UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ASHLEY DIAMOND,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.
v.	:	5:20-cv-00453-MTT
	:	
TIMOTHY WARD, *et al.*,	:	
	:	
Defendants.	:	

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SPOLIATION SANCTIONS

Defendants Sharon Lewis, Ahmed Holt, Robert Toole, Brooks Benton, Grace Atchison, and Lachesha Smith, through counsel, respectfully submit this response in opposition to Plaintiff's motion for spoliation sanctions (Doc. 165).[1]

A. Plaintiff Seeks Relief in Equity But Comes with Unclean Hands

As an initial matter, Plaintiff comes to the Court with unclean hands. As has been previewed and as will be shown at trial, Plaintiff instructed a friend, Jamie Blake Duckworth, to erase her Google account including emails in the event that her contraband cell phone was discovered, and just two days after that instruction was made public in a hearing before this Court, Mr. Duckworth destroyed the emails.[2] There is some confusion

[1] Plaintiff's motion is nominally filed only against Defendants Benton, Holt, and Toole. The relief that she seeks would affect all of the Defendants in a trial.

[2] Reference is made to the March 23, 2022 hearing transcript (Doc. 145), the text message from Plaintiff's contraband cell phone to the phone associated with Mr. Duckworth that was referenced in the hearing (Exhibit A hereto), and the letter communication from counsel for Plaintiff to the Court dated June 21, 2022 (Exhibit B hereto). Plaintiff's counsel confirmed in a telephone call with undersigned counsel that Mr. Duckworth is the "third party" referenced in the letter. As explained at the March 23 hearing, early in discovery Plaintiff's lawyers insisted on an ESI agreement that

in the case law as to whether the Court's inherent authority, meaning its equitable power, or instead Rule 37(e) as amended in 2015, governs spoliation sanctions for electronically stored information. *See ML Healthcare Servs. LLC v. Publix Super Mkts., Inc.*, 881 F.3d 1293, 1307-1308 (11th Cir. 2018). To the extent that it is the Court's inherent authority that is invoked, then Plaintiff's demonstrably unclean hands should foreclose the relief that she seeks. *See Stanfill v. Talton*, 851 F.Supp.2d 1346, 1361-1362 (M.D. Ga. 2012) (Treadwell, J.) (addressing spoliation sanctions as within the Federal courts' "inherent power to manage their own affairs"); *and see Thomas v. Schwab*, 2012 U.S. Dist. LEXIS 177080, *4 (E.D. Mich. Dec. 14, 2012) ("Courts have refused to invoke their inherent authority to impose sanctions where the party requesting sanctions has unclean hands."); *accord Bursztein v. Best Buy Stores, L.P.*, 2021 U.S. Dist. LEXIS 92978, *15-16 (S.D.N.Y. May 17, 2021); *South Shore Ranches, LLC v. Lakelands Co., LLC*, 2010 U.S. Dist. LEXIS 70147, *11 and n. 2 (E.D. Cal. June 18, 2010).

---

contained no provision for the collection and preservation of her ESI, and they rebuffed Defendants' request for assistance identifying the ESI. Twice in the March 23 hearing undersigned counsel expressed concern about an impending destruction of evidence, *see* Doc. 145 at 16, 30, and the Court instructed: "Ms. Diamond and her attorneys need to preserve any electronic evidence such as this." *Id.* at 54. Just two days before the hearing, on March 21, 2022, Plaintiff's counsel had represented that "our review for, and production of 'email, social media, and/or text, chat, or other communications sources identified as being used by [our] client' is, and has been, complete. There are no further non-privileged responsive documents." *See* March 28, 2022 email from B. Littrell to R. Chalmers. Apparently, notwithstanding that representation, not one of Plaintiff's many lawyers in the case had inquired if Plaintiff had a Google account or email. After the hearing, on March 28, 2022, undersigned counsel wrote to Plaintiff's counsel by email asking, "Would you please confirm that you are beginning steps to identify and preserve the communications discussed in Court last week." We now know that preservation did not occur and instead somehow Mr. Duckworth was able to permanently destroy all of Plaintiff's emails "prior to March 25, 2022," again a date just two days after the hearing.

B. Plaintiff Has Not Proved Spoliation of Relevant Evidence, By A Party, In Bad Faith or with Intent

Plaintiff has not proved spoliation of relevant evidence by a party, and has not demonstrated under either of the two potentially applicable standards that spoliation sanctions are warranted here.

