STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: January 18, 2013)

NAYSHA BERRIOS, Individually and As Administratrix of the Estate of CASSANDRA BERRIOS	:	
	:	**C.A. No. PC-04-2390**
v.	:	
JEVIC TRANSPORTATION, INC.; CRAIG G. BENFIELD; FIRST STUDENT, INC.; ILBA BERRIOS, Alias; SAIA, INC.; SAIA MOTOR FREIGHT LINE, LLC, Alias; and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA	:	

DECISION

GIBNEY, P.J. In this wrongful death action, Defendant First Student, Inc. ("First Student"), Defendant Ilba Berrios ("Ilba"), and Plaintiff Naysha Berrios, Individually and as Administratrix of the Estate of Cassandra Berrios ("Naysha") (collectively "Movants"),[1] have filed Motions for Sanctions for Spoliation of Evidence against Defendant Jevic Transportation, Inc. ("Jevic"), arguing that Jevic has destroyed several different kinds of relevant evidence in bad faith and should be severely sanctioned. Jevic denies these claims and has filed a Motion for Sanctions for Spoliation of Evidence against First Student, contending that First Student destroyed relevant investigation reports and internal emails in bad faith and should face equally severe sanctions. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

[1] While First Student, Naysha, and Ilba have filed separate Motions, Naysha and Ilba have expressly joined with First Student's Memorandum of Law in Support of its Motion for Sanctions for Spoliation of Evidence. This Court will therefore address the three parties' claims together.

I

Facts and Travel

This case's history has been detailed in numerous recent decisions of this Court. A concise summary of the pertinent facts shall suffice here.[2]

On the early morning of September 5, 2001, a school bus owned by First Student and driven by Ilba, a First Student employee, was involved in an accident on the northbound side of Route I-95 with a tractor-trailer owned by Jevic and operated by Jevic employee Craig Benfield ("Benfield"). According to police reports and deposition testimony, the tractor-trailer was parked in the breakdown lane along I-95 when, at some point, the school bus crossed into the breakdown lane and struck the rear of the tractor-trailer. Benfield and his wife, Tina Benfield, a passenger in Benfield's tractor-trailer, escaped the accident without injury. Ilba and Naysha, a passenger in the school bus, suffered severe injuries but survived. Cassandra Berrios ("Cassandra"), Naysha's infant daughter, suffered severe injuries resulting in her death.

Naysha filed the instant lawsuit. The parties dispute the factual circumstances surrounding the accident. Movants claim that the tractor-trailer was not parked fully within the breakdown lane and had begun moving before being struck by the school bus. Jevic alleges that the tractor-trailer was, in fact, parked completely within the breakdown lane and had not yet begun moving when the school bus struck it.

[2] For a more detailed rendition of this case's underlying facts and procedural history, see Berrios v. Jevic Transportation, Inc., C.A. No. PC-2004-2390, 2012 WL 2946775 (R.I. Super. July 11, 2012), Berrios v. Jevic Transportation, Inc., C.A. No. PC-2004-2390, 2012 WL 2648201 (R.I. Super. June 29, 2012), Berrios v. Jevic Transportation, Inc., C.A. No. PC-2004-2390, 2012 WL 4040225 (R.I. Super. June 8, 2012), Berrios v. Jevic Transportation, Inc., C.A. No. PC-2004-2390, 2012 WL 894010 (R.I. Super. March 12, 2012), and Berrios v. Jevic Transportation, Inc., C.A. No. PC-2004-2390, 2012 WL 254974 (R.I. Super. Jan. 23, 2012).

II

Discussion

The parties proffer competing Motions for Sanctions for Spoliation of Evidence. Movants allege that Jevic has destroyed three specific types of evidence: (1) internal Jevic emails discussing the accident; (2) documents that Jevic was ordered to retain by a bankruptcy court; and (3) Electronic Control Module ("ECM") and Qualcomm OmniTRACS ("Qualcomm") data from Benfield's tractor-trailer. Movants contend that the totality of the record strongly suggests that Jevic destroyed this evidence in bad faith. Movants further assert that all of the allegedly despoiled evidence is relevant to this case because it bears on the disputed factual circumstances of the accident. Moreover, Movants aver that they are prejudiced in prosecuting their claims against Jevic without the benefit of this evidence and cannot obtain it from any other source.[3]

Jevic denies the allegations of spoliation. It maintains that the lost emails were deleted as part of its regular data retention policy and not due to any fraudulent intent. Jevic also argues that it hired a third-party administrator, Crawford & Company (the "TPA"), to investigate the accident, and thus the TPA was the party responsible for accident-related data retention. Jevic further contends that none of the allegedly despoiled bankruptcy documents are relevant to this case, and Movants cannot

[3] Movants seek a bevy of sanctions against Jevic. First, Movants ask this Court to strike Jevic's claims for contribution and enter judgment in favor of their cross-claims for contribution from Jevic. In the alternative, Movants seek to limit Jevic's ability to present expert testimony and other evidence concerning its liability and/or negligence regarding the accident. If this Court is unwilling to grant such relief, Movants contend that it should, at the least, give to the jury an instruction that they may infer that the evidence allegedly despoiled was adverse to Jevic. Finally, Movants seek costs and attorneys' fees associated with investigating and responding to Jevic's alleged spoliation of evidence.

demonstrate that such documents ever existed in the first instance. Jevic also asserts that Movants overstate the scope and quality of the allegedly destroyed ECM and Qualcomm data. Finally, Jevic avers that such data is not relevant to this case because Jevic used the data for maintenance and logistical purposes only and then routinely discarded it.

Jevic seeks sanctions against First Student for First Student's alleged spoliation of two types of evidence. First, Jevic claims that First Student destroyed the reports and conclusions of the investigator First Student hired to analyze the accident. In support, Jevic maintains that First Student was obligated by an August 2, 2012 Order of this Court to produce "all correspondence" between itself and its investigator. Because First Student has failed to produce any reports or a privilege log noting the existence of such reports, Jevic contends that First Student must have destroyed these documents.

Second, Jevic alleges that First Student despoiled internal emails discussing the circumstances of the accident and the course of First Student's investigation. Jevic asserts that First Student allowed emails to accumulate on individual computers' hard drives instead of on a central server and willfully refused to maintain a backup system. Therefore, Jevic contends that First Student despoiled evidence when the hard drive of Percy Abbott ("Abbott"), First Student's Vice President of Safety, "crashed" in 2005 and all of his accumulated emails and other data were irretrievably lost.

Jevic maintains that the investigator's lost reports and emails are relevant to this case because they contain internal First Student discussions regarding the circumstances of the accident and the course of First Student's investigation. Jevic contends that it is

prejudiced in conducting its defense without this evidence because it cannot obtain this important information from any other source.[4]

First Student replies that it has not despoiled evidence in the instant matter. Concerning the reports of its investigator, First Student asserts that the investigator produced only photographs of the accident and nothing more. First Student avers that all of the photographs have been provided to Jevic. First Student argues that there is no evidence demonstrating that any investigator's reports existed in the first instance. Thus, First Student contends that it did not destroy any investigatory reports.

First Student further argues that there is no evidence showing that it produced or subsequently destroyed any internal emails regarding the accident. In fact, First Student maintains that it immediately retained legal counsel to investigate the circumstances of the accident, and counsel handled all accident-related communications. First Student asserts that it has already produced a complete privilege log of relevant communications to Jevic.

[4] Jevic also seeks sanctions against First Student for its alleged pattern of willful misconduct. First, Jevic requests that this Court dismiss First Student's cross-claims for contribution from Jevic and enter judgment in favor of Jevic's claims for contribution from First Student. Jevic seeks, in the alternative, to limit First Student's ability to present expert testimony at trial concerning Jevic's liability. In either case, Jevic also asks this Court to instruct the jury that it may infer that the allegedly despoiled evidence was adverse to First Student.

III

Analysis

A

The Spoliation Doctrine

Spoliation is defined as "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." 126 Am. Jur. Proof of Facts 3d 1 at 7; see also Jimenez-Sanchez v. Caribbean Restaurants, LLC, 483 F. Supp. 2d 140, 143 (D.P.R. 2007) (finding that spoliation "can be defined as the failure to preserve evidence that is relevant to pending or potential litigation"). Our Supreme Court has stated that in Rhode Island, "[t]he doctrine of spoliation provides that 'the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party.'" Malinou v. Miriam Hospital, 24 A.3d 497, 511 (R.I. 2011) (quoting Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744, 748 (R.I. 2000)); Kurczy v. St. Joseph Veterans Assoc., Inc., 820 A.2d 929, 946 (R.I. 2003). The Court has elaborated that the "'[d]estruction of potentially relevant evidence obviously occurs along a continuum of fault-ranging from innocence through the degrees of negligence to intentionality.'" Rhode Island Hospital Trust Nat'l Bank v. Eastern General Contractors, Inc., 674 A.2d 1227, 1234 (R.I. 1996) (quoting Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir. 1988)); Kurczy, 820 A.2d at 947. Although "[a] showing of bad faith on the part of the despoiler is not necessary to permit the spoliation inference," the Court has found that such a showing "may strengthen the inference." Farrell v. Connetti Trailer Sales, Inc., 727 A.2d 183, 186 (R.I. 1999); see also Sacramona v. Bridgestone/Firestone,

Inc., 106 F.3d 444, 447 (1st Cir. 1997) (citing Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214, 219 (1st Cir. 1982), and finding that "bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence. But bad faith is not essential . . ."). (Emphasis added.)

