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County of KOOTENAI)ss

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JEREMY PATTON, *Plaintiff*, vs. **ARIK ACKERMAN AND DOUGLAS GRANT**, *Defendants*.

Case No. **CV 2013 6249**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR SPOILATION INSTRUCTION

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the defendants' Motion for Spoliation Instruction.

The Complaint in this case was filed August 28, 2013. This lawsuit arises out of a motor vehicle accident that occurred on September 6, 2011, at the intersection of North Government Way and East Countryridge Court. Complaint, p. 1, ¶ 2. At the time of the accident the plaintiff Jeremy Patton (Patton) was stopped at the intersection waiting to turn when he was hit from behind by a 2005 Ford pickup owned by the defendant Doug Grant and driven by the defendant Arik Ackerman (Ackerman). *Id.*, pp. 1-2, ¶¶ 2, 3. According the Patton's Complaint, Ackerman was driving the vehicle at a speed between 25 and 30 miles per hour at the time of impact. *Id.*, p. 2, ¶ 4. As a result, Patton claims he has suffered a traumatic brain injury.

On May 9, 2014, this Court, at a scheduling conference, and with the agreement of counsel for both sides, scheduled a jury trial for January 5, 2015. On November 3,

2014, this Court heard oral argument on defendants' Motion to Compel and Motion to Continue Trial. The Motion to Continue Trial was due to Patton's failure to timely respond to discovery, with trial only two months away. This Court granted the defendants' Motion to Compel and granted the Motion to Continue the trial. The Court scheduled the trial for June 8, 2015, and the Court stated at that November 3, 2014, hearing, that due to Patton's failure to timely respond to discovery, there would be no further continuances granted for any reason.

As far as court filings are concerned, nothing further happened in the case until May 11, 2015, when Patton filed Plaintiff's Expert Witness Disclosure. Then, on May 18, 2015, the defendants filed voluminous pleadings, including, "Defendants' Motion for Spoliation Jury Instruction", "Memorandum in Support of Defendants' Motion for a Spoliation Jury Instruction", "Affidavit of Kent Doll in Support of Defendants' Motion for Spoliation Jury Instruction", and "Affidavit of Michael Black". The defendants claim that they ". . . began investigating Plaintiff's Facebook page to determine if the postings matched Plaintiff's claimed injuries/behavior." Memorandum in Support of Defendants' Motion for a Spoliation Jury Instruction, p. 2. Based on that investigation, the defendants contend Patton is "exaggerating his pain complaints for secondary gain" and is "malingering". *Id.,* pp. 1-2. The defendants deposed Patton on July 22, 2014. During that deposition, counsel for the defendants, Kent Doll, showed Patton copies of Facebook postings from Patton's account made on October 1, 2012, claiming to have lost 50 pounds due to swimming. Affidavit of Kent Doll in Support of Defendants' Motion for Spoliation Jury Instruction, p. 2, ¶ 8, Exhibit G, p. 114, L. 5 – p. 116, L. 9. Patton alleged he couldn't remember posting that to his account and blamed other family members for making such posts, even though he admitted losing the weight by swimming as recommended by his physical therapist. *Id.*.

"[A] social media internet investigation of Jeremy Patton" was then conducted by Michael Black of Specialized Investigations in September and October 2014. Affidavit of Michael Black, p. 1, ¶ 3. Attached to Black's affidavit are a plethora of postings that are arguably inconsistent with Patton's claims of his residual functional capacity following the September 6, 2011, accident. *Id.,* ¶ 4, Exhibit A. Black then stated:

> 5. In March of 2015, I was asked to conduct a follow-up investigation of Jeremy Patton. A true and correct copy of the report summarizing my second investigation is attached as Exhibit "B". The same methodology and searches were used for the second investigation. It was during this investigation I determined that a majority of the Facebook posting prior to January 1, 2015 had been deleted.
> 6. I did not conduct an investigation into Mr. Patton's Facebook postings between October 2014 and March 2015. Therefore, anything posted by Mr. Patton in that time frame has been deleted.
> 7. Based on my experience and training as an online investigator, these posting would have been deleted by the account user.