Defendants acknowledge at the outset of this argument the Court's prior expressed concern regarding the state of the surveillance video record in this case. Defendants, and the Georgia Department of Corrections, take the obligation to preserve evidence seriously and by the arguments advanced herein do not mean to diminish that obligation. Defendants ask the Court in its analysis to consider that, at bottom, Plaintiff and her lawyers here are attacking the implementation of the Prison Rape Elimination Act or PREA investigative process, the very process in which Plaintiff refused to participate – *i.e.*, she refused to discuss her July, September, and October 2020 complaints with PREA investigators – and she did so at the instruction of her lawyers. The Court has said, in the spoliation context, that "relative culpability of the parties is important." *Stanfill*, 851 F.Supp.2d at 1363; *see also Little v. McClure*, 2014 U.S. Dist. LEXIS 104423, *9 (M.D. Ga. July 31, 2014) (Treadwell, J.). Although the pertinent PREA documentation is difficult to locate among the volume of Plaintiff's submissions on this motion, the documentation shows that Defendant Benton and the persons at Coastal State Prison (CSP) who were charged with conducting PREA investigations made repeated efforts to collect information pertaining to Plaintiff's complaints. These efforts bely the contention that bad faith or intentional loss or destruction of evidence is at play. And, by her refusals to participate in the process, Plaintiff is partly responsible for the state of the PREA investigative record.

The motion is premised on an assertion that Defendants Benton, Holt, and Toole "intentionally failed to preserve a single frame of video recordings," or, alternatively, "deleted the recordings or allowed them to be deleted in the normal course." Plaintiff argues bad faith or intentional loss or destruction of video evidence but offers no direct evidence to support the position.

By "video recordings" the motion refers to surveillance cameras that were placed in the N building at CSP and the footage that would be captured by such cameras. In written discovery responses, Defendant Benton stated that "[c]amera footage is not backed up and stored and instead is retained for 30 days and then overwritten."[3] That is standard Georgia Department of Corrections practice and it is based on the practicality that all video cannot be retained. Also in written discovery responses, Defendants Benton and Atchison each explained the following process that applies to collecting video footage in the course of a PREA investigation:

> When a PREA complaint is made, part of the documentation that is created at the facility is an incident report. GDC incident reports include as an attachment video recordings **when an incident is captured on video**. The SART investigator, the Warden, and the OPS investigator are the persons who would have access to security camera recordings, and it is my understanding that when a report is made the SART investigator, the Warden, or a designee of one of them checks for any video of the incident if the incident occurred in an area where security cameras might have captured the incident. **If video footage of the incident is found, then that footage will be copied and saved and made a part of the incident report.** The incident report contains a box that is to be checked to indicate that video exists, and left unchecked if no video exists. For incidents involving Plaintiff, any video recording

[3] Amendment to Objections and Responses to Plaintiff's Second Set of Interrogatories to Brooks Benton, Benjamin Ford, Ahmed Holt, and Robert Toole, dated and served October 19, 2021. The written discovery responses referenced herein contain highly confidential information subject to the protective order. Defendants will file the material redacted or under seal if requested by the Court or Plaintiff.

> of a reported incident of assault would have been collected in this manner.

There is no evidence that this investigative process was not followed. And there is no evidence that, for any alleged assault or PREA complaint, the "incident [was] captured on video" or "video footage of the incident [was] found." So when Plaintiff asserts that Defendants Benton, Holt, and Toole caused the loss or destruction of video evidence, in fact what is meant by the assertion – and in fact what occurred – is simply that, when a PREA complaint was made and the PREA or SART investigator looked into the matter, the investigator did not download and save the surveillance video for the time period covered by the complaint. Then, after 30 days, the normal overwriting process would have occurred, such that the surveillance video could not thereafter be recovered.

There is no evidence that Defendants Benton, Holt, or Toole instructed CSP personnel not to conduct PREA investigations, or not to review surveillance video for footage of alleged incidents, or not to follow the investigative practice for collecting video evidence that is described above. At risk of repetition, there is no evidence that investigators at CSP did not follow the investigative practice described above, and no evidence that Defendants Benton, Holt, or Toole had any reason to believe that the investigative practice was not being followed. Finally, there also is no evidence that Defendants Benton, Holt, or Toole knew of the existence of surveillance video footage of a reported incident and with such knowledge failed to collect the video footage, either because it was unfavorable to Defendants' contentions in this case or for any other reason.