A court properly finds that spoliation of evidence has occurred when the moving party establishes a two-prong "evidentiary foundation." Booker v. Massachusetts Dep't of Public Health, 612 F.3d 34, 46 (1st Cir. 2010); see also 89 C.J.S. Trial § 671 at 1. First, the moving party must demonstrate that the opposing party knew of "the claim (that is, the litigation or the potential for litigation)." Booker, 612 F.3d at 46. Our Supreme Court has found that while a party is certainly on notice of a claim once the complaint is filed, the "'obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely.'" Tancrelle, 756 A.2d at 749 (quoting Conderman v. Rochester Gas & Electric Corp., 180 Misc. 2d 8, 687 N.Y.S.2d 213, 217 (1998)). (Emphasis added.)

Second, the moving party must show that the opposing party knew of the evidence's "potential relevance to that claim." Booker, 612 F.3d at 46. Our federal courts have consistently recognized that allegedly despoiled evidence is relevant when it "has some tendency, however small, to make the existence of a fact at issue more probable than it would otherwise be." Nation-Wide Check Corp., Inc., 692 F.2d at 218 (citing Fed. R. Evid. 401); see also 22 Wright & Miller Evidence § 5178 at 2 (noting that the allegedly despoiled evidence must have relevance that satisfies Fed. R. Evid. 401). Our federal courts have also found that in many spoliation cases "[evidence's] potential

relevance to the plaintiff's claims is apparent from the nature of the missing [evidence] itself." Booker, 612 F.3d at 47. In establishing both prongs of the "evidentiary foundation," the moving party need only show that the opposing party had "institutional notice—the aggregate knowledge possessed by a party and its agents, servants, and employees." Testa v. Wal-Mart Stores, Inc., 144 F.3d 173, 177-78 (1st Cir. 1998).

B

Movants' Claims Against Jevic

1

Internal Jevic Emails

Movants allege that Jevic despoiled internal emails from the time of the accident when Jevic allowed the emails to be routinely deleted instead of preserving them for litigation purposes. Movants argue that many of these emails are relevant to this case because they discuss the circumstances of the accident and the course of Jevic's investigation. Movants further assert that they are prejudiced by the loss of this evidence because they cannot obtain the information from any other source.

Jevic responds that it did not destroy the internal emails for two reasons. First, Jevic contends that the lost emails were not deleted maliciously or to hide liability, but as part of Jevic's routine data retention program. Second, Jevic maintains that it hired a TPA to investigate the accident as part of its standard practice. According to Jevic, the TPA, and not Jevic officials, was responsible for all document gathering and maintenance activities regarding the accident. Therefore, Jevic argues that it did not despoil its internal emails.

This Court finds that Movants have shown that Jevic had notice of the likelihood of this litigation almost immediately following the accident. As an initial matter, Jevic is a large and sophisticated trucking company operating in multiple states. See Jevic 1997 10-K Report at 1-3. It has dealt with a plethora of litigation involving its tractor-trailers. See id. at 11 ("[Jevic] is routinely a party to litigation incident to its business, primarily involving claims for . . . personal injury and property damage incurred in the transportation of freight"). Moreover, all of Jevic's executives at the time of the accident had decades of experience in the trucking and freight industries. See id. at 10. James J. Noone ("Noone"), Jevic's Risk and Insurance Manager in 2001, testified on behalf of Jevic at trial and in depositions numerous times. (Noone Dep. Vol. I at 142 ¶¶ 11-15, 143 ¶¶ 22-25.) Several of these cases involved traffic accidents. Id. at 142 ¶ 25, 143 ¶¶ 1-3. Thus, it follows that at the time of the accident Jevic was well aware that fatal motor vehicle accidents likely engender litigation. See In re Wechsler, 121 F. Supp. 2d 404, 418 (D. Del. 2000) (determining that the parties involved in a boating fire case "knew or should have known that lawsuits would eventually be filed" at the time they investigated the fires based on their "level of sophistication" and experience); Conderman, 180 Misc. 2d at 14, 687 N.Y.S.2d at 217 (finding that an electric company investigating a fatal accident involving falling telephone poles demonstrated "a high degree of awareness of the likelihood of possible litigation" based, among other factors, on their experience in the industry).

Concomitantly, the record shows that Noone was notified by Benfield of the accident within two hours of its occurrence. (Noone Dep. Vol. I at 88 ¶¶ 22-24.) Noone entered an initial investigatory report into Jevic's computer system within thirty-two

minutes of conversing with Benfield about the accident. Id. at 87 ¶¶ 20-25, 88 ¶¶ 1-12. The report noted that the accident caused extensive property damage and resulted in a fatality. Id. at 86 ¶¶ 15-17. The report also stated that the accident was "non-preventable" and was not Benfield's fault. Id. at 86 ¶¶ 12-25, 87 ¶¶ 1-19.

Moreover, Noone was notified by Jevic's TPA on September 6, 2001 that Ilba and Naysha were already represented by counsel and that the attorney was investigating the accident. (Noone Dep. Vol. II at 265 ¶¶ 8-22.) The TPA provided Noone with a copy of counsel's letter of representation. Id. at 265 ¶¶ 12-14. The TPA also informed Noone of the need to develop a litigation defense plan. Id. at 294 ¶¶ 17-25; 295 ¶¶ 1-8. This knowledge led Noone to conclude that "litigation was going to follow." Id. at 265 ¶¶ 23-25, 266 ¶¶ 1-2. Based on these factors, this Court finds that Movants have demonstrated that Jevic had institutional notice of the likelihood of litigation within hours of the accident. See Testa, 144 F.3d at 177-78 (finding that Wal-Mart had notice of the plaintiff's claim almost immediately following a freight shipping accident because Wal-Mart investigated the scene of the accident within hours of the injury and produced an accident report only days later); Jimenez-Sanchez, 483 F. Supp. 2d at 144.

The second prong of the "evidentiary foundation" requires the moving party to demonstrate that the opposing party also had institutional notice that the despoiled evidence was potentially relevant to the case. Booker, 612 F.3d at 46. Spoliated evidence is potentially relevant to a case when it has even a small tendency to make a disputed fact more likely than it otherwise would be. Nation-Wide Check Corp., Inc., 692 F.2d at 218. Concurrently, the potential relevance of despoiled evidence may be inferred from the nature of the evidence itself. Booker, 612 F.3d at 47.

This Court finds that Movants have shown that Jevic had notice that the allegedly despoiled internal emails were potentially relevant to the instant litigation. Jevic's employees regularly communicated via an internal email system at the time of the accident. See Noone Dep. Vol. I at 22 ¶¶ 5-19, 23 ¶¶ 11-25, 24 ¶¶ 1-9; Karvois Dep. at 19 ¶¶ 3-4; Selwood Dep. at 43 ¶¶ 22-25, 44 ¶¶ 1-3, 48 ¶¶ 4-9, 49 ¶¶ 1-3; Buckley Dep. at 50 ¶¶ 18-23; Friia Dep. at 99 ¶¶ 15-25, 100 ¶¶ 1-6, 104 ¶¶ 11-18. The record demonstrates that at least some of these emails discussed traffic accidents involving Jevic trucks. For example, Tammy Selwood, a Jevic dispatch clerk, received emails from Jevic's maintenance department whenever a tractor-trailer was damaged in an accident and required repair. (Selwood Dep. at 43 ¶¶ 22-25, 44 ¶¶ 1-3, 48 ¶¶ 4-9, 20-25, 49 ¶¶ 1-7.) Dawn Buckley, a safety supervisor at Jevic, received email communications from Jevic's insurance and risk management department whenever an accident involving a Jevic truck occurred. (Buckley Dep. at 50.) Charles Friia ("Friia"), another Jevic employee at the time of the accident, regularly received emails regarding accidents involving Jevic trucks and any resulting driver suspensions. (Friia Dep. at 168 ¶¶ 22-25, 169 ¶¶ 1-8.) Jevic's terminal managers received similar emails as well. Id. at 169 ¶¶ 22-25, 170 ¶¶ 1-25.

Moreover, Noone regularly communicated with Jevic's TPA via email whenever the TPA investigated an accident involving a Jevic truck, including for the instant accident. (Noone Dep. Vol. I at 41 ¶¶ 22-25); (Noone Dep. Vol. II at 232 ¶¶ 21-25, 233 ¶¶ 1-25, 234 ¶¶ 1-23.) Noone also communicated with Jevic employee Mary Beth Fitzgerald via email regarding the instant accident. (Noone Dep. Vol. II at 245 ¶¶ 2-25, 246 ¶¶ 1-22.) Taken together, this evidence demonstrates that Jevic was aware of the relevance of such emails to this case. See Nation-Wide Check Corp., 692 F.2d at 219.

Nevertheless, Jevic allowed its internal emails from the time of the accident to be deleted.[5] Therefore, this Court finds that Movants have satisfied the two-part "evidentiary foundation" and demonstrated that Jevic despoiled internal emails. See Booker, 612 F.3d at 46-47; Testa, 144 F.3d at 177.

Jevic argues, however, that it did not despoil its internal emails. First, Jevic argues that it did not willfully destroy the emails because they were deleted pursuant to Jevic's routine document retention policy. Because our Supreme Court has held that spoliation does not occur when evidence is destroyed "as a matter of routine with no fraudulent intent," Jevic asserts that it could not despoil the emails here. Movants respond that Jevic was under a duty to preserve relevant evidence as soon as it knew that litigation was likely in this case, and should have suspended its routine email deletion policy with a "litigation hold."

This Court finds Jevic's argument to be unavailing. While it is true that our Supreme Court has declined to find that spoliation of evidence has occurred where evidence is destroyed as a matter of routine "with no fraudulent intent," see State v. Roberts, 841 A.2d 175, 180 (R.I. 2003), this rule does not apply where the duty to preserve evidence has already attached. See Tancrelle, 756 A.2d at 749 (quoting Conderman, 180 Misc. 2d at 14, 687 N.Y.S.2d at 217, and holding that the "'obligation to preserve evidence even arises prior to the filing of a complaint where a party is on notice that litigation is likely'").

[5] According to Francis A. Ieradi ("Ieradi"), Jevic's IT Director at the time of the accident, Jevic retained internal emails on a server only for 270 days before automatically deleting them. (Ieradi Dep. at 46 ¶¶ 23-25, 47 ¶¶ 1-4.)

In fact, once a party is on notice of potential litigation, it is under an affirmative duty to "suspend its routine document retention policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004); see In re NTL, Inc. Securities Litigation, 244 F.R.D. 179, 193 (S.D.N.Y. 2007). The record indicates that Jevic's routine email retention policy did not include a "litigation hold" or any other email backup system as a matter of standard practice.[6] (Ieradi Dep. at 63 ¶¶ 21-25; 64 ¶¶ 1-25; 65 ¶ 1); (Noone Dep. Vol. I at 57 ¶¶ 4-19); (Adams Dep. at 109 ¶¶ 8-25; 111 ¶¶ 12-25; 112 ¶¶ 1-15); (Karvois Dep. at 131 ¶¶ 1-15.) Concurrently, neither Jevic's executives nor its legal counsel instructed Ieradi or other Jevic employees to institute a "litigation hold" after the instant accident occurred. (Ieradi Dep. at 64 ¶¶ 18-21.) This Court has already determined that Jevic was on notice of the likelihood of litigation in this case almost immediately following the accident. Therefore, Jevic's duty to preserve evidence attached at that time, and it engaged in spoliation of evidence when it failed to institute a "litigation hold" and allowed internal emails to be deleted pursuant to its routine policy. See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F. Supp. 2d 456, 475 (S.D.N.Y. 2010).

Second, Jevic contends that it did not despoil the emails because Jevic immediately turned investigation of the accident over to the TPA. Therefore, Jevic asserts that the TPA, and not Jevic, was responsible for collecting, organizing, and retaining all accident-related documents and communications, including internal emails

[6] A "litigation hold" is a legal term of art describing "[a] notice issued in anticipation of a lawsuit or investigation, ordering employees to preserve documents and other materials relevant to the lawsuit or investigation." Black's Law Dictionary 9th ed. at 800.

regarding the accident. Movants again rely on their argument that once the duty to preserve evidence attached, Jevic was obligated to retain relevant internal emails.

Jevic's reliance on the TPA is unavailing. It is widely acknowledged that a party to litigation may be sanctioned for destruction of evidence caused by a non-party when the non-party is acting as the party's agent. See, e.g., NUCOR Corp. v. Bell, 251 F.R.D. 191, 196-97 (D.S.C. 2008) (recognizing that "[o]rdinary agency principles govern a party's responsibility for spoliation committed by its employees"); Scott v. Garfield, 454 Mass. 790, 798-99 (2009) (holding that a party is liable for spoliation caused by its expert); Bouvé & Mohr, LLC v. Banks, 618 S.E.2d 650, 654-55 (Ga. App. 2005) (determining that "the trial court did not abuse its discretion in concluding that the spoliation was attributable to [the defendant] because [the non-party] acted as [the defendant's] agent"); cf. Roberts, 841 A.2d at 179 (finding that the police had not despoiled a vehicle because there was no evidence showing that the alleged spoliator, a non-party towing agency, "was the agent of the police" when it recycled the vehicle).

In Rhode Island, an agency relationship exists whenever three specific elements are contemporaneously present. Rosati v. Kuzman, 660 A.2d 263, 265 (R.I. 1995). These elements are that "(1) the principal manifests that the agent will act for him, (2) the agent accepts the undertaking, and (3) the parties agree that the principle will be in control of the undertaking." Credit Union Central Falls v. Groff, 966 A.2d 1262, 1268 (R.I. 2009); Lauro v. Knowles, 739 A.2d 1183, 1185 (R.I. 1999). "The essence of an agency relationship is the principal's right to control the work of the agent, whose actions must primarily benefit the principal." Groff, 966 A.2d at 1268 (quoting Rosati, 660 A.2d at 265).

Here, the record shows that the TPA was Jevic's agent following the accident. First, Noone "manifested that [the TPA] act for him" when he contacted the TPA immediately after receiving notice of the accident to investigate the circumstances of the crash. (Noone Dep. Vol. I at 41 ¶¶ 22-25, 42 ¶¶ 1-10); (Noone Dep. Vol. II at 211 ¶¶ 9-11, 231 ¶¶ 7-11.) Moreover, the TPA "accepted" this relationship because, upon Noone's call, it immediately proceeded to the scene and undertook the requested investigation. (Noone Dep. Vol. I at 129 ¶¶ 20-24.) Finally, Noone was "in control of the undertaking" because he gave the TPA clear and specific "instructions" regarding the investigation and controlled the course of that investigation. Id. at 49 ¶¶ 16-25, 128 ¶¶ 9-15; (Noone Dep. Vol. II at 207 ¶¶ 10-16, 208 ¶¶ 20-24.) Based on this evidence, this Court finds that Noone "controlled the work of [the TPA]" and the TPA's investigation benefited Jevic. Groff, 966 A.2d at 1268. This Court therefore finds that the TPA was Jevic's agent following the accident, and Jevic could not rely on the TPA to retain relevant evidence because Jevic was subject to the duty to preserve. See Banks, 618 S.E.2d at 654-55.

2

Jevic Bankruptcy Documents

Additionally, Movants allege that Jevic has despoiled various documents that it was ordered to retain by The United States Bankruptcy Court for the District of Delaware in 2008. Movants contend that the order specifically required Jevic to retain litigation-related documents for a period of some years, but Jevic has not produced any of these documents in discovery and cannot locate them now. Jevic responds that it has not despoiled the bankruptcy documents because it has already produced all relevant

documents in discovery. Moreover, Jevic asserts that Movants cannot demonstrate that Jevic destroyed the documents in the first instance.

In order to show that Jevic despoiled the bankruptcy documents, Movants must demonstrate that Jevic had institutional notice of the likelihood of litigation and of the potential relevance of the bankruptcy documents to that litigation. Booker, 612 F.3d at 46. Movants have shown that Jevic had notice of the likelihood of litigation almost immediately following the accident. Thus, the duty to preserve evidence for trial attached at that time, and Jevic was obligated to retain all evidence relevant to this case. See Tancrelle, 756 A.2d at 749; Zubulake, 229 F.R.D. at 431.

The remaining inquiry concerns whether Jevic had notice of the potential relevance of the bankruptcy documents to this case. See Booker, 612 F.3d at 46. The record shows that The United States Bankruptcy Court for the District of Delaware ordered Jevic to retain various documents in 2008 as Jevic wound up its bankruptcy proceedings. See In re Jevic Holding Corp., et al., No. 1:08-BK-11006 (Order, Sept. 24, 2008) ("Debtor's Order"). The Debtor's Order expressly required Jevic to retain, among other documents, "records on litigated cases" and documents concerning "[l]itigation (or anticipated litigation cases)," for five years.[7] See id. at Ex. A, p. 2. The instant case was pending against Jevic at the time the Debtor's Order entered. See Noone Dep. Vol. I at 13 ¶¶ 10-15. In addition, Noone created at least one insurance subrogation file regarding the accident and tasked his secretary with filling it with relevant documents. (Noone Dep. Vol. II at 246 ¶¶ 3-25; 247 ¶¶ 1-25; 248 ¶¶ 1-12.) Thus, this Court finds that Movants

[7] Because the Order was dated September 24, 2008, Jevic was obligated to retain these documents until at least late September 2013.

have presented sufficient circumstantial evidence showing that the "litigation" documents that Jevic was ordered to retain contained evidence regarding this case. See Kronisch v. U.S., 150 F.3d 112, 128 (2nd Cir. 1998) (finding that the moving party "produced enough circumstantial evidence to support the inference that the destroyed [evidence] may have contained documents supporting (or potentially proving) his claim" to justify a finding of spoliation); Ashton v. Knight Transportation, Inc., 772 F. Supp. 2d 772, 795-805 (N.D. Tex. 2011) (finding same); Beaven v. U.S. Dept. of Justice, 622 F.3d 540, 555 (6th Cir. 2010) (acknowledging that "a party seeking an adverse inference may rely on circumstantial evidence to suggest the contents of destroyed evidence"); E.I. du Pont de Nemours & Co. v. Kolon Industries, Inc., 803 F. Supp. 2d 469, 498-99 (E.D. Va. 2011) (quoting Samsung Electronics Co., Ltd. v. Rambus, Inc., 439 F. Supp. 2d 524, 561 (E.D. Va. 2006) and recognizing that "a party moving for sanctions based on spoliation 'cannot be expected to demonstrate with certainty the content of destroyed documents'"); Blinzler v. Marriot Int'l, Inc., 81 F.3d 1148, 1159 (1st Cir. 1996) (holding that "[t]he proponent of a "missing document" inference need not offer direct evidence of a coverup . . . Circumstantial evidence will suffice."); Nation-Wide Check Corp., Inc., 692 F.2d at 218-19 (finding that, based on the circumstantial evidence presented, there was a substantial likelihood that sale proceeds had not dissipated before the assignees received them). Accordingly, this Court finds that Movants have demonstrated that Jevic had notice of the potential relevance of the bankruptcy documents to this case. See Nation-Wide Check Corp., 692 F.2d at 219.

Jevic contends, however, that it did not despoil the bankruptcy documents because it already had produced all relevant bankruptcy documents in discovery before

the bankruptcy court ordered them to retain any documents. Jevic further asserts that a recent careful search of its retained documents has not revealed any additional relevant evidence for this case. In addition, Jevic maintains that Movants cannot prove that Jevic destroyed any of these documents in the first instance. Therefore, Jevic argues that there were no documents in existence for it to despoil in the first instance.

This Court disagrees. The bankruptcy court ordered Jevic to retain current litigation and anticipated litigation documents while this case was pending against Jevic. Movants have presented sufficient circumstantial evidence that these documents existed and contained relevant evidence relating to this case. It is true that Movants cannot show that Jevic actually destroyed the documents. However, our Supreme Court has expressly "decline[ed] to place the burden on plaintiffs to prove that [the evidence] was destroyed by defendants in anticipation of trial." Mead v. Papa Razzi Restaurant (Mead I), 840 A.2d 1103, 1108 (R.I. 2004); see also Kurczy, 820 A.2d at 947 (refusing again "to place [the burden of proving that unavailable evidence was, in fact, destroyed by the opposing party] on the party seeking to introduce such relevant evidence"). Therefore, Movants need not produce evidence demonstrating that Jevic actually destroyed the bankruptcy documents to satisfy their evidentiary burden here; it is enough that Jevic cannot produce the documents or explain their absence. See Mead I, 840 A.2d at 1108-09; Kurczy, 820 A.2d at 947.

Moreover, in the Debtor's Motion Jevic expressly sought from the bankruptcy court the ability to "make material modifications to the Records Management Policy without further [order] of this Court" regarding, among others, "documents that are being retained for the purpose of potentially pursuing causes of action on behalf of the estate . .

. ." In re Jevic Holding Corp., et al., No. 1:08-BK-11006 (Debtor's Mot. Authorizing Implementation of Records Management Policy at 8.) The Bankruptcy Court, however, authorized Jevic only to "make non-material modifications to the Records Management Policy without further order of this Court;" thus, Jevic was precluded by the Debtor's Order from destroying the litigation documents. (Debtor's Order at 1).

The record demonstrates that Jevic cannot locate or produce these documents today. Ieradi headed Jevic's bankruptcy document retention program. (Ieradi Dep. at 77 ¶¶ 2-5, 90 ¶¶ 11-16.) While Ieradi officially oversaw the retention of only Jevic's financial documents, he was also the only Jevic employee who knew the contents of all of the documents retained by Jevic for bankruptcy purposes. (Ieradi Dep. 76 ¶¶ 16-25, 90 ¶¶ 17-25.) Nonetheless, Ieradi could not identify a spreadsheet containing a list of retained Jevic documents, nor could he locate several "Safety" or other files listed in Jevic's bankruptcy retention program. Id. at 75 ¶¶ 21-25. Despite searching through many boxes of Jevic documents and reconstructing several data tapes, counsel for Jevic could not physically locate any relevant documents at Jevic's document retention warehouse in Robbinsville, New Jersey. (Oleyer Aff. at 1 ¶¶ 2-5.); see generally Arndt Aff., McDaniel Aff. Thus, this Court finds that Movants have demonstrated that Jevic despoiled the bankruptcy documents. See West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2nd Cir. 1999) (recognizing that federal courts impose sanctions "when a party spoliates evidence in violation of a court order"); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 517 (D. Md. 2010) (finding similarly that "if the spoliation violates a specific court order or disrupts the court's discovery plan, sanctions . . . may be imposed"); Sampson v. City of Cambridge, Md., 251 F.R.D. 172, 178 (D. Md. 2008)

(holding same); Gogos v. Modell's Sporting Goods, Inc., 87 A.D.3d 248, 250, 926 N.Y.S.2d 53, 54 (2011) (determining that spoliation in "violation of a court order is subject to sanction"); Cabasso v. Goldberg, 288 A.D.2d 116, 116-17, 773 N.Y.S.2d 47, 47 (2001) (finding that a trial court appropriately levied spoliation sanctions where the defendant destroyed relevant evidence in violation of a court order to preserve that evidence).

3

The ECM and Qualcomm Data

Movants further claim that Jevic despoiled ECM and Qualcomm data from Benfield's tractor-trailer when they failed to download the data and allowed it to be automatically deleted. Movants assert that such data is relevant to the instant case because it contained specific engine, braking, and location information for Benfield's tractor-trailer from immediately before, during, and after the accident. Movants further contend that Jevic knew of the relevance of this information to this case because Jevic was a large trucking company well-versed in accident litigation.

Jevic argues that it did not despoil the ECM and Qualcomm data because its usual practice was to retain such data only for maintenance, diagnostic, and logistical purposes and then discard it. Jevic asserts that it did not review or analyze this data for any other purpose. Jevic further contends that Movants overstate the technical and information-gathering abilities of the ECM and Qualcomm units at the time of the accident; in fact, Jevic maintains that the units did not retain the types of information that Movants allege they did in the first place.

At the outset, this Court finds that Jevic's argument that it did not despoil the ECM and Qualcomm data because it routinely discarded the data after utilizing it only for maintenance and logistical purposes is unavailing. Our Supreme Court addressed a similar issue in Mead v. Papa Razzi Restaurant (Mead I), 840 A.2d 1103 (R.I. 2004). In that case, the plaintiff sought copies of an accident report following a slip-and-fall in the defendant's restaurant. The defendant regularly generated such documents whenever an accident occurred on its premises; however, it could not produce one for the plaintiff's accident. The Court "decline[ed] to allow [the defendant] to benefit from [its] own unexplained failure to preserve and produce responsive and relevant information during discovery" because the record demonstrated that the defendant regularly produced such reports. Mead I, 840 A.2d at 1108-09. Therefore, the Court sanctioned the defendant for despoiling the report. Id. at 1009.

The record before this Court demonstrates that Jevic routinely downloaded the ECM and Qualcomm data from its trucks and utilized this data for diagnostic, maintenance, and fleet management purposes. (Adams Dep. at 32 ¶¶ 1-25; 33 ¶¶ 1-6; 47 ¶¶ 12-25; 48 ¶¶ 1-25; 49 ¶¶ 1-25; 50 ¶¶ 1-18); (Daulerio Dep. at 30 ¶¶ 1-25; 31 ¶¶ 1-20; 58 ¶¶ 6-25; 59 ¶¶ 1-13); (Karvois Dep. at 58 ¶¶ 1-25; 59 ¶¶ 1-25; 60 ¶¶ 13-24; 64 ¶¶ 15-25; 65 ¶¶ 1-22.) Jevic regularly made use of this data as part of its operations. Jevic did not download the ECM and Qualcomm data from Benfield's tractor-trailer, however. (Jevic's Ans. to First Student's Interrogs., Answer No. 18 at 11.) Therefore, this Court declines to allow Jevic to benefit from its unexplained failure to produce the data in question and finds that spoliation sanctions are appropriate in the instant matter. See Mead I, 840 A.2d at 1108-09; Kurczy, 820 A.2d at 947.

This Court finds that Movants have also satisfied the two-part "evidentiary foundation" required to establish that Jevic despoiled the ECM and Qualcomm data in this case. See Booker, 612 F.3d at 46. First, this Court has already found that Movants have shown that Jevic had notice of the likelihood of litigation in this case almost immediately following the accident. The duty to preserve evidence attached to Jevic at that time. See Tancrelle, 756 A.2d at 749. In fact, Jevic was required to suspend its routine data destruction policies and institute a "litigation hold" to gather and preserve evidence and ensure that such evidence was not discarded. See Zubulake, 229 F.R.D. at 431; In re NTL Litigation, 244 F.R.D. at 193.

Second, this Court finds that Movants have also demonstrated that Jevic had notice of the potential relevance of this data to the case. The record evinces that all of Jevic's tractor-trailers were installed with ECM and Qualcomm devices after the mid-1990s. (Adams Dep. at 33 ¶¶ 12-25; 34 ¶¶ 1-2); (Daulerio Dep. at 56 ¶¶ 10-25; 57 ¶¶ 1-24); (Karvois Dep. at 55 ¶¶ 1-21; 62 ¶¶ 5-12; 63 ¶¶ 3-6.) Benfield's tractor-trailer was equipped with these devices at the time of the accident. (Adams Dep. at 44 ¶¶ 13-19.) According to Kenneth Adams ("Adams"), Jevic's Vice President of Maintenance and Facilities in 2001, the ECM unit continuously recorded a wide range of operational data from its host truck, including engine, braking, rpm, idle time, and other mechanical and electrical data. (Adams Dep. at 44 ¶¶ 20-25; 45 ¶¶ 1-3, 14-25; 46 ¶¶ 1-25; 47 ¶¶ 1-11; 50 ¶¶ 19-25; 51 ¶¶ 1-10, 24-25; 52 ¶¶ 1-5; 56 ¶¶ 14-25; 57 ¶¶ 1-25; 58 ¶¶ 1-21; 67 ¶¶ 16-20; 69 ¶¶ 20-25; 72 ¶¶ 9-23; 75 ¶¶ 10-16.) The Qualcomm unit retained vehicle position and driver messaging data via satellite. Id. at 30 ¶¶ 5-16; 31 ¶¶ 14-19; 32 ¶¶ 1-4; (Daulerio Dep. at 30 ¶¶ 1-24); (Karvois Dep. at 58 ¶¶ 1-24; 59 ¶¶ 1-10.)

Such data constitutes important and revealing evidence in any motor vehicle accident case involving a tractor-trailer. (First Baade Aff. at 3 ¶¶ 13-14); (Second Baade Aff. at 3 ¶¶ 12-14.); see also 3 Chandler Handling Motor Vehicle Accident Cases 2d § 11A:2 at 11A-6 to 11A-7. Jevic employees regularly downloaded this data for maintenance, fleet management, and related purposes. (Adams Dep. at 32 ¶¶ 1-25; 33 ¶¶ 1-6; 47 ¶¶ 12-25; 48 ¶¶ 1-25; 49 ¶¶ 1-25; 50 ¶¶ 1-18); (Daulerio Dep. at 30 ¶¶ 1-25; 31 ¶¶ 1-20; 58 ¶¶ 6-25; 59 ¶¶ 1-13); (Karvois Dep. at 58 ¶¶ 1-25; 59 ¶¶ 1-25; 60 ¶¶ 13-24; 64 ¶¶ 15-25; 65 ¶¶ 1-22.)[8] While Jevic did not utilize ECM and Qualcomm data for accident reconstruction purposes, Jevic's employees were familiar with the nature and quality of the data that the devices retained. This Court finds that based on this evidence, Movants have shown that Jevic had notice of the potential relevance of the ECM and Qualcomm data to this case. See Nation-Wide Check Corp., Inc., 692 F.2d at 218-19. However, Jevic did not download the ECM and Qualcomm data from Benfield's tractor-trailer following the accident and allowed it to be automatically deleted. (Jevic's Ans. to First Student's Interrogs., Answer No. 18 at 11.) This Court finds that Movants have demonstrated that Jevic despoiled the ECM and Qualcomm data. See Booker, 612 F.3d at 46-47; Testa, 144 F.3d at 177-78; Mead I, 840 A.2d at 1108.[9]

[8] For example, Jevic mechanics could use ECM data to determine why a truck's engine was misfiring. (Adams Dep. at 48 ¶¶ 15-19; 50 ¶¶ 9-18.) Similarly, Jevic logistical analysts and dispatchers could use Qualcomm data to track a truck's movements and project its operating expenses. (Adams Dep. at 30 ¶¶ 10-12; 32 ¶¶ 1-4); (Daulerio Dep. at 30 ¶¶ 1-24); (Karvois Dep. at 58 ¶¶ 1-25; 59 ¶¶ 1-25; 60 ¶¶ 1-10.)

[9] Because Movants have demonstrated that Jevic had notice of the potential relevance of the ECM and Qualcomm data to this case, this Court need not address Jevic's arguments concerning the ECM's "quick stop" data and its challenges to the relevance of the actual contents of the lost data to this case. See McGarry v. Pielech, 47 A.3d 271, 283-84 (R.I. 2012) (finding that the moving party need not proffer additional evidence of the actual

C

Jevic's Claims Against First Student

1

The Investigator's Reports

Jevic claims that First Student has despoiled evidence in this case. Jevic alleges that First Student must have destroyed the reports and conclusions of the investigator it hired to investigate the accident. Jevic contends that First Student was ordered by this Court to produce these documents but has not done so. Jevic further asserts that First Student has produced only photographs taken by its investigator and has failed to proffer any reports or a privilege log referencing such reports.

First Student responds that it did not destroy any investigator's reports because those reports never existed in the first instance. First Student argues that it hired the investigator only to take photographs of the accident scene because it immediately retained counsel to investigate the circumstances of the accident. First Student maintains that it has produced all of its investigator's photographs to Jevic, and that all investigation reports that were generated by First Student's counsel are privileged. Therefore, First Student contends that it did not despoil any investigator's reports.

To prove that First Student despoiled its investigator's reports, Jevic must first demonstrate that First Student had notice of the litigation or the likelihood of litigation. Booker, 612 F.3d at 46. Jevic must then show that First Student had notice of the

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relevance of the despoiled evidence to its case in order to establish the necessary evidentiary foundation for spoliation).

potential relevance of the allegedly despoiled investigator's reports to the instant case. Id. Such notice need only constitute the aggregate knowledge of First Student's employees, executives, and agents. Testa, 144 F.3d at 177-78.

This Court finds that Jevic has demonstrated that First Student had notice of the likelihood of litigation in this case. The record reflects that Ilba, Naysha, and Cassandra suffered serious physical injuries from the accident. (R.I. State Police Report, Collision Reconstruction Unit, CA. No. 01RIX4-2275-AC at 1.) Cassandra eventually died as a result of her injuries. Id. Ilba and Naysha retained local counsel no later than September 6, 2001, only one day following the accident. (Noone Dep. Vol. II at 265 ¶¶ 8-22.) This attorney began investigating the accident on that day. Id. Furthermore, First Student retained its own local counsel to investigate the accident on September 6 as well. (Abbott Dep. at 70 ¶¶ 16-24; 71 ¶¶ 1-11.); (Castelli Dep. at 49 ¶¶ 20-24; 50 ¶¶ 1-7.) Abbott was contacted by First Student's in-house counsel regarding the accident on September 6. Id. First Student also hired a third-party investigator to photograph the accident scene almost immediately following the accident. (First Castelli Aff. at 2 ¶¶ 5-6.) First Student took these actions "in anticipation of litigation." Id. at 2 ¶ 5. Thus, this Court finds that First Student had notice of the likelihood of litigation in the instant matter. See Testa, 144 F.3d at 177-78; Jimenez-Sanchez, 483 F. Supp. 2d at 144. The duty to preserve evidence attached to First Student at that time. See Zubulake, 229 F.R.D. at 431; Tancrelle, 756 A.2d at 748-49.

This Court finds, however, that Jevic cannot show that First Student had notice of the potential relevance of the allegedly despoiled investigator's reports for two reasons. On one hand, the record is devoid of any evidence showing that First Student's third-

party investigator generated any such accident reports in the first instance. First Student hired local counsel and a third-party investigator to investigate the accident the day after the accident occurred. (Castelli Dep. at 49 ¶¶ 20-24; 50 ¶¶ 1-7); (First Castelli Aff. at 2 ¶ 5.) First Student retained these individuals so quickly because the accident involved a fatality. (Abbott Dep. at 79 ¶¶ 7-23.) The third-party investigator only took photographs of the accident scene, and First Student has produced these photographs in discovery. (First Castelli Aff. at 2 ¶ 6.) Neither Abbott nor James Castelli ("Castelli"), a local First Student vice president at the time of the accident, viewed any investigator's reports or had any knowledge that such reports existed. (Abbott Dep. at 68 ¶¶ 1-17; 69 ¶¶ 13-24; 70 ¶ 1); (Castelli Dep. at 52 ¶¶ 1-13.) This Court finds that the record does not support the conclusion that First Student's investigator generated any accident-related documents other than the already-produced accident scene photographs. Cf. Mead I, 840 A.2d at 1108 (finding that the moving party proffered sufficient evidence showing that the opposing party regularly created an official report each time an accident occurred on its premises). Therefore, this Court finds that Jevic cannot demonstrate that First Student had notice of the potential relevance of evidence that did not exist in the first instance. See Gomez v. Stop & Shop Supermarket Co., 670 F.3d 395, 399 (1st Cir. 2012) (finding that "[b]efore an inference of spoliation may be drawn . . . the party urging that spoliation has occurred must show that there is evidence that has been spoiled [because otherwise] [t]he absence of any such evidence is fatal to the [moving party's] hypothesis").[10]

[10] Jevic also obliquely argues that First Student despoiled its own internal accident reports because it has failed to produce such completed reports in discovery. Though First Student often convened group meetings and generated a series of investigation reports in response to accidents involving First Student vehicles, Castelli Dep. at 45 ¶¶ 6-19; 60 ¶¶ 1-17, the record shows that First Student did not always convene such group

On the other hand, the record indicates that the only investigation reports generated were created by First Student's local counsel as privileged work product. For example, First Student's counsel generated an accident report and shared it with First Student's insurer. (Abbott Dep. at 65 ¶¶ 4-15.) The counsel and First Student's third-party investigator also corresponded regarding the accident on more than one occasion. See Sixth Castelli Aff. at 1 ¶ 4. There is no evidence in the record showing that First Student destroyed these reports and communications; in fact, First Student listed all of this correspondence in a privilege log. See id. Our Supreme Court has held that a party withholding evidence based on a privilege has not despoiled that evidence absent proof that the asserted privilege is not valid. See McAdam v. Grzelczyk, 911 A.2d 255, 261 (R.I. 2006) (holding that a party did not despoil evidence when it redacted lines in a report based on a valid privilege). Therefore, this Court finds that Jevic has failed to satisfy the second prong of the required two-part "evidentiary foundation," and First Student did not despoil the investigator's reports. See Booker, 612 F.3d at 46-47.

2

Internal First Student Emails

Jevic also claims that First Student despoiled relevant internal emails from the time of the accident. Jevic maintains that in 2001, First Student's employees regularly

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meetings in response to accidents, nor did these groups always generate accident reports. Id. at 60 ¶¶ 12-21. Thus, it was not First Student's routine policy to generate accident reports. The record further demonstrates that First Student did not generate any such reports in the instant matter. (Castelli Dep. at 63 ¶¶ 10-24; 64 ¶¶ 1-5); (Abbott Dep. at 63 ¶¶ 4-24; 64 ¶¶ 1-24; 65 ¶¶ 1-15; 67 ¶¶ 12-24.) Therefore, this Court finds that First Student did not despoil its own internal accident reports. Cf. Mead I, 840 A.2d at 1108 (finding that spoliation had occurred where the defendant regularly prepared reports for accidents occurring on its premises but failed to produce any such reports in response to the plaintiff's discovery request); Kurczy, 820 A.2d at 947.

communicated via an internal email system that required them to save all emails to their individual computers' hard drives. Jevic further argues that Abbott utilized this email system and, as First Student's national-level safety executive, he "headed" First Student's response to the accident. Jevic asserts that Abbott saved all of his "important" email correspondence from the time of the accident only on his laptop computer's hard drive; thus, Jevic avers that all of that relevant information was irretrievably lost when Abbott's hard drive "crashed" in 2005.

First Student replies that while Abbott was in charge of First Student's overarching accident response initiative, First Student's corporate and retained counsel actually investigated the accident scene immediately following its occurrence. First Student asserts that Abbott communicated only with the counsel regarding the accident and not with any First Student employees. Therefore, First Student argues that its employees did not generate any internal emails regarding the accident in the first place.

Jevic must demonstrate that Movants had institutional notice of the likelihood of litigation and of the potential relevance of the allegedly despoiled emails to that litigation to prove that Movants despoiled the emails. Booker, 612 F.3d at 46. This Court has already found that First Student had notice of the likelihood of litigation here. See Testa, 144 F.3d at 177-78; Jimenez-Sanchez, 483 F. Supp. 2d at 144. The duty to preserve relevant evidence attached to First Student at that time. See Zubulake, 229 F.R.D. at 431; Tancrelle, 756 A.2d at 748-49. Thus, the determinative factor in this analysis is whether First Student had notice of the potential relevance of the allegedly despoiled emails to this case. See Nation-Wide Check Corp., Inc., 692 F.2d at 218-19.

The record reflects that First Student organized a national-level response to the accident almost immediately following its occurrence, bypassing local employees in favor of national management because the accident involved a fatality. (Castelli Dep. at 55 ¶¶ 14-24; 56 ¶¶ 1-20); (Abbott Dep. at 78 ¶¶ 14-23.) Abbott, in his capacity as First Student's national Vice President of Safety, "handled" First Student's national-level accident response initiative. (Castelli Dep. at 55 ¶¶ 14-24; 56 ¶¶ 1-20); (Abbott Dep. at 55 ¶¶ 17-22.) Moreover, Abbott had worked in the busing and transportation industries since 1971 and had considerable experience dealing with transportation safety issues. (Abbott Dep. at 8 ¶¶ 4-23; 18 ¶¶ 4-24; 19-24; 25 ¶¶ 1-16.) First Student's counsel conducted First Student's investigation of the accident scene as part of First Student's national-level response. Id. at 65 ¶¶ 10-11; 67 ¶¶ 20-24; 77 ¶¶ 23-24; 78 ¶¶ 2-11. Thus, while "handling" the accident response initiative, Abbott communicated only with First Student's corporate counsel regarding the accident. Id. at 70 ¶¶ 2-24; 71 ¶ 1-24; 72 ¶¶ 1-2.

The record further shows that First Student's "management" employees, including Castelli and Abbott, utilized an internal email system to communicate with each other in 2001. (Castelli Dep. at 52 ¶¶ 20-24; 53 ¶¶ 1-12; 54 ¶¶ 16-24); (Abbott Dep. at 53 ¶¶ 10-21.) Abbott "regularly" utilized this email system at the time of the accident. (Abbott Dep. at 53 ¶¶ 22-24; 54 ¶ 1.) The email system had no memory backup or other data retention protocol; thus, users had to archive emails and documents on their own computers' hard drives when they wished to save the materials. (Castelli Dep. at 53 ¶¶ 13-24; 54 ¶¶ 1-7; 58 at ¶¶ 1-17); (Abbott Dep. at 54 ¶¶ 15-24; 55 ¶¶ 1-16.) Commensurate with the email retention policy, Abbott saved all of his "important" and

"necessary" correspondence from 2001 on his laptop computer's hard drive. (Abbott Dep. at 54 ¶¶ 15-24; 55 ¶¶ 1-2.)

Although Jevic cannot prove the actual contents of these communications, the evidence adduced in the record—Abbott's experience with transportation accidents, his position at the forefront of First Student's accident response initiative, his regular correspondence with First Student's corporate counsel at that time, and the corporate counsel's responsibility for conducting First Student's accident investigation—demonstrates that the "important" emails retained by Abbott in 2001 likely included emails concerning First Student's investigation of the accident. See Beaven, 622 F.3d at 555 (finding that a party seeking spoliation sanctions "may rely on circumstantial evidence to suggest the contents of destroyed evidence"); State Farm Fire and Cas. Co. v. Broan Mfg. Co., Inc., 523 F. Supp. 2d 992, 996 (D. Ariz. 2007) (recognizing that where a party "is a sophisticated litigant," that party should be "aware of its obligations to preserve relevant evidence"). Thus, this Court is satisfied that Jevic has proffered sufficient circumstantial evidence showing that Abbott's hard drive likely contained emails relevant to the instant case. See Kronisch, 150 F.3d at 128; Ashton, 772 F. Supp. 2d at 795-805; E.I. du Pont de Nemours & Co., 803 F. Supp. 2d at 498-99; Blinzler, 81 F.3d at 1159; Testa, 144 F.3d at 219. This Court therefore finds that Jevic has shown that First Student had notice of the potential relevance of the emails to the instant litigation. See Testa, 144 F.3d at 177-78; Nation-Wide Check Corp., Inc., 692 F.2d at 218-19. Because Jevic has satisfied the necessary two-part "evidentiary foundation" and Abbott irretrievably lost all of his saved data when his hard drive "crashed" in 2005, this Court

finds that First Student despoiled the internal emails on Abbott's computer. See Booker, 612 F.3d at 46-47; Testa, 144 F.3d at 177-78; Tancrelle, 756 A.2d at 748-49.

D

Determining the Appropriate Sanctions

It is well-settled that once the moving party demonstrates that spoliation of evidence has occurred, courts have inherent authority to levy sanctions against the despoiling party to remedy the misconduct. 121 A.L.R. 5th 157 at 21; see also 27 C.J.S. Discovery § 117 at 1 ("The trial court has inherent power to impose sanctions for spoliation of evidence, and the task of determining what, if any, sanction is to be imposed is implicated by the court's broad authority"). In determining which sanction to apply in a given case, our Supreme Court recognized in Farrell v. Connetti Trailer Sales, Inc., 727 A.2d 183 (R.I. 1999) that "[o]ther courts have used five factors in determining an appropriate sanction for spoliation of relevant evidence: '(1) whether the defendant was prejudiced; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the despoiler acted in good faith or bad faith; and (5) the potential for abuse if the evidence is not excluded.'" Farrell v. Connetti Trailer Sales, Inc., 727 A.2d 183, 187 (R.I. 1999) (quoting Northern Assurance Co. v. Ware, 145 F.R.D. 281, 282-83 (D. Me. 1993)).[11] This Court therefore finds it appropriate to utilize these five factors to determine the proper sanctions to levy in the instant matter.[12]

[11] The Court further found that "[t]he trial justice in the case at bar appropriately considered these five factors" in determining the level of sanctions to apply. Farrell, 727 A.2d at 187. (Emphasis added.)

[12] These factors reflect the policies underlying the application of spoliation sanctions to a given case. It is widely acknowledged that "[sanctions] for spoliation of evidence should be designed to deter spoliation and restore the prejudiced party to the same position he or she would have been in absent the destruction of evidence by the opposing party, as well

The range of sanctions for spoliation of evidence includes "dismissal of the action [or a claim], exclusion of evidence or testimony[,] or instructing the jury on a negative inference to spoliation . . . ." Jimenez-Sanchez, 483 F. Supp. 2d at 143 (quoting Perez v. Hyundai Motor Co., 440 F. Supp. 2d 57, 62 (D.P.R. 2006)); Gagne v. D.E. Johnson, Inc., 298 F. Supp. 2d 145, 147 (D. Me. 2003). Courts may also impose monetary penalties—including costs and attorneys fees—for the destruction of evidence. See Century ML-Cable Corp. v. Carrillo, 43 F. Supp. 2d 176, 185 n.15 (D.P.R. 1998); see also E.I. du Pont de Nemours & Co., 803 F. Supp. 2d at 509-10; Doe v. Norwalk Comm. College, 248 F.R.D. 372, 381-82 (D. Conn. 2007).

Rhode Island courts most often levy the so-called adverse inference jury instruction as a sanction in spoliation cases. See Youngsaye v. Susset, 972 A.2d 146, 150 (R.I. 2009); Kurczy, 820 A.2d at 947. The adverse inference instruction permits the jury to infer "that the destroyed evidence was unfavorable to the [despoiling] party." Almonte v. Kurl, 46 A.3d 1, 22 (R.I. 2012) (citing Tancrelle, 756 A.2d at 748); see also Testa, 144 F.3d at 177 (finding that "the trier of fact may (but need not) infer from a party's obliteration of [evidence] relevant to a litigated issue that the contents of the [evidence] were unfavorable to the party").[13] Once the trial judge gives the adverse inference

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as to shift the burden of an erroneous judgment to the spoliator." 10A Federal Procedure § 26:853 at 1. Moreover, our federal courts have found that "'[t]he measure of the appropriate sanctions will depend on the severity of the prejudice suffered.'" Jimenez-Sanchez, 483 F. Supp. 2d at 143 (quoting Perez v. Hyundai Motor co., 440 F. Supp. 2d 57, 61 (D.P.R. 2006)). "Another consideration is whether the non-offending party bears any responsibility for the prejudice from which he suffers." Jimenez-Sanchez, 483 F. Supp. 2d at 143 (quoting Perez v. Hyundai Motor co., 440 F. Supp. 2d 57, 61 (D.P.R. 2006)). Id.

[13] The First Circuit Court of Appeals has explained that "[t]he adverse inference [instruction] is based on two rationales, one evidentiary and one not." Nation-Wide

instruction, "[it is] within the province of the jury . . . to determine what inference [is] to be drawn from" evidence of spoliation. Mead v. Papa Razzi (Mead II), 899 A.2d 437, 444-45 (R.I. 2006); see Tancrelle, 756 A.2d at 749 (quoting New Hampshire Ins. Co. v. Rouselle, 732 A.2d 111, 114 (R.I. 1999) and determining that "'the doctrine of spoliation merely permits an inference that the destroyed evidence would have been unfavorable to the despoiler,' and is by no means conclusive"). (Emphasis added.)

1

Sanctions for Jevic

Movants seek the full range of spoliation sanctions against Jevic. They ask this Court to dismiss Jevic's cross-claims for contribution and enter judgment in favor of their claims for contribution from Jevic. In the alternative, Movants seek to have this Court

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Check Corp., Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214, 218 (1st Cir. 1982). The evidentiary rationale

> "is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document."

Id. Similarly, the other rationale

> "has to do with [the instruction's] prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. The inference also serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk."

Id. This reasoning comports with our Supreme Court's holding that "[u]nderlying the spoliation doctrine is our policy-based resolve to 'decline to allow defendants to benefit from their own unexplained failure to preserve and produce responsive and relevant information during discovery.'" Almonte, 46 A.3d at 22 (quoting Mead I, 840 A.2d at 1108).

exclude Jevic's accident reconstruction expert from offering any testimony or other evidence at trial. At the very least, Movants request that this Court give an adverse inference instruction to the jury and award them costs and attorneys' fees for the time and resources spent in identifying and responding to Jevic's spoliation of evidence.

This Court finds that heavy sanctions are appropriate against Jevic based on application of the five Farrell factors. This Court finds that Movants are severely prejudiced by Jevic's despoiling of its internal emails, bankruptcy documents, and the ECM and Qualcomm data. A central dispute in this case revolves around the placement and orientation of Benfield's tractor-trailer in the I-95 breakdown lane and Benfield's conduct immediately before and after the accident occurred. Without access to the emails, bankruptcy documents, and the electronic data from Benfield's tractor-trailer, Movants have little evidence with which to effectively respond to Jevic's proffered evidence or prove some of their claims. Therefore, this Court finds that Movants are severely prejudiced by Jevic's spoliation. See Flury v. Daimler Chrysler Corp., 427 F.3d 939, 945-46 (11th Cir. 2005) (finding that the moving party was "severely prejudiced" by the spoliation of valuable and important evidence); Northern Assurance Co. v. Ware, 145 F.R.D. 281, 283 (D. Me. 1993) (holding that the defendants were "severely prejudiced" by the plaintiff's spoliation of evidence from the scene of a fire because the destruction of evidence precluded the defendants from responding to the plaintiff's claims).

This Court finds that such prejudice cannot readily be cured in this case. Jevic's internal emails and the ECM and Qualcomm data are irretrievably deleted, and no backup tapes exist. Jevic cannot produce or even locate the missing bankruptcy documents. Moreover, there is no evidence in the record demonstrating that Movants can obtain the

missing evidence from any other source. Thus, this Court finds that Movants' prejudice cannot be readily cured. See Ware, 145 F.R.D. at 283; cf. Pitney Bowes Gov't Solutions, Inc. v. U.S., 94 Fed. Cir. 1, 9 (2010) (holding that spoliation sanctions are inappropriate where the aggrieved party can acquire the missing evidence from another source).

This Court finds that the despoiled evidence had great importance to this litigation. The lost emails and bankruptcy documents could have provided Movants with insight into the course of Jevic's investigation of the accident and may have helped resolve issues of liability and compensation. See In re NTL, Inc., 244 F.R.D. at 198-99; Zubulake, 229 F.R.D. at 436. Perhaps most important was the ECM and Qualcomm data from Benfield's tractor-trailer. As this Court has already determined, it is well-settled that electronic data from commercial vehicles involved in motor vehicle accidents is "extremely useful in reconstructing the sequence of events immediately prior to and shortly after an accident involving a heavy truck." 3 Chandler 2d § 11A:2 at 11A-6 to 11A-7. In particular, such data "can be analyzed by a qualified expert to form the basis of his/her opinions concerning the cause of and/or fault for the accident." Id. at § 13:3 at 13-5 to 13-6. Therefore, this Court finds that the importance of the despoiled evidence is significant. See Ware, 145 F.R.D. at 283.

This Court finds that Jevic acted in bad faith in despoiling the lost evidence. In determining whether the despoiling party acted in bad faith, "[t]he court should weigh the degree of the spoliator's culpability against the prejudice to the opposing party." Flury, 427 F.3d at 945. Concerning Jevic's culpability, this Court finds that, at the least, Jevic was negligent in deleting the emails and the ECM and Qualcomm data and failing to locate documents it was ordered by a court to retain. See Pension Comm. of Univ. of

Montreal, 685 F. Supp. 2d at 464 (finding that the "failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent . . ."). (Emphasis added.) This Court further finds, based on Jevic's experience in accident litigation, the importance of the lost evidence, and the totality of Jevic's conduct, that Jevic's destruction of relevant evidence in this case rises to the level of willfulness. See id. at 464-65 (recognizing that "depending on the extent of the failure to collect evidence . . . the resulting loss or destruction of evidence is surely negligent, and, depending on the circumstances, may be grossly negligent or willful"). Moreover, this Court has already found that Movants have been severely prejudiced by Jevic's despoiling of evidence. See Flury, 427 F.3d at 945-46; Ware, 145 F.R.D. at 283. Weighing these factors against each other, this Court finds that Jevic acted in bad faith when despoiling evidence. See Flury, 427 F.3d at 944-47 (holding that alleged spoliator acted in bad faith based on the totality of the circumstances).

This Court finds that the potential for abuse if the prejudice is not cured is significant. Without the lost evidence, Movants will have a difficult time rebutting Jevic's interpretation of the circumstances of the accident. "A fair trial requires that both parties be heard and that both parties be permitted wherever possible to marshal and present evidence relevant to their positions . . . . [However,] the truth-seeking process [is] irreparably subverted, denying opposing parties a full and fair hearing" when spoliation occurs. Id. at 284. Therefore, this Court finds that without sanctions to remedy Jevic's misconduct, the potential for abuse of the judicial process is significant. See id.; see also Flury, 427 F.3d at 946-47.

Accordingly, this Court bars Jevic from presenting any testimony or other evidence from any accident reconstruction expert at trial. See Unigard Security Ins. Co. v. Lakewood Engineering & Manufacturing Corp., 982 F.2d 363, 368-69 (9th Cir. 1992) (holding that exclusion of expert testimony was warranted because "allowing Unigard to introduce the testimony of its experts would unfairly prejudice Lakewood and thus preclude the court's ability to conduct a fair trial"); Kraft Reinsurance Ireland, Ltd. v. Pallets Acquisitions, LLC, 843 F. Supp. 2d 1318, 1328 (N.D. Ga. 2011) (finding similarly that "excluding [expert] testimony is the most appropriate sanction here and will more effectively cure the substantial prejudice that Defendant would otherwise incur in attempting to present its position"). This Court also finds it appropriate to issue the adverse inference jury instruction to remedy Jevic's misconduct. See Almonte, 46 A.3d at 22; Youngsaye, 972 A.2d at 150; Tancrelle, 756 A.2d at 748-51. Costs and attorneys' fees are issues which will be addressed, and assessed, post-trial.

2

Sanctions for First Student

Jevic asks this Court to levy the full range of spoliation sanctions against First Student. First, Jevic seeks to have First Student's contribution claim dismissed and judgment entered in favor of its own cross-claim for contribution from First Student. Alternatively, Jevic asks this Court to preclude First Student from proffering expert testimony regarding the cause of the accident at trial. Jevic further requests that this Court give the adverse inference jury instruction to remedy First Student's misconduct.

This Court finds that the totality of the Farrell factors warrants issuing the adverse inference instruction against First Student in this case. First, this Court finds that Jevic

has suffered some prejudice from First Student's loss of Abbott's emails. Abbott was a "key player" in First Student's accident response because he was First Student's leading national-level executive "handling" the response. (Castelli Dep. at 56 ¶¶ 2-8.) The record demonstrates that Abbott's computer likely contained emails relevant to this case. While it is unlikely that the missing emails, standing alone, would resolve the disputed circumstances of the accident, Jevic is denied a clear picture of First Student's investigation strategy without them. See In re NTL, Inc., 244 F.R.D. at 198-99; Zubulake, 229 F.R.D. at 436. Thus, this Court finds that Jevic has suffered some prejudice here. See Driggin v. American Sec. Alarm Co., 141 F. Supp. 2d 113, 121 (D. Me. 2000) (finding that the moving party suffered only "some prejudice" from the spoliation of evidence when the existence of other competent evidence mitigated the harm); Mayes v. Black & Decker (U.S.), Inc., 931 F. Supp. 80, 84 (D.N.H. 1996) (holding that the moving party was "prejudiced to a certain degree" by the spoliation of evidence concerning possible causes of a fire because other competent evidence existed supporting the moving party's claims).

This Court finds that Jevic's prejudice cannot readily be cured because the missing emails were irretrievably lost when Abbott's computer "crashed" and no other source for the emails exists. See Ware, 145 F.R.D. at 283; cf. Pitney Bowes, 94 Fed. Cir. at 9. This Court finds that the missing emails have little practical importance here. Jevic has proffered competent evidence supporting its claim that Benfield's tractor-trailer was parked completely within the I-95 breakdown lane and Ilba drove off the road into the tractor-trailer. Even assuming that the emails on Abbott's computer also corroborated Jevic's interpretation of the circumstances of the accident, such evidence would be

merely cumulative of that which Jevic already has. This Court therefore finds that Abbott's lost emails are not significant in the grand scheme of things. See Managed Care Solutions, Inc., 736 F. Supp. 2d at 1327-28 (holding that despoiled evidence "is not crucial to the plaintiff's claims because . . . [the missing evidence] would be cumulative in establishing the plaintiff's claim that the defendant breached [the contract]").

When determining whether the despoiling party acted in bad faith in destroying relevant evidence, the court must weigh the spoliator's culpability against the prejudice suffered by the opposing party. Flury, 427 F.3d at 945. This Court finds that First Student acted negligently in allowing internal emails to be lost when Abbott's computer "crashed." First Student has much accident litigation experience and is responsible for the loss of the emails. There is no evidence in the record, however, showing that First Student acted willfully in destroying the evidence; it merely failed to preserve all of its internal emails from the time of the accident. See Treppel v. Biovail, 249 F.R.D. 111, 121 (S.D.N.Y. 2008) (finding that the failure to take all appropriate measures to preserve electronic evidence falls within the negligence category). Moreover, this Court has already found that the prejudice suffered by Jevic is not substantial. See Driggin, 141 F. Supp. 2d at 121; Mayes, 931 F. Supp. at 84. Weighing these factors against each other, this Court finds that First Student did not act in bad faith in despoiling the internal emails on Abbott's computer. See Managed Care Solutions, Inc., 736 F. Supp. 2d at 1328; cf. Flury, 427 F.3d at 944-47.

This Court finds that the potential for abuse if the prejudice is not cured is not significant. Jevic has other competent sources of proof supporting its interpretation of the circumstances of the accident and is able to rebut First Student's version of events. See

Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, 1377 (N.D. Ga. 2008) (recognizing that "the analysis under this fifth spoliation factor is focused on whether the non-spoliating party, despite its ability to present evidence in support of its claims, has had a full opportunity to discover the most relevant and most reliable evidence"). As such, this Court finds that the loss of the emails on Abbott's computer will not seriously hamper the fairness of a trial or undermine the effective administration of justice between the parties here. See Iowa Ham Canning, Inc. v. Handtmann, Inc., 870 F. Supp. 238, 245 (N.D. Ill.1994) (finding that the potential for abuse if the prejudice from spoliation of evidence was not cured was not significant because the moving party could obtain the lost evidence from other competent sources); see also Bagnell v. Ford Motor Co., 678 S.E.2d 489, 495 (Ga. App. 2009).

Based on the totality of the circumstances, this Court finds that issuing the adverse inference jury instruction at trial is the most appropriate sanction to remedy First Student's conduct here. See Vazquez-Corales v. Sea-Land Service, Inc., 172 F.R.D. 10, 14 (D.P.R. 1997) (collecting cases and finding that issuing the adverse inference jury instruction was the most appropriate sanction when "the prejudice [suffered by the opposing party] did not rise to a level that would warrant dismissal of the case or exclusion of the plaintiffs' expert testimony as to the cause"). Moreover, stronger sanctions are inappropriate because there is no evidence in the record demonstrating that First Student acted in bad faith in destroying the emails. See Farrell, 727 A.2d at 187. Therefore, this Court will issue an adverse inference jury instruction against First Student at trial. See Almonte, 46 A.3d at 22; Youngsaye, 972 A.2d at 150; Tancrelle, 756 A.2d at 748-51.

IV

Conclusion

For the foregoing reasons, this Court finds that both Jevic and First Student have despoiled relevant evidence in the instant matter. Movants have amply demonstrated that Jevic despoiled internal emails, bankruptcy documents, and electronic data from the tractor-trailer involved in the accident. The lost evidence was greatly important to this case, and correspondingly Movants were severely prejudiced by its destruction. This Court therefore finds it appropriate to levy heavy sanctions against Jevic, excluding it from presenting any testimony or other evidence from any accident reconstruction expert at trial and issuing an adverse inference instruction to the jury. Costs and attorneys' fees will be addressed, and assessed, post-trial.

Jevic has shown that First Student despoiled internal emails when Abbott allowed his laptop computer to "crash" without saving his documents in some external backup storage device. While the prejudice suffered by Jevic due to the loss of this data is not as great as that suffered by Movants, it is nonetheless enough to justify sanctions. This Court therefore finds it appropriate to issue the adverse inference jury instruction against First Student. Accordingly, Movants' Motions are granted in part and denied in part, and Jevic's Motion is granted in part and denied in part.

Counsel shall submit the appropriate Order for entry.