Id., p. 2, ¶¶ 5-7, Exhibit B.

On November 24, 2014, the defendants' counsel took the deposition of Patton's physician Dr. Stanek, and showed Dr. Stanek some of the Facebook postings allegedly made by Patton. Memorandum in Support of Defendants' Motion for a Spoliation Jury Instruction, pp. 3-4. He asked Dr. Stanek if Patton typed these entries, would the posted activities be inconsistent with Patton's brain injury Dr. Stanek had diagnosed. Memorandum in Support of Defendants' Motion for a Spoliation Jury Instruction, pp. 3-4 (citing Affidavit of Kent Doll in Support of Defendants' Motion for Spoliation Jury Instruction, p. 2, ¶ 8, Exhibit G [actually, Exhibit H], p. 75, Ll. 7-15). Dr. Stanek responded, "I think that to a certain extent, yes, it is inconsistent." *Id.*

The defendants discovered Patton's Facebook page had been deleted as of March 2015. However, the defendants waited until May 19, 2015, two weeks before the hearing on their Motion for Spoliation Jury Instruction and three weeks before the jury trial scheduled for June 8, 2015, to bring this to the Court's attention. The defendants

now claim they are entitled to the following jury instruction:

> Plaintiff Patton deleted his Facebook pages shortly after his medical doctor indicated that his postings were inconsistent with his claimed brain injury. Therefore, you must first determine whether there is a reasonable explanation for the deletion of the Facebook pages. If you determine that the deletion of the Facebook pages was deliberately performed, you may infer that the Facebook postings were unfavorable to his position.

Memorandum in Support of Defendants' Motion for a Spoliation Jury Instruction, pp. 5-6. No citation is given for the defendants' proposition. *Id.,* p. 6. However, such an instruction is certainly consistent in form with that given by the trial court and affirmed by the Supreme Court of Idaho in *Courtney v. Big O Tires, Inc.,* 139 Idaho 821, 823, 87 P.3d 930, 932 (2003).

At no time did the defendants ever ask Patton to *produce* his Facebook pages through a discovery request. Instead, the defendants already had copies of what certainly appear to be postings made by Patton on his Facebook page, and the defendants asked Patton about those postings during Patton's deposition on July 22, 2014. On October 9, 2014, the defendants' counsel sent Patton Requests for Admission. Affidavit of Kent Doll in Support of Defendants' Motion for Spoliation Jury Instruction, p. 2, ¶ 10, Exhibit I, and exhibit H, C, D, E, F, G to Exhibit I. The defendants' counsel asked Patton to admit that certain copies attached to the Request to Admit were true and correct copies of posts on his Facebook page, to which Patton responded each of the 23 times, "Deny. Plaintiff cannot recall." From what the defendants have submitted, it is unclear what date Patton gave those denials or whether Patton's discovery response was even verified. From what Patton's counsel submitted after the hearing, those denials were made on November 10, 2014, and were verified by Patton.

While Pattons' repetitive answer certainly seems disingenuous, the defendants did not press the matter further in discovery or by further deposition of Patton. Even with those denials by Patton, the defendants failed to ask Patton to turn over a copy of his Facebook postings or grant them access to his Facebook account and they failed to take another deposition of Patton.

On May 28, 2015, Patton filed an "Affidavit of Jeremy Patton Re: Facebook." In that affidavit Patton states he asked a graphic designer to add the logo of Patton's business, Collectables Corner, to his Facebook Page. Affidavit of Jeremy Patton Re: Facebook, pp. 1-2, ¶ 2. Then, Patton testifies:

> 3. Recently, Facebook disabled my Facebook account due to using it primarily for business purposes. I did not know that they had disabled my Facebook and was not notified in advance. When I attempted to go onto Facebook, I got a message that said, "Account Disabled. Your account has been disabled. If you have any questions or concerns, you can visit our FAQ page here." The old Facebook account is still there, but I had to create a new personal Facebook account in order to access it. I certainly did not close my Facebook account on purpose. I don't know why I would try to destroy evidence that the Defendants already have copies of.

Id., p. 2 ¶ 3. From an evidentiary standpoint, the first two sentences are admissible. The next few sentences are hearsay, and the last sentence is self-serving speculation. Incredibly, Patton does not tell us when he received this "message" from Facebook and did not attach a copy of a screenshot of the "message" (which at oral argument counsel for Patton, who admitted knowing little about Facebook, claimed that her client Patton could still access and print). But equally incredibly, the defendants knew in March that Patton's Facebook account no longer existed, yet did not confront Patton about that through further discovery or deposition.

While Patton's claims that "Facebook disabled my Facebook account due to using it primarily for business purposes", and "I did not know that they had disabled my Facebook and was not notified in advance", might be false, those claims are

admissible, and at this point, the defendants have done nothing to discredit those claims.

After the June 1, 2015, hearing, on June 2, 2015, counsel for the defendants filed "Defendants' Supplementation of Authorities in Support of Defendants' Motion for a Spoliation Instruction", and counsel for Patton submitted a "Notice of Filing Plaintiff's First Response to Requests for Admission", an "Affidavit of Monica Brennan Re: Facebook" (to which Brennan attaches an email from her client Patton, which Brennan then explains "is a screen shot of what he [Patton] got from Facebook about his closing his page") and a letter from Patton's counsel to the Court asking that her affidavit be "expedited to the court." None of this information was requested by the Court at that hearing and neither counsel for either party indicated they would be providing such after the hearing. The Court has read the cases submitted by the defendants counsel, and finds they do not support the defendants' argument for a spoliation instruction. The Court has read the Affidavit of Monica Brennan Re: Facebook and is at a loss to understand why such affidavit was not prepared for the signature of Patton. Since it is signed by Brennan, it is hearsay. The Court has reviewed the Notice of Filing Plaintiff's First Response to Requests for Admission in which Patton's counsel claims, nearly seven months late, that Plaintiff's First Response to Defendants' Request for Admission was filed on November 10, 2014.

II. STANDARD OF REVIEW.

"Spoliation is a rule of evidence applicable at the discretion of the trial court." *Bromley v. Garey,* 132 Idaho 807, 812, 879 P.2d 1165, 1170 (1999) (citing *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995)).

III. ANALYSIS

"Spoliation occurs where evidence is destroyed or significantly altered, or where

a party fails to 'preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'" *Gatto v. United Air Lines, Inc.*, No. 10-CV-1090-ES-SCM, 2013 WL 1285285, at *3 (D.N.J. Mar. 25, 2013) (*quoting Mosaid Technologies v. Samsung Electronics,* 348 F.Supp.2d 332, 335 (D.N.J. 2004)). Before imposing a sanction, the court must find that four factors are satisfied:

> (1) the evidence was within the party's control; (2) there was an actual suppression or withholding of evidence; (3) the evidence was destroyed or withheld was relevant to the claims or defenses; and (4) it was reasonably foreseeable that the evidence would be discoverable.

Id. (*citing Mosaid,* 349 F.Supp.2d at 336; *Brewer v. Quaker State Oil Refining Co.,* 72 F.3d 326, 334 (3d Cir.1995); *Veloso v. Western Bedding Supply Co.,* 281 F.Supp.2d 743, 746 (D.N.J. 2003); *Scott v. IBM Corp.,* 196 F.R.D. 223, 248 (D.N.J. 2000)).

Here, Patton's Facebook account was clearly within his control, as Patton has authority to add, delete, or modify his account's content. The first factor has been met by defendants.

However, there is no evidence before this Court that the remaining factors have been satisfied. There is no evidence that the defendants sought discovery related to Patton's Facebook postings and that upon such a request, Patton suppressed or withheld the evidence. In fact, defendants have copies of some of Patton's Facebook postings. There is no evidence that Patton's Facebook page has actually been deleted, rather than simply made private from public viewing. Rather, the testimony from Patton is that "[r]ecently, Facebook disabled my Facebook account . . . ." Affidavit of Jeremy Patton Re: Facebook, p. 2, ¶ 3 (emphasis added).

Moreover, with regard to the fourth factor, at this time, one week prior to trial, the Court finds that it was not, and is not now, reasonably foreseeable that Patton's Facebook account would have been sought in discovery. A week from trial, it is now

too late for discovery. At no point during this litigation up to this time have the defendants ever requested the plaintiff's Facebook account information through discovery. A Motion to Compel was previously filed by the defendants on September 30, 2014, which only requested financial information.

In addition to the four factors mentioned above from *Brewer*, the defendants have failed to demonstrate that Patton had a *duty* to preserve his Facebook account at the time it was allegedly deleted/deactivated. The Supreme Court of Idaho in *Bromley v. Garey,* 132 Idaho 807, 879 P.2d 1165 (1999), held:

> The evidentiary doctrine of spoliation recognizes it is unlikely that a party will destroy favorable evidence. Thus, the doctrine of spoliation provides that when a party *with a duty to preserve evidence* intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party. *Stuart v. State,* 127 Idaho 806, 907 P.2d 783 (1995).

132 Idaho 807, 812, 879 P.2d 1165, 1170 (emphasis added). Until the defendants make a discovery request for Patton's Facebook information, this Court cannot find that Patton had a *duty* to preserve any such an account, especially when it was obvious that the defendants already had such information via hard copy. The Court has reviewed two cases that indicate a discovery request is a prerequisite for spoliation, *Gatto v. United Airlines, Inc.,* 2013 WL 1285285 (D. New Jersey, March 25, 2013), and *Allied Concrete Company v. Lester,* 285 Va. 295, 736 S.E.2d 699 (Va. 2013).

In *Gatto*, a personal injury law suit, the defendant United Airlines asked the plaintiff Gatto in its Third Request for Production of Documents served July 21, 2011, "...for documents and information related to social media accounts maintained by Plaintiff as well as online business activities such as eBay." 2013 WL 1285285, p. *1. In response, Gatto provided signed authorizations for the release of information from social networking sites and other online services like eBay and PayPal, but did not

include an authorization for the release of records from his Facebook page. *Id.* United Airlines brought that to the attention of the federal Magistrate Judge, who ordered Gatto to sign an authorization for the release of information from Facebook. *Id.*, pp. *1-*2. On December 5, 2011, Gatto changed his Facebook password and gave that new password to United Airlines. *Id.,* p. *2. "Shortly thereafter, counsel for United allegedly accessed the account 'to confirm the password was changed,' and printed portions of Plaintiff's Facebook page." *Id.* Facebook then informed the plaintiff that his account has been accessed from an unfamiliar IP address. *Id.* On December 9, 2011, counsel for Gatto contacted counsel for United to confirm that Gatto's Facebook account had been accessed by counsel. *Id.* On December 11, 2011, counsel for United confirmed he had accessed the Facebook account. *Id.* On December 11, 2011, Gatto deactivated his Facebook account and, pursuant to Facebook's policy, all of Gatto's Facebook data was deleted by Facebook 14 days after the deactivation. *Id.* The data was irretrievable. *Id.*

Following the deletion, United sought a spoliation jury instruction regarding the destroyed Facebook page. Examining the four factors discussed above, the court found that factors one, three and four had been satisfied and focused their analysis on the second factor, whether there was an actual suppression or withholding of the evidence. *Id.*, p. *4. Gatto argued that he did not suppress the evidence because he claimed he acted reasonably in deactivating his account because he believed it had been hacked. *Id.* He further argued that it was Facebook that actually took steps to delete his account following the deactivation and despite his efforts he was unable to reactivate the account following the deletion. *Id.* The court was unpersuaded by his arguments, and held:

> Even if Plaintiff did not intend to permanently deprive the defendants of the information associated with his Facebook account, there is no dispute that Plaintiff intentionally deactivated the account. In doing so, and then failing to reactivate the account within the necessary time period, Plaintiff effectively caused the account to be permanently deleted. Neither defense counsel's allegedly inappropriate access of the Facebook account, nor Plaintiff's belated efforts to reactivate the account, negate the fact that Plaintiff failed to preserve relevant evidence. As a result, Defendants are prejudiced because they have lost access to evidence that is potentially relevant to Plaintiff's damages and credibility. In light of all of the above, a spoliation inference is appropriate.

Id. at *4 (internal citations omitted). As such, the court granted United's motion for a spoliation instruction. Keep in mind that nearly four months before Gatto's intentional of deactivating his Facebook account on December 11, 2011, United Airlines had asked the Gatto in its Third Request for Production of Documents served July 21, 2011, "...for documents and information related to social media accounts maintained by Plaintiff as well as online business activities such as eBay." 2013 WL 1285285, p. *1.

In *Allied Concrete Co. v. Lester*, 285 Va. 295, 736 S.E.2d 699 (Va. 2013), the plaintiff sued the defendants following an automobile accident. *Id.*, at 299, 36 S.E. 2d at 701. The defendants "issued a discovery request to [the plaintiff], seeking production of 'screen print copies on the date this request is signed of all pages from Isaiah Lester's Facebook page including, but not limited to, all pictures, his profile, his message board, status updates and all messages sent or received." *Id*. at 302, 36 S.E. 2d at 702. Attached to this discovery request was a screenshot of a photograph of the plaintiff from his Facebook page of the plaintiff wearing a T-shirt saying "I ♥ hot moms." *Id*. The following day, the plaintiff's attorney sent an email to his paralegal, instructing her to direct the plaintiff to "clean up" his Facebook page. *Id.* at 302, 736 S.E.2d at 702. The paralegal then emailed the plaintiff instructing him to "clean up" his Facebook page because "[w]e do NOT want blow ups of other pics at trial so please, please clean

up your facebook and myspace!." *Id*. In response, the plaintiff deactivated his Facebook page and responded to the discovery request by stating he did not have a Facebook page as of the date the discovery response was signed. *Id.* In response, the defendants filed a motion to compel discovery. *Id.* The plaintiff then reactivated his Facebook page, deleted 16 photos, and produced copies of what was left to the defendants. *Id.* at 303, 36 S.E. 2d at 702. At his deposition, the plaintiff testified that he never deactivated his Facebook account. *Id.* at 303, 36 S.E. 2d at 703. Following the deposition, the defendant hired an expert who confirmed that the 16 photos had been deleted. *Id.* The plaintiff finally produced those photos. *Id.*

The court sanctioned the plaintiff and his attorney for the fees and costs the defendants had incurred in obtaining copies of the Facebook page and the 16 deleted photos. *Id.* at 304, 736 S.E.2d at 703. The judge also allowed the spoilated evidence to be presented to the jury gave the following adverse instruction to the jury at trial:

> The Court instructs the jury that the Plaintiff, Isaiah Lester, was asked in discovery in this case to provide information from his Facebook account. In violation of the rules of this Court, before responding to the discovery, he intentionally and improperly deleted certain photographs from his Facebook account, at least one of which cannot be recovered. You should presume that the photograph or photographs he deleted from his Facebook account were harmful to his case.

Id. The unavoidable conclusion in *Allied Concrete* is that the defendant in that case **made a discovery request** for specific information from the plaintiff, and upon getting that discovery request, the plaintiff deleted that specifically requested information. None of that occurred in the present case.

Here, Patton's affidavit is unclear as to whether any postings might still be retrievable on a private account, so there is even an issue that the evidence might not be destroyed. At this point the Court does not know because the defendants have not

asked Patton. Granted, only two business days passed between Patton's affidavit and the hearing on the defendants' spoliation motion, but the defendants created that compressed time by not engaging in further discovery of Patton after the defendants found out in March 2015 that the Facebook page no longer existed.

Finally, the Court has reviewed the cases cited by counsel for defendants the day *after* oral argument. As a preliminary matter, the Court notes counsel for the defendants failed to comply with this Court's Scheduling Order filed May 9, 2014, which requires case law not contained in the Idaho Reports to be attached to the Court's copy of the brief or memorandum. Scheduling Order, p. 3, ¶ 2.

Counsel for defendants first cites *Kearney v. Foley & Lardner, LLP,* 590 F.3d 638 (9th Cir. 2009). Defendants' Supplementation of Authorities in Support of Defendants' Motion for a Spoliation Instruction, p. 2. That case is of no value on this issue as it simply discusses the "nearly eradicated" "tort of spoliation." *Id.,* at 649-50. Counsel for defendants second case cited is *Leon v. IDX Sys., Corp.,* 464 F.3d 951, 959 (9th Cir. 2006), for the proposition that spoliation occurs when a party had "some notice that the documents were potentially relevant to the litigation before they were destroyed." Defendants' Supplementation of Authorities in Support of Defendants' Motion for a Spoliation Instruction, p. 2. This isolated quote ignores the facts of that case, which were set forth by the Ninth Circuit Court of Appeals:

> Leon was hired by IDX in 2001. In mid–2002, Leon began complaining of mismanagement of the "Standards–Based Interoperable Guideline System" ("SAGE") project, claiming there were irregularities in the financing and reporting of the federally-funded project. On April 25, 2003, after putting Leon on unpaid leave, IDX brought an action for declaratory relief, seeking to establish that it could terminate Leon's employment without violating the anti-retaliation provisions of the False Claims Act, SOX, and the ADA. On May 20, 2003, Leon filed his own action, which included claims for retaliation under the False Claims Act, violations of Title VII, the ADA, and state law claims. Leon's complaint alleged that IDX fired him in retaliation for his whistle-blowing activities.

> On April 30 and May 7, 2003, IDX's attorneys sent letters to Leon's attorney, requesting that Leon return the IDX-issued laptop to IDX. On May 8, 2003, Leon's attorney responded in writing by asking if Leon could keep his laptop for the duration of an audit of the SAGE project. On May 9, IDX's counsel stated that Leon could keep the laptop for the specific purpose of responding to the auditors. The April 30 and May 9 letters cautioned that Leon should take care to preserve all data; one letter specifically warned that Leon should "ensure no data on the laptop is lost or corrupted so as to avoid any possible despoliation of evidence." The audit was completed in July, and by October, counsel for both sides were negotiating the return of the laptop. IDX's computer forensics expert received the laptop on February 5, 2004.
>
> After conducting a forensic analysis, IDX's expert reported that all data in the hard drive's unallocated space had been intentionally wiped, and also reported that the computer had been used to view and download pornography. The expert concluded that more than 2,200 files had been deleted. After receiving this information, IDX moved for dismissal of Leon's action based on Leon's intentional spoliation of evidence.

464 F.3d 951, 955-56. IDX's attorneys specifically requested Leon return the IDX issued computer, similar to a specific discovery request. No discovery request was ever made by the defendants in the present case. A complete review of *Leon*, rather than simply a one line quote, supports this Court's finding that the defendants in this case needed to make a formal request of Patton for his Facebook information. Counsel for defendants third case is "*E.E.O.C. v. Fry's Electronics, Inc.,* 874 F.Supp.2nd [sic] 1042, 1044 (W.D. Washington 2012)", and quoted the following language, "Thus, the duty to preserve evidence is triggered when a party *knows or reasonably should know* that the evidence may be relevant to pending or future litigation". In that EEOC case, the federal district court judge noted:

> Plaintiff Ka Lam engaged in protected activity and was fired a few weeks after his store manager learned of the complaint. Assuming, for purposes of this motion, that the temporal relationship between these two events did not provide sufficient notice of a potential retaliation claim, notice was certainly provided when Mr. Lam responded to his suspension notice with reference to the Equal Employment Opportunity Commission ("EEOC"). Defendant is a sophisticated corporate employer: the mention of the EEOC in this context put it on notice that a charge might be filed. Thus, the duty to preserve potentially relevant documents was triggered as of May 24, 2007.

Id., at 1044. The trial court noted the destruction of evidence occurred *nearly two years after that duty to preserve* attached:

> Plaintiffs also argue that the decision to scrap two computer hard drives in 2009 constitutes willful spoliation. The computers were located in the office of the Renton store where plaintiffs were employed. Defendant offers no justification or explanation for their destruction. There is no evidence that they were replaced on a planned schedule or as part of a company-wide upgrade. Rather, the hard drives on which documents and communications regarding plaintiffs' discipline, termination, and/or complaints of harassment, discrimination, or retaliation were simply rendered unavailable. Defendant argues that their destruction was irrelevant because they did not contain any unique information: all personnel-related documents were printed out and sent to defendant's corporate offices in San Jose for retention and were not saved on the two computers. Thus, defendants argue, plaintiffs have no evidence that the hard drives contained any relevant information that was not separately preserved.
>
> This is not, however, a case in which defendant mirrored or otherwise transferred the contents of a hard drive to another medium for preservation. The evidence shows only that the office computers were used to create documents, which, if they were considered personnel documents, were transferred to San Jose. Defendant has not shown that drafts of documents (including personnel documents), notes, informal communications, investigative documents, or documents related to issues that were handled at the local level were sent to corporate headquarters. Nor has defendant shown that all documents sent to San Jose were preserved. In light of defendant's failure to retain relevant sales performance documents and the MOPARs after their relevance should have been apparent, its spontaneous destruction of the computers located in the Renton store is suspicious. Having unilaterally caused the loss of information that was potentially relevant to the claims of both Mr. Lam and Ms. Rios, defendant is not entitled to a presumption that the documents on the hard drives were irrelevant or that all relevant documents were saved in another format. *See Leon,* 464 F.3d at 959 (where " 'the relevance of ... [destroyed] documents cannot be clearly ascertained because the documents no longer exist,' a party 'can hardly assert a presumption of irrelevance as to the destroyed documents.' " (quoting *Alexander v. Nat'l Farmers Org.,* 687 F.2d 1173, 1205 (8th Cir.1982))).

Id., at 1045-46. Counsel for the defendants fourth case is *West v. Goodyear Tire & Rubber Co.,* 167 F.3d 776, 779 (2nd Cir. 1999), for the quote "[s]poliation is the destruction or significant alteration of evidence, or the failure to preserve property for

another's use as evidence in pending or reasonably foreseeable litigation." Defendants' Supplementation of Authorities in Support of Defendants' Motion for a Spoliation Instruction, p. 2. The important fact omitted by the defendants' counsel is as follows:

> After discovery began, **the defendants asked to inspect West's shop, and especially his tire mounting machine and air compressor**. An inspection was scheduled for June 1993. However, in May 1993, with no notice to the defendants, West went ahead and sold the tire changing machine and air compressor. Although the defendants eventually located the tire mounting machine and compressor, they had been left outside and exposed to the elements for some time, and their condition had deteriorated.

167 F.3d 776, 778. (bold added). The bold portion shows the specific request to retain the evidence. Counsel for defendants fifth case is *Fujitsu v. Federal Exp. Corp.,* 247 F.3d 423, 436 (2nd Cir. 2001), for the quote, the "obligation to preserve evidence arises when a party had notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to litigation." Defendants' Supplementation of Authorities in Support of Defendants' Motion for a Spoliation Instruction, p. 2. The following excerpt from that case shows the party requesting sanction for spoliation or a spoliation instruction, needs to make a *request* for the evidence or a *request* to inspect the evidence, which defendants did not do in the instant case:

> In this case, the trial court found that FedEx had failed to demonstrate that Fujitsu's action was an intentional attempt to destroy evidence. In *Thiele v. Oddy's Auto and Marine, Inc.,* 906 F.Supp. 158, 160 (W.D.N.Y.1995), the court sanctioned the plaintiff for destroying an allegedly defective boat before the third-party defendant could inspect it, but denied a spoliation sanction requested by the main defendant who had been given the opportunity to inspect the boat prior to its destruction. *See also Indemnity Ins. Co. of N. Am. v. Liebert Corp.,* 96 Civ. 6675(DC), 1998 WL 363834 (S.D.N.Y. June 29, 1998) (denying spoliation sanction where defendant had an opportunity to inspect evidence prior to its destruction). It is undisputed that FedEx did not request to inspect the damaged shipping container after Fujitsu notified it of the damage, nor at any time other than prior to it making the summary judgment motion in

> August 1999. Accordingly, the trial court did not abuse its discretion in finding that, under the particular facts of this case, no sanction for spoliation was required.

Fujitsu, 247 F.3d at 436. Finally, counsel for defendants sixth case is *Zubulake v. UBS Warburg,* LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003), for the quote, "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." Defendants' Supplementation of Authorities in Support of Defendants' Motion for a Spoliation Instruction, p. 2. In *Zubulake,* the federal district court provides an excellent and detailed discussion on spoliation. Similar to the *Fry's Electronics* case, *Zubulake* is an EEOC case and makes clear the duty to retain evidence begins at least at the time the EEOC claim is filed. Nothing in *Zubulake* convinces this Court that the defendants in this case are entitled to a spoliation instruction having never requested Patton's Facebook information in discovery.

The six cases cited by the defendants' counsel after the hearing only serve to convince this Court that a discovery request by the defendants requesting Patton's Facebook information was needed in order to place a duty upon Patton to preserve that information.

It is important to note that at least as of July 22, 2014, when defendants' counsel took Patton's deposition and showed Patton photocopies of Patton's own Facebook page, Patton knew that the defendants' counsel was "looking" at Patton's Facebook page. For the next several months, Patton did nothing about his Facebook page, even while Black (unbeknownst to Patton) was investigating Patton's Facebook page on behalf of the defendants. During this time Patton had no reason to believe that counsel for the defendants, and/or agents of counsel for the defendants such as Black, *would*

not *be looking* at Patton's Facebook page. The fact that from October 2014 to January 2015, defendants' counsel and defendants' counsel's agents in fact were not looking at Patton's Facebook page **is not Patton's fault**. The fact that Patton had every reason to believe that his Facebook page was being viewed by defendants' counsel and/or defendants' counsel's agents up until the day that page was deleted, is evidence that even if Patton (and not Facebook) deleted the page, such deletion was done without any ill intent, **absent a request from defendants through discovery**.

The outcome likely could have been much different if the defendants had requested Patton's Facebook postings through formal discovery. Since the defendants failed to request access to, or copies of, Patton's Facebook account, they cannot complain that they do not have such evidence one week prior to trial, regardless of whether the lack of access is due to Patton's destruction of such evidence (a claim which has been denied by Patton and not rebutted by the defendants). Additionally, the defendants have in their possession Facebook evidence used in the July 22, 2014, deposition of Patton to attack the credibility of Patton's claims. However, there is no evidence that Patton continued to post information to his Facebook account following that deposition. There is no evidence that Patton might not be able to retrieve any Facebook postings made between the time of the deposition and the time the account was deactivated. And no request has been made by the defendants to have Patton retrieve such postings.

The Court finds that the defendants have failed to prove that Patton's postings have in fact been destroyed and are now irretrievable by Patton. The Court finds the defendants have failed to prove that if the postings were destroyed, they were destroyed by an affirmative and deliberate act of Patton, and not by Facebook due to its action based on policy. Nor have they proven that Patton had the option to prevent his

account from being deleted, as was the case in *Gatto.* The Court also finds that even if Patton deliberately destroyed his Facebook account, because defendants had never made a discovery request, Patton had no duty to preserve such account.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the Court, acting within its discretion, the requested spoliation jury instruction is inappropriate and the request is denied.

IT IS HEREBY ORDERED defendants' "Motion for Spoliation Jury Instruction" is DENIED.

Entered this 3rd day of June, 2015.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2015, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	
Monica Flood Brennan	208-676-8288	Hon. Charles Hosack
Kent Neil Doll Jr	509-838-4906	

_____
Jeanne Clausen, Deputy Clerk