not recall), and located a mug shot of Timothy Deegan from Florida. Ware testified that he clicked through to confirm that Deegan had been arrested, and then uploaded the mug shot. At the time, Ware did not see any other mug shots on the Google Image search results, and was "certain" he had the right photograph.[3]

8. At 1:49 p.m., Inergize client services representative Kristine Morical received both an email and a phone call from Gary Detman (Action News' digital content manager), advising of the mistaken publication. Two minutes later, Morical notified her boss, Kelly Clarke. At 1:54 p.m., Clarke removed the mug shot from the news article.[4]

9. At 2:46 p.m. -- after being asked by Detman -- Morical sent Ware an email asking for him to explain how the wrong image was posted. In that same email, Morical attached the "correct" Timothy Deegan mug shot.[5]

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[2] Ware was Inergize's director of digital content, and was responsible for publishing news articles to multiple clients around the nation. He was not aware of the specific markets in which the articles were published, including whether articles were published in Florida. *See* Ware Dep.15, 28, 34-35; Gould Dep. 28, 29.

[3] *See* Ware Dep. 87-95, 97-99, 101-102, 104-111. At Ware's deposition, Plaintiff's counsel showed him a number of unauthenticated Google Images searches that Plaintiff's counsel (or someone in his office) purportedly had performed and printed. *Id.* Ware did not save or print his original search results. *Id.* at 47-48, 91-92; [D.E. 69-23 at 4].

[4] *See also* DEF-000007, and DEF-000014-000020, copies of which are attached as **Composite Exhibit B**. *See also* Kristine Morical Dep. 15-16, 19-22 (April 9, 2015)("Morical Dep.") and Exh. 3; Kelly Clarke Dep. 63-64 (April 9, 2015)("Clarke Dep.") and Exh. 2; Gary Detman Dep. 84-87, 92-93 (May 26, 2015)("Detman Dep."). These are Defendant's internal and undisputed record of the correspondence and chronology of events from June 16 and 17, 2014, portions of which were attached to Morical's and Clarke's depositions as exhibits. Plaintiff filed portions of these same documents as part of Exhs. D and I, but highlighted particular passages, which were not highlighted in the originals. [D.E. 69-9 at 6-12, D.E. 69-4]

[5] *See* DEF 17-18 (Exh. B); Morical Dep. 40-42.

10. Ware responded to Morical's email at 3:06 p.m., stating in part that: "Yes, there were mug shots of a Tim Deegan. I clicked on the wrong one." It is undisputed that two mug shots of a Florida man named Timothy Deegan were accessible on the internet at the time of publication. Prior to the publication, however, Ware only saw one mug shot on his Google Images search results. After notification, he realized he made a mistake, and that in fact there were two mug shots in existence.[6]

11. As the afternoon of June 16th progressed, Inergize worked with attorneys at Cox Media (parent company of Action News) to craft and post a correction, as well as to modify and unpublish the original news article.[7]

Post-Publication Events

12. On June 17, 2014, one day after the incident, Nexstar General Counsel Elizabeth Ryder received an evidence preservation demand from a Cox attorney. Ryder emailed the letter to Jason Gould, who in turn instructed Doug Ware and others to "make sure we have a record of the events from yesterday preserved."[8]

13. Ware testified that he must have received Gould's email, but does not recall opening it or reading the attached letter. Ware continued to use his computer until he was fired for the mistaken publication on July 1, 2014, and did not delete any data.[9]

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[6] *See* DEF 18 (Exh.B); Morical Dep. 44; Ware Dep. 166-177; 207-210.

[7] *See* D.E. 69-9 at 2-4; DEF 7 (Exh. B); Ware Dep. 149, 150; Gould Dep. 121-123.

[8] *See* D.E. 69-11 at 2-3; DEF 230-31 (attached as **Composite Exhibit C**). Plaintiff filed a portion of Comp. Exh. B at D.E. 69-13 at 2, but again included highlighting not contained in the originals.

[9] *See* Douglas Ware Dep. 7-18 (Aug. 24, 2015)("Ware 2nd Dep."). This testimony corrected Ware's prior testimony of April 9, 2015, where he stated that he was not aware of having received any notification to preserve evidence. Deegan relies upon the prior testimony, [D.E. 66 at ¶ 8], without mentioning the correction.

14. After Ware's termination, his computer was re-formatted on July 16, 2014 by KTVX IT Administrator John Caprai, who was not aware of any preservation responsibilities.[10] In fact, no one at KTVX had any knowledge whatsoever of any preservation requests or even the specific facts of Ware's mistake.[11]

15. On July 9, 2014, plaintiff's counsel mailed a pre-suit letter to Inergize's Minnesota offices. On July 17, 2014, in response, Ryder sent a preservation email to Gould, who then worked with his team to ensure all evidence was gathered and saved.[12]

16. In late August 2014, after settlement negotiations reached an impasse, Gould contacted KTVX and requested that Ware's computer be located for inspection. At that time, Gould was advised for the first time that Ware's computer had been repurposed.[13]

Investigation and Undisputed Expert Testimony

17. Deegan asserts that Nexstar "actively concealed" the information concerning Ware's and Gould's hard drive by carrying out a "cover-up" akin to the "Watergate" tapes. [D.E. 66 at 1, 3, 16] The actual facts, however, reveal otherwise.

18. When asked, Defendant timely responded to production requests and interrogatories concerning Ware's and Gould's hard drives. As to earlier production

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[10] *See* John Caprai Dep. 4, 6, 37-39, 43-49, 51-53 (July 17, 2015)("Caprai Dep."). Deegan asserts that Nexstar tried to deflect culpability for the alleged spoliation by claiming that Caprai is not a *Nexstar* employee. [D.E. 66 at 14] Again, Deegan misstates the facts. Nexstar stated that Caprai is not an *Inergize* employee and therefore had no idea of the litigation. Nexstar never denied his employment with a TV station owned by Nexstar. [D.E. 69-23 at 4]

[11] *See* Richard Doutr[e] Jones Dep. 17-18, 24-29, 32-35, 39-41, 43-49 (Aug. 14, 2015)("Doutre Jones Dep."); Dean Davidson Dep.8-22, 25-27 (Aug. 24, 2015)("Davidson Dep.").

[12] *See* D.E. 61-2 at 2-3; D.E. 61-1 at 2; Emails Bates-numbered DEF-000256-260, copies of which are attached at **Composite Exhibit D**.

[13] *See* D.E. 61-2 at 3; Jason Gould Dep. 15, 16 (Aug. 25, 2015)("Gould 2nd Dep.").

requests, both parties limited the scope of their responses to exclude privileged materials, and agreed on a schedule to provide privilege logs of withheld documents.[14]

19. Defendant had Ware's computer forensically imaged and initially investigated in October 2014. After receiving production requests in April 2015 for Ware's Google Images searches and inspection of his hard drive, Defendant's forensic examiner performed additional searches in May 2015 -- which yielded in excess of 43,000 images.[15] These examinations of Ware's computer revealed that the results of Ware's Google Images search are unrecoverable.[16]

20. As Dr. Terri Giddens explained in her rebuttal report, unless Ware stopped using his computer *immediately* after his search, a record of the precise results would not have been recoverable from his computer.[17]

21. Plaintiff's expert, Dr. Michael Antal, testified similarly. He stated that Ware's computer would have needed to be forensically imaged or taken out of use ("just the plug

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[14] *See generally* D.E. 59 and supporting evidence, [D.E. 59-1 through 59-13; D.E. 60 and D.E. 60-1 through 60-3; D.E. 61 and 61-1, 61-2]; and D.E. 63 and supporting evidence, [D.E. 64 and 64-1 through 5].

[15] *See* Michael Gutierrez Dep. 4, 7-13 (July 17, 2015)("Gutierrez Dep.") and Exhibits 2 and 3. *See also* D.E. 69-23 at 5. More specifically, Exhibit 2 is composite exhibit of Orange IT's invoices, which describe activities in October 2014, well as additional investigation of Ware's hard drive in May 2015, among other events.

[16] *See* D.E. 69-23; [D.E. 64-3]; Orange Legal Technologies Forensic Analysis Report, dated August 21, 2015 (which has been separately filed). In addition, Jason Gould testified in his April 9, 2015 deposition that, on June 16, 2014 (*after* learning of the mistaken publication), he conducted a Google Images search for a photo of Tim Deegan. [D.E. 64-4]. That search resulted in only one mug shot -- that of plaintiff Timothy W. Deegan. *Id.* Gould did not print or save his search results. [D.E. 51-1] Gould's computer was set to "not save" internet search history, as had been his practice for 20 years. [D.E. 64-5] Gould continued to use his computer after the date in question but set it aside in February 2015 when it became too full to operate effectively. [D.E. 57-2] Gould's computer contains no web history of the search he conducted on June 16, 2014. *See* Orange Legal Technologies Forensic Analysis Report, dated October 12, 2015 (which has been separately filed).

[17] See Rebuttal Report of Terri D. Giddens, Ph.D., dated October 4, 2015 (which has been separately filed).

pulled") within 24 hours of his initial search even to *potentially* be able to recover his precise search results.[18]

I

Legal Standards for Imposing Sanctions for Spoliation of Evidence

Deegan has not met -- cannot meet -- his burden of demonstrating entitlement to sanctions for the alleged spoliation of evidence. Spoliation is defined as "the *intentional* destruction, mutilation, alteration or concealment of evidence." *E.g.*, *Advantor Sys. Corp. v. DRS Technical. Servs., Inc.*, No. 6:14-533, 2015 WL 403308, *6 (M.D. Fla. Jan. 28, 2015) (emphasis added). Spoliation is considered to be a matter of procedure. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005). In a diversity case such as this, federal law applies. *Id.* at 944.

The Eleventh Circuit has not established specific guidelines for imposition of sanctions for spoliation; courts therefore look to the forum state's law for guidance. *Id.* In Florida, spoliation is established when the party seeking sanctions proves that:

> (1) the evidence existed at one time, (2) the alleged spoliator had a duty to preserve the evidence, and (3) the evidence was crucial to the movant's prima facie case or defense.

Se. Mech. Servs., Inc. v. Brody, No. 8:08-CV-115, 2009 WL 2242395, *2 (M.D. Fla. Jul. 24, 2009).[19] Critically, a finding of bad faith is required before sanctions for spoliation can be imposed. *Id.* And as the court made clear in *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir.

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[18] *See* Michael Antal, Ph.D. Dep. 122-127 (Sept. 17, 2015)("Antal Dep."); *see also* Antal. Dep. 18-20.

[19] This decision is different from the similarly-named case relied upon by Deegan [D.E. 66 at 17], *Se. Mechanical Servs., Inc. v. Brody*, 657 F. Supp. 2d 1293 (M.D. Fla. 2009). In this case, the defendant's motion for sanctions from spoliation was *denied*. In Deegan's case, plaintiff's motion was granted.

1997), "[m]ere negligence in losing or destroying [evidence] is not enough for an adverse inference, as it does not sustain an inference of consciousness of a weak case." (internal quotations omitted). Even gross negligence does not suffice. *E.g.*, *Preferred Care Partners Holding Corp. v. Humana, Inc.*, No. 08-20424-CIV, 2009 WL 982460 (S.D. Fla. Apr. 9, 2009) (gross negligence did not constitute bad faith regarding deletion of computer files).

A. Evidence Existed Only Briefly Before Preservation Duty Arose

Deegan contends the Ware and Gould hard drives contained evidence of their Google Images searches on June 16, 2014. While that statement may have been true for a brief moment in time, it is misleading.[20]

As Dr. Giddens explains in her rebuttal report, unless Ware stopped using his computer *immediately* after his search, his exact results would not have been recoverable. Significantly, Plaintiff's expert agreed on this point. Accordingly, Ware's continued use of his computer *after* the preservation demand received in the afternoon on June 17 -- more than 24 hours later -- made it impossible to retrieve evidence of his search. Similarly, the re-formatting of Ware's computer in July 2014 had no effect on the retrieval of his search.[21]

[20] Plaintiff also cannot establish with certainty what may have been contained on either hard even if they had been immediately preserved. *See Keen v. Bovie Med. Corp.*, No. 8:12-cv-305-T-24-EAJ, 2013 WL 3832382 (M.D. Fla. July 23, 2013) (no spoliation where contents of computer hard drive were unknown prior to wipe); *In re: Brican Am. LLC Equip. Lease Litig.*, No. 10-md-02183, 2013 WL 5519980,*5-6 (S.D. Fla. Oct. 1, 2013) (no spoliation where contents of allegedly destroyed evidence were disputed).

[21] Gould, likewise, did not save his Google Images search due to long-term computer internet settings. Nor did he stop using his computer immediately after running the search. Gould's search results, therefore, were not available and did not exist when the initial preservation letter was received on June 17, 2014.

B. The Evidence Is Not Crucial to Prove Deegan's Prima Facie Case

Deegan claims that proof of Ware's and Gould's Google Images search is crucial to his case because without that evidence his ability to contradict their testimony about the results of their searches is impaired. [D.E. 66 at 15] These arguments misstate and misinterpret applicable law concerning proof of fault in a libel claim against the media.

Specifically, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that public officials could only recover for defamation by proving that the journalist published a (1) false and (2) defamatory statement about them with (3) "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80; *see also Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 156 (1967) (extending the actual malice rule to public figures). If Deegan is deemed to be a public figure, he will be required to prove the actual malice standard of fault.[22]

Here, there is no evidence whatsoever to establish or even suggest that Doug Ware published Plaintiff's mug shot knowing it depicted the wrong person. Plaintiff accordingly is seeking to establish the second prong of the actual malice test, *i.e.*, that Doug Ware acted with reckless disregard of whether the publication was false.

Reckless disregard does not mean negligence, or even gross negligence. Only those false statements made with a *high degree of awareness of their probable falsity* are sufficient.

[22] By contrast, if he is a private figure, Deegan will be required only to show that Ware acted negligently in publishing the wrong mug shot. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (the states may determine standard of fault for private individuals); *Rubin v. U.S. News & World Report, Inc.*, 271 F.3d 1305, 1307 n. 8 (11th Cir. 2001) (negligence standard applies to private figures in Florida). In this regard, because there is no dispute that Ware incorrectly used Deegan's mug shot when the mug shot of the actual perpetrator was available, it is utterly unclear how Ware's Google Image search results would add anything to a negligence argument. In any event, Deegan will need to establish actual malice to recover presumed or punitive damages. *Gertz*, 418 U.S. at 349.

Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (emphasis added). Accordingly, a plaintiff must establish *subjective* doubt. As the Court explained *St. Amant v. Thompson*, 390 U.S. 727 (1968), the reckless disregard test:

> . . .is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. *There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant, 390 U.S. at 731 (emphasis added); *see also Klayman v. City Pages*, No. 5:13-cv-143-Oc-22PRL, 2015 WL 1546173, slip op. at *12 (M.D. Fla. April 3, 2015).

On this point, Ware has been unwavering in his testimony that he *saw only one image* he recognized as a mug shot.[23] The evidence additionally makes clear that, after Ware received notification from Inergize, he became aware for the first time he had published the wrong mug shot, and that mug shots of the actual perpetrator existed. Whether in fact the correct mug shot was contained on his Google Image search results thus is irrelevant to whether Ware published Deegan's image with the requisite subjective awareness of its probable falsity because he did not see and/or recognize any other mug shot.[24]

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[23] Although Plaintiff vigorously attacks Ware's credibility on this point, Ware's mistake is not so far-fetched. Plaintiff's journalism expert, University of Florida Professor Michael Foley (a former longtime editor of the Pulitzer-Prize winning *St. Petersburg Times*), [D.E. 69-8 at 2], made the exact same type of error. In his initial report, Foley attached his Google Images search pages, purportedly showing what Doug Ware would have seen prior to publication on June 16, 2014. In those attached search results, however, an image of the mistaken publication appeared in all three searches. [D.E. 69-8 at 23, 36, 48] Foley testified that he overlooked those images, which could not possibly have been included on Ware's search -- because they were screen shots of the publication at issue. [D.E. 51-11 at 20-23] Unlike Ware, Foley had ample time to study and prepare his Google Images searches, and still made the error in his report.

[24] *See, e.g.*, *Meisler v. Gannett Co. Inc.*, 12 F.3d 1026 (11th Cir. 1994) (affirming summary judgment where there was no evidence that anyone involved in the publication actually saw the correcteded report); *see also Jenkins v. Liberty Newspapers Ltd. P'ship*, 971 P.2d 1089 (Hawaii 1999) (no actual malice arising from inadvertent misidentification of plaintiff where correct information was available in records reviewed); *Johnson*

As to Gould, the operative term is *relevant evidence*. Gould's post-publication searches have no bearing whatsoever on whether Ware acted with actual malice. It is only the subjective intent of Ware -- the person responsible for publishing the offending material -- that is relevant. When the defendant is a company (as here), the Court requires that actual malice must be established for the specific individuals responsible for the false publication. *New York Times*, 376 U.S. at 287; *see also Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841, 847 (Fla. 4th DCA 2002) (same).[25] The issue in this case therefore is what *Ware* saw and what was in his mind -- not what Gould found or saw on his computer after the fact.[26]

This element -- whether the evidence is crucial to the movant's case -- often hinges on the determination of bad faith, particularly in cases where it is unknown what would be revealed by lost computer data.[27] Courts are unlikely to infer that the missing evidence was

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v. Chicago Tribune Co., 42 Media. L. Rep (BNA) 2489 (Ill. App. Ct. 2014) (no actual malice where misidentification arose from journalists' failure to read end of AP story which would have revealed mistake).

[25] The timing of Gould's search also renders it irrelevant. The court in this regard looks at the publisher's knowledge at the time of publication. *Dockery v. Fla. Democratic Party*, 799 So. 2d 291, 294 (Fla. 2d DCA 2001) Even if Jason Gould's knowledge were relevant -- which it is not -- his subsequent Google search has no bearing on the results Ware obtained prior to the mistaken publication.

[26] In addition, because of way in which Google searches the web for information, similar -- and even identical -- searches performed at different times will yield different results. *See* D.E. 51-3 at 4-13; Antal Dep. 18-20. Neither Doug Ware nor Jason Gould could testify to the exact search terms they used. Jason Gould's search -- conducted hours after Ware's search -- has no probative value in discerning the results of Doug Ware's search.

[27] In *Bashir*, for example, the train engineer and conductor were unwavering that the train had not exceeded 70 miles per hour. The court refused to infer that the missing speed tape would show otherwise because there was no evidence of bad faith in its destruction. 119 F.3d at 931-32. The court in *Se. Mech. Servs, Inc. v. Brody*, relied upon by Deegan, echoes that very point. In deciding whether the deleted BlackBerry and computer data was crucial to the movant's case, the court stated that "it should not be inferred that missing evidence was unfavorable unless the circumstances surrounding the evidence's absence indicate bad faith." 657 F. Supp. 2d at 1300 (*citing Bashir*, 119 F.3d at 931). In *Graff v. Baja Marine Corp.*, 310 Fed. App'x 298 (11th

crucial in the absence of bad faith. That was the very point made in *Kimbrough v. City of Cocoa*, No. 6:05-CV-471, 2006 WL 3500873, *5 (M.D. Fla. Dec. 4, 2006), which refused to conclude that the evidence was crucial by the mere fact that defendant had destroyed it.[28] As more fully discussed below, however, Deegan cannot show any bad faith.

D. No Bad Faith

Nexstar agrees that bad faith is required for impositions of sanctions for spoliation. *See Bashir*, 119 F.3d at 931.[29] But there was no bad faith here. There is no direct proof of bad faith, and Deegan has not shown bad faith by circumstantial evidence. *Vanliner Ins. Co. v. ABF Freight Sys., Inc.*, No. 5:11-cv-122, 2012 WL 750743, *1 (M.D. Fla. Mar. 8, 2012). The four factors that go into the circumstantial analysis are:

> (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

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Cir. 2009), the destroyed evidence was not unknown computer data -- it was part of the very product claimed to be defective.

[28] Deegan misplaces his reliance upon *Simon Prop. Group, Inc. v. Lauria*, No. 6:11–cv–01598, 2012 WL 6859404, *6 (M.D. Fla. Dec. 13, 2012), because the defendant there did not dispute that the evidence on her computer was crucial to plaintiff's case. In addition, proof of bad faith was clear: defendant admitted throwing her computer in the river because she did not want the evidence around. *Id.* at *5-6. To the same effect are *King v. DSE, Inc.*, No. 8:08-CV-2416, 2013 WL 610531, *9 (M.D. Fla. Jan. 17, 2013), and *Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 1281-82 (M.D. Fla. 2009), also relied upon by Deegan. In those cases, the findings that the evidence was crucial were based on the party's bad faith (*King*) or utter failure to take any steps to preserve relevant evidence (*Swofford*). In addition here, Inergize went to great lengths to preserve and turn over volumes of computer data from its servers. *See Arthrex, Inc. v. Parcus Med., LLC*, No. 2:10-cv-151, 2014 WL 2742813, *3 (M.D. Fla. Jun. 10, 2014) (distinguishing *Swofford* on the basis that plaintiff had provided "volumes of discovery materials").

[29] Deegan erroneously argues that bad faith is not required for dismissal under Florida law and cites *Sponco Mfg., Inc. v. Alcover*, 656 So. 2d 629 (Fla. 3d DCA 1995), in support. That case, however, said that appropriate sanctions depend upon "willfulness or bad faith" but that "willful destruction" is not required. *Id.* at 630-31. The court did not eliminate the bad faith requirement. *Id.*

> affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator.

Id. at *2.

Deegan cannot prove any of these factors because: (1) the alleged evidence existed for only a brief period of time and, as discussed above, is irrelevant to Doug Ware's subjective intent; (2) even if it existed, the evidence was lost due to continued use of the computers and therefore cannot be deemed to be an intentional or affirmative act that caused destruction of the web search history; (3) Nexstar agrees that it was aware of the preservation duty at the time the Ware computer was re-formatted, but since the web search history was already unavailable that point is irrelevant; and (4) the re-formatting of Ware's computer -- to the extent it is relevant -- has been fully and credibly explained.

While this may amount to negligence on the part of Nexstar, negligence -- and even gross negligence -- is insufficient to impose sanctions for spoliation. *See Bashir*, 119 F.3d at 931; *see also Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22KRS, 2007 WL 486633, *7 (M.D. Fla. Feb. 9, 2007) (no bad faith where re-imaging and disposition of computer was consistent with defendant's regular practice). And there can be no real contention that continued use of the computers amounted to bad faith. Such a contention, if taken to its logical extreme, would require every company to take its employees' computers out of service every time there is a hint of litigation. Such a requirement could potentially severely disrupt the company's business -- a result that cannot be intended by the duty to preserve relevant evidence.

This case is nothing like *Britton v. Wal-Mart Stores, L.P.*, No. 4:11cv32, 2011 WL 3236189 (N.D. Fla. Jun. 8, 2011), relied upon by Deegan.[30] Here unlike *Britton*, there is no evidence that the web search results received by Ware or Gould would help Deegan. And unlike *Britton*, Nexstar immediately sent Cox's preservation demand letter to the relevant employees. In addition, the video surveillance tapes in *Britton* were available for at least 45 days after the incident and could have been copied had Wal-Mart complied with the preservation demands. Here by contrast, the web search data was not available because it would have to have been saved within a day (which is prior to receipt of the initial preservation demand). And finally, Doug Ware's continued use of his computer is not the same as the general manager's delay in copying the video surveillance tapes in *Britton*.

That aside, John Caprai, the Salt Lake City IT technician who re-formatted Ware's computer was not privy to the preservation communications and therefore had no idea that anything on Ware's computer needed to be saved. Indeed, this case is similar to *Calixto v. Watson Bowman Acme Corp.*, No.07-60077-CIV, 2009 WL 3823390 (S.D. Fla. Nov. 16, 2009), also relied upon by Deegan. There, the court found no bad faith in the IT officer's destruction of emails of the relevant employee when he left the company because the IT officer had no knowledge of the lawsuit and the email destruction was a practice she had

[30] In that case, Wal-Mart was warned immediately after the incident by a Florida Highway Patrol trooper to save relevant store surveillance video tapes because they showed that there was no evidence that plaintiffs had stolen any merchandise. Plaintiff's attorney sent a preservation letter within one week and followed up with a phone call less than a month later. The general manager denied receiving the first letter until the follow up phone call came in. By that time, the video surveillance tapes had been overwritten. The court found the general manager to be unbelievable and self-serving, concluding that he sat on the letter until he could no longer plausibly deny its existence, in hopes that the damaging video tape would be destroyed. Critically, the court found that the spoliation was an "intentional act." *Id.* at *10.

engaged in with all employee emails to preserve space on the company servers. *Id.* at *16-17.[31]

Any negligence in this regard hardly rises to the level of bad faith found in *Swofford*, 671 F. Supp. 2d 1274 (M.D. Fla. 2009), also cited by Deegan.[32] Here, in stark contrast to the conduct in *Swofford*, Nexstar's general counsel sent the Cox preservation letter to Gould, who circulated it to the relevant employees with a message to make sure that the record regarding the events was preserved. Nexstar's failure to communicate the preservation requirement to the IT tech who re-formatted Ware's computer is a far cry from the wholesale dereliction of preservation duties in *Swofford*.

E. No Duty to Disclose Re-Formatting of Ware Hard Drive Until Asked

Deegan argues here Nexstar had an affirmative duty to notify him of the re-formatting of Ware's hard drive. Deegan is wrong. No such duty arose until Deegan asked the pertinent question in discovery. That did not occur until April 2015. Nexstar complied with all discovery obligations.

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[31] To the same effect is *Advantor*, which found no intentional conduct or bad faith where an employee's laptop was re-formatted for a new employee, after defendant received plaintiff's preservation letter, as part of defendant's established routine. 2015 WL 403308 at *3, 7-8. *See also Se. Mech. Servs.*, 2009 WL 2242395 at *3 (finding no bad faith in automatic overwriting of backup tapes); *Socas v. Nw. Mut. Life Ins. Co.*, No. 07-20336, 2010 WL 3894142 (S.D. Fla. Sept. 30, 2010) (no bad faith in plaintiff's failure to suspend her ordinary policy of purging inactive patient files even after she became aware of their relevance to her disability claim). As in each of these cases, no bad faith can be found in Caprai's routine re-formatting of Ware's computer.

[32] In that case, counsel for the sheriff acknowledged receipt of two preservation letters from counsel but "never issued any directives or 'litigation hold memos'" to prevent "destruction of evidence relevant to this case." *Id.* at 1278. And while certain senior officers were sent copies of the preservation letters, the actual deputies involved in the incident were not sent the letters. *Id.* at 1279. Neither the Sheriff or senior officers did anything to ensure that preservation of evidence was carried out. *Id.* at 1281. The court found that this was not a case of inadvertent destruction of evidence, but rather a "case of knowing and willful disregard" for the obligation to preserve evidence. *Id.* at 1282.

In this regard, Deegan misquotes the Fourth Circuit and Maryland District Court decisions in *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001), and *Goodman v. Praxair Servs*, 632 F. Supp. 2d 494 (D. Md. 2009), contending that an affirmative duty exists. The key point in those cases was the fact that the party was not in control of the evidence and the question was whether there was a duty to advise the opposing party of how access can be attained to avoid possible destruction. *Silvestri*, 271 F.3d at 591; *Goodman*, 632 F. Supp. 2d at 514. Nothing about those decisions dictates a duty to affirmatively advise an opponent of loss of potentially relevant evidence *before* any such request is made in discovery.[33]

Deegan's further reliance upon *Fed. R. Civ. P.* 26(f) for such a duty is similarly off-base. As is made clear in the Rule Commentary, the direction to parties to discuss "issues regarding preservation" refers to issues that may arise with regard to compatibility of systems for providing electronically stored evidence.[34] Nothing in Rule 26 or its commentary

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[33] Deegan's reliance upon *In re eBay Seller Antitrust Litig.*, No. C 07-01882, 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007), is equally misplaced because plaintiffs had requested information about defendant's preservation efforts in discovery. *Id.* at *2. Here, Defendant specifically narrowed the scope of Plaintiff's first request for production to exclude privileged communications, and Plaintiff responded in kind. And in *Keir v. Unumprovident Corp.*, No. 02 Civ. 8781, 2003 WL 21997747, *3 (S.D.N.Y. Aug. 22, 2003), there was a *preservation order* that explicitly required defendant to provide an affidavit regarding any electronic documents that were no longer in existence due to routine destruction or otherwise. The decision does not suggest a duty independent of that preservation order as Deegan contends. And, finally, Deegan's reliance upon *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004), is puzzling. While that case recognizes duties of in-house and outside counsel to monitor their client's preservation activities, nothing in that decision suggests an affirmative duty to notify opposing counsel of any loss of potential evidence.

[34] As the comment to the rule explains,

> When a case involves discovery of electronically stored information, the *issues to be addressed during the Rule 26(f) conference depend on the nature and extent of* the contemplated discovery and of *the parties' information systems. It may be important for the parties to discuss those systems,* and accordingly important for counsel to become familiar with those systems before the conference. *With that information, the*

provides for an affirmative duty to disclose inadvertent loss of evidence before the question arises in discovery. Similarly, there was no duty to disclose witnesses who were aware of the computer re-formatting. Rule 26(a)(1)A)(ii) requires disclosure of witnesses relevant to Nexstar's defenses -- not witnesses to the tangential issue of preservation of evidence.

Deegan's attempt to frame this as a grand cover-up is hyperbole of the first order. As discussed above, Nexstar responded as required to Deegan's discovery. There was no concealment.[35] Nexstar has consistently explained the circumstances surrounding the re-format of Ware's hard drive, and Deegan has had ample time and opportunity to depose multiple witnesses on this very point.[36]

Unlike *Advantor*, relied upon by Deegan, there was nothing "suspicious and mystifying" about the termination of Doug Ware and re-format of his computer. [D.E. 66 at 14] What is mystifying is Deegan's reliance upon *Advantor*, given that the court in that case *denied* sanctions for spoliation. 2015 WL 403308 at *1. There, the employee -- who was alleged to have stolen plaintiff's confidential information and turned it over to defendant -- was fired. *Id.* And like this case, the employee's laptop was re-formatted for a new

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> *parties can develop a discovery plan that takes into account the capabilities of their computer systems*.

Fed. R. Civ. P. 26, Comment 2006 Amend. (emphasis added).

[35] *King v. DSE, Inc.*, No. 8:08-DV-2416, 2013 WL 610531 (M.D. Fla. Jan. 17, 2013), does not assist Deegan in this regard. In *King*, the plaintiff failed to disclose the existence of critical video diaries until 12 days before discovery cut off, refused to produce them, and gave conflicting accounts about how they had gone missing. *Id.* at *7-8. Nothing of the kind occurred here.

[36] Deegan also misplaces his reliance upon *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002). That case involved delayed discovery production -- not concealment of the fact of spoliation. In addition, it is important to note that the Second Circuit, which decided that case, has a lesser standard for imposing the sanction of an adverse inference than the Eleventh Circuit. In the Second Circuit, such sanctions may be imposed on the basis of simple negligence. *Id.* at 108.

employee, after defendant received plaintiff's preservation letter, as part of defendant's established routine. *Id.* at *3. As defendant's general counsel explained, the re-formatting was simply a mistake. *Id.* at *7. The court found, therefore, that re-formatting of the computer did "not appear to be the product of any actual intent to destroy specific evidence…" *Id.* at *8. Likewise in this case, Nexstar has explained how the re-formatting of Ware's computer occurred. As in *Advantor*, there is no proof of any actual intent to destroy specific evidence. The fact is that the Google Images search data Deegan is looking for was no longer available on the computer at the time it was re-formatted. This is a red herring if ever there was one.

E. No Sanctions Are Warranted

Deegan argues that he is entitled to "dismissal,"[37] an adverse inference instruction and monetary sanctions. The Eleventh Circuit has made it abundantly clear that bad faith is required for dismissal or an adverse inference jury instruction.[38] Deegan cannot prove any of the elements of spoliation and cannot prove bad faith. Sanctions therefore are not warranted. And as more fully detailed above, Deegan's accusations of concealment have no merit.[39]

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[37] Since dismissal would terminate Deegan's case, Nexstar understands that Deegan intended to request a default or striking of affirmative defenses.

[38] *Flury*, 427 F.3d at 944 (11th Cir. 2005) ("Dismissal represents the most severe sanction available to a federal court, and therefore should only be exercised where there is a showing of bad faith and where lesser sanctions will not suffice."); *Bashir*, 119 F.3d at 931 ("an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith").

[39] For example, when Mike Tholkes testified that he was not aware of any data having been lost he was referring to the data he was tasked with saving -- namely, logs of the management system, logs for the web traffic, the primary data based that stores the data about the content that was published -- not Doug Ware's computer. *See* Tholkes Dep. 26, 27; *see also* Michael Tholkes Dep. 14-16, 19 (Aug. 25, 2015)("Tholkes 2nd Dep.") Similarly, Gould's testimony that no "databases" had been erased is accurate because Nexstar had saved all "server databases" and actually were still investigating in May 2015 whether additional data could be retrieved from Ware's hard drive.

The cases relied upon by Deegan for "dismissal" involved highly egregious conduct and destruction of crucial evidence -- none of which occurred here.[40] Deegan's "adverse inference" cases are equally unavailing.[41] Nor can Deegan demonstrate entitlement to monetary sanctions for this ill-conceived motion. The time Deegan's counsel has spent on alleged spoliation and concealment has not revealed any proof that Nexstar destroyed crucial evidence in bad faith.[42]

Deegan similarly has no basis for exclusion of evidence. Deegan's reliance upon *In re Brican Am. LLC Equip. Lease Litig.*, 977 F. Supp. 2d 1287 (S.D. Fla. 2013), is not helpful because the basis for the motion in that case was witness tampering -- not spoliation. Moreover, *Graff* was decided looking to Georgia law. 310 Fed. App'x at 301. In addition, there was substantial prejudice to defendant in *Graff* because plaintiff's expert destroyed the

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[40] In *Veolia Transp. v. Evanson*, No. CV 10—1392, 20011 WL 5909917 (D. Ariz. Nov. 28, 2011), the defendant was aware of her preservation duty but deliberately deleted email records and web search history; replaced her own hard drive; allowed an IT contractor to destroy a mirror image of the hard drive; and did not notify plaintiff of the imminent destruction of the mirror image. The court found that she acted willfully and likely in bad faith. Id. at *3. And in *King*, as discussed above, the plaintiff failed to disclose the existence of critical video diaries until 12 days before discovery cut off, refused to produce them and gave conflicting accounts about how they had gone missing. 2013 WL 610531 at *7-8. *Veolia* and *King* are nothing like this case.

[41] As discussed above, the facts in *Swofford* can be easily distinguished. And while *Optowave Co. v. Nikitin*, No. 6:05-cv-1083, 2006 WL 3231422 (M. D. Fla. Nov. 7, 2006), has some facial appeal because of the re-formatting of the key employee's hard drive, that case is distinctly different from this case. In *Optowave*, the court found the requisite bad faith because (1) the lost data was email files which were crucial and clearly available when the re-formatting occurred, and (2) defendant Nikitin was well aware that re-formatting the computer would result in the loss of the key employee's emails. *Id.* at *9-10, 12. Here, the Google Images search results were not available at the time of re-formatting, the search results are not crucial to the Plaintiff's case, and the IT engineer who performed the re-format had no knowledge of the potential existence of any evidence.

[42] Deegan additionally misplaces his reliance upon case law to the effect that bad faith is not required for imposition of monetary sanctions. In *Britton*, the court found bad faith. 2011 WL 3236189 at *3. *Brown v. Chertoff*, 563 F. Supp. 2d 1372 (S.D. Ga. 2008), was decided looking to Georgia law and therefore is not persuasive on the standard for spoliation sanctions in the Middle District of Florida. And *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045 (11th Cir. 1994), pre-dates *Bashir* and was not a spoliation case.

very product part plaintiff alleged to be defective when he conducted his testing. *Id.* at 302. Nothing of the sort is present here.

CONCLUSION

For these reasons, Deegan's motion for sanctions for alleged spoliation should be denied in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **15th** day of October, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record and parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

By: */s/ Dana J. McElroy*
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