As this Court has observed, "[s]poliation is the 'destruction or significant alteration of evidence, or the failure to preserve property for another's use in pending or

reasonably foreseeable litigation.'" *Stanfill*, 851 F. Supp.2d at 1361 (quoting *Graff v. Baja Marine Corp.*, 310 Fed. Appx. 298, 301 (11th Cir. 2009)). The party seeking sanctions has the burden of proof. *See id.* The movant "must prove that the missing evidence existed at one time; that the alleged spoliator had a duty to preserve the evidence; and that the evidence was crucial to his case." *Id.* (citing *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 770 F. Supp. 2d 1299, 1305 (N.D. Ga. 2011)). Then, if spoliation is found, the Court decides whether sanctions are warranted, taking into considering the following factors: "(1) whether the movant was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the alleged spoliator acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence is not excluded." *Id.* (citing *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005)).

With respect to the duty to preserve, this Court has recognized that it extends to relevant evidence. *See Allen v. Sanchez*, 2019 U.S. Dist. LEXIS 115198, *9 (M.D. Ga. July 11, 2019) (Treadwell, J.). But here there is no indication that Defendants Benton, Holt, or Toole, or any person under their control, identified or knew of video footage of an incident and failed to preserve that footage. There is instead a contention that all video footage surrounding the time of an alleged assault or PREA incident should have been downloaded and saved in the PREA investigative process. However desirable that level of preservation may be when viewed in the context of a single case such as this one, it is not practical or workable for the Georgia Department of Corrections which houses upwards of 50,000 offenders. Plaintiff is one of any number of offenders across the department who, on any given day, might submit a complaint or a PREA allegation

requiring review of surveillance video footage. (There are, of course, also any number of other events or incidents that may occur at a facility on any given day that require prison officials to review surveillance video.) Investigators on the ground are tasked with looking into the allegations (a substantial number of which can be and are without merit), including by reviewing available surveillance video, and making real time assessments as to whether the incident is captured on video. If the assessment is that the incident is captured on video, the video is preserved; otherwise, it is not. Here, there simply is no evidence that a party knew of relevant evidence – an investigator's identification of video footage of an alleged assault or PREA incident – and failed to preserve that evidence. In short, there is no showing of a duty to preserve and violation of the duty.

With respect to whether Plaintiff was prejudiced and the practical importance of the evidence, two considerations come into play. *First*, Plaintiff is not prohibited from making out a *prima facie* case. She has her own testimony, and she has suggested also the testimony of others, on the alleged assaults. *Second*, Plaintiff does not contend that an assault is captured on video. Rather, she contends that the video might have confirmed that an inmate entered her cell, or that she entered another inmate's cell, and that information would partly corroborate her claim of an assault occurring inside the cell which would not have been captured on the video. The alleged video evidence is of limited practical importance because it would not have showed an assault. Stated otherwise, the evidence is not crucial to Plaintiff's case.

With respect to the required showing of bad faith, this Court in *Stanfill* said that "simple negligence is not enough but actual malice is not required." 851 F. Supp.2d at 1362. In a later case, *Little*, the Court cited to a Georgia case noting a material difference

between an unintended dissipation of evidence by a person with no interest in the matter (not bad faith), on the one hand, and a party with knowledge of litigation tactics acting to deprive an opponent of evidence for the case (bad faith), on the other hand. 2014 U.S. Dist. LEXIS 104423 at **6-7. More recently, the Eleventh Circuit has made clear that bad faith means substantially more than negligence. In *Tesoriero v. Carnival Corp.*, 965 F.3d 1170 (11th Cir. 2020), the Court said that "bad faith in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence." *Id.* at 1184. Negligence is not sufficient because it "does not sustain an inference of consciousness of a weak case." *Id.* (citing *Vick v. Tex. Emp't. Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975)).

Plaintiff has not shown bad faith under any of the above formulations. There is no evidence that a party with knowledge of litigation tactics acted to deprive Plaintiff of evidence for use in this case. There is no evidence of a party engaging in destruction for the purpose of hiding adverse evidence. And there is no evidence or even an indication that Defendants Benton, Holt, or Toole believed that they have a weak case (they do not – they worked to protect Plaintiff in her period of incarceration and will show at trial that they were successful in that regard) and so lost or destroyed evidence for that purpose.

Plaintiff has suggested, by reference to surveillance video pulled when a correctional officer reported that Plaintiff had sex with another inmate, that bad faith can be inferred because Defendants seemingly pulled video only when beneficial to them. Plaintiff's telling of events is selective. The October 2020 video of Plaintiff and inmate John Doe is not the only video that has been produced in this case. Moreover, it simply is not the case that greater retention of video would not have been helpful to Defendants. As will be shown at trial, Plaintiff's intercepted cell phone communications reveal that she

was comfortable moving about the N building throughout her time at CSP, among other reasons to buy drugs from other inmates for her own personal consumption which she paid for with monies donated to her GoFundMe fundraising platform, and further that she interacted in numerous ways with others in the dormitory which demonstrated that she did not fear for her safety. Retention of all of the surveillance video would have been helpful to Defendants in making this point at trial.

Defendants note that, in *ML Healthcare Servs. LLC*, the Eleventh Circuit said that it had not yet decided whether the multi-factor *Flury* test discussed above, or instead Rule 37(e), is applicable when a party seeks spoliation sanctions concerning electronically stored information. 881 F.3d at 1308. Rule 37(e) provides:

> (e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e)(1) and (2). Subsection (e)(1) requires a finding of prejudice but not intent, and in the event of such a finding then the Court should order measures no greater

than it imposed in *Allen*. 2019 U.S. Dist. LEXIS 115198, *10 (allowing issue to be presented to the jury, with instruction that if it finds bad faith then the absence of evidence could give rise to a rebuttal presumption that the evidence was harmful).[4] Subsection (e)(2) requires a finding that the non-movant acted with intent to deprive the other of use of the evidence in litigation, and only with such a finding of intent could the sanctions listed there be issued. For the reasons stated above, Plaintiff has not proved prejudice from loss or destruction of relevant ESI by a party or that Defendants Benton, Holt, or Toole acted with intent to deprive her of evidence in this litigation.

C. Objection to Form of Evidence

Plaintiff's motion relies in part on a declaration of one of her lawyers which purports to authenticate evidence. Doc. 166. Counsel of record in a case is not a proper witness, and the purported authentication is improper. *See* Fed. R. Evid. 901(a), (b). Production of documents in discovery also is not tantamount to authentication. *See id*. That Plaintiff's motion relies on evidentiary material that is not properly before the Court is further reason why the issues addressed herein should be presented to the fact finder.

For all of the reasons stated herein, Defendants respectfully ask that Plaintiff's motion for spoliation sanctions (Doc. 165) be denied.

[SIGNATURE ON NEXT PAGE]

[4] The same trial procedure would apply for Plaintiff's destruction of email evidence.

Respectfully submitted,

Christopher M. Carr 112505
Attorney General

Loretta L. Pinkston-Pope 580385
Deputy Attorney General

s/ Roger A. Chalmers
Roger A. Chalmers 118720
Senior Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO
Roger A. Chalmers
State Law Department
40 Capitol Square SW
Atlanta, GA 30334
Tel: (404) 458-3220
Fax: (404) 651-5304
Email: rchalmers@law.ga.gov

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing pleading with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Emma Lee Douglas
Andrea Chinyere Ezie
Bruce Warfield Hamilton
Elizabeth Littrell
Scott D. McCoy
Caitlin Joy Sandley

This 18th day of November, 2022.

s/ Roger A. Chalmers
Roger A. Chalmers

(owner)
To: [redacted]

I got to send an email to c h i n y e r e..she needs to have a complete detailed understanding of what course of action is next before she even gets on the phone with me this week

Participant	Delivered	Read	Played
[redacted]			

Status: Sent
Delivered: 8/2/2021 02:56:59(UTC+0)

8/2/2021 02:56:59(UTC+0)

Source Info:
Universal_Android Access.zip/data/data/com.google.android.apps.messaging/databases/bugle_db : 0x4092BD (Table: messages, parts: Size: 14979072 bytes)
Universal_Android Access.zip/data/data/com.google.android.apps.messaging/databases/bugle_db-wal : 0x285AE (Table: participants; Size: 524288 bytes)

(owner)
T[redacted]

And if you don't mind tomorrow I'm going to send you all the information on this phone I would love to keep this phone number but if that is not possible we will have to figure it out but you need to be able to shut down my Google account that is connected with this phone so that all of the sensitive information cannot be collected and I think that if you can just erase the Google account or anyway somehow it can be done I'm going to have to do my homework on it but I think that it's about time I think I'm going to sell this phone to Ivan tomorrow for about $700 just to get rid of it and so I have money and it's not a total loss and I guess I'll just try to put some money on the blue phone and hope that I don't go to the hole or anywhere crazy and that I can use it

Participant	Delivered	Read	Played
[redacted]			

Status: Sent
Delivered: 8/2/2021 02:59:07(UTC+0)

8/2/2021 02:59:08(UTC+0)

Source Info:
Universal_Android Access.zip/data/data/com.google.android.apps.messaging/databases/bugle_db : 0x409252 (Table: messages, parts; Size: 14979072 bytes)
Universal_Android Access.zip/data/data/com.google.android.apps.messaging/databases/bugle_db-wal : 0x285AE (Table: participants; Size: 524288 bytes)

[redacted]

We've got to come up with a direct plan there's no room for anything else to fail

Participant	Delivered	Read	Played
[redacted]			

Status: Sent
Delivered: 8/2/2021 02:59:22(UTC+0)

8/2/2021 02:59:22(UTC+0)

Source Info:
Universal_Android Access.zip/data/data/com.google.android.apps.messaging/databases/bugle_db : 0x4091EA (Table: messages, parts; Size: 14979072 bytes)
Universal_Android Access.zip/data/data/com.google.android.apps.messaging/databases/bugle_db-wal : 0x285AE (Table: participants; Size: 524288 bytes)

Roger Chalmers

From: Scott McCoy <Scott.McCoy@splcenter.org>
Sent: Tuesday, June 21, 2022 5:00 PM
To: Kim Tavalero
Cc: Chinyere Ezie; Beth Littrell; Roger Chalmers
Subject: Diamond v. Ward, et al., No. 5:20-cv-00453-MTT
Attachments: 20220621 Letter to Judge Treadwell.pdf

Good afternoon Kim,

Would you please provide the attached correspondence to Judge Treadwell?

Thank you.

Scott

Scott D. McCoy he/him/his
Interim Deputy Legal Director LGBTQ Rights & Special Litigation | Legal
Southern Poverty Law Center & SPLC Action Fund
T 850.521.3042 C 334.224.4309
scott.mccoy@splcenter.org | www.splcenter.org
Admitted in Florida, New York and Utah
Facebook | Twitter | Instagram | YouTube | Donate

SPLC Southern Poverty Law Center

Working for Racial Justice in the South

Southern Poverty Law Center
2 S. Biscayne Boulevard
Suite 3750
Miami, FL 33131
786.347.2056
Toll Free 877.751.6183
www.splcenter.org

June 21, 2022

VIA EMAIL

Honorable Marc T. Treadwell
Chief Judge, United States District Court
Middle District of Georgia
475 Mulberry St.
Macon, GA 31202
Email c/o: Kim_Tavalero@gamd.uscourts.gov

Re: *Diamond v. Ward, et al.*, 5:20-cv-00453-MTT

Dear Judge Treadwell:

At a status conference held March 23, 2022 ("the Status Conference'), Plaintiff's counsel learned from Defendant's counsel that Georgia Department of Corrections ("GDC") claimed to have extracted data from two devices allegedly found in Ms. Diamond's cell indicating that she may have had access to certain social media and email accounts since 2019 ("the Accounts"). Defendant's counsel produced documents to the Court and counsel at the Status Conference listing the Accounts as: two email accounts, ("the Gmail Accounts'), one Instagram account, three Facebook accounts, and one Facebook messenger account.[1] Following the Status Conference, Plaintiff's counsel has attempted to preserve data in the Accounts pursuant to the Court's directives regarding preservation obligations. This letter is intended to update the Court as to these preservation efforts.

Immediately following the Status Conference, Plaintiff's counsel began contacting third parties whom they believed might have access to any of the Accounts to inform them of the Court's preservation order and to instruct them not to delete any information in any such account should they have access and ability to do so. Plaintiff's counsel also attempted to gain access to each of the Accounts but encountered challenges accessing some of the Accounts because they were not in Plaintiff's present control.

Plaintiff's counsel was unable to gain access to any private messages, if they exist, in the Instagram Account or to one of the Gmail Accounts ("1017diamondproductions") but was ultimately able to gain access to the other Gmail Account ("houstonwhitney10"). However, while attempting to review and preserve data from houstonwhitney10, counsel

[1] Two of the three Facebook accounts, and the Facebook messenger account, were associated with other incarcerated people.

determined there were no emails prior to March 25, 2022. Upon further inquiry, Plaintiff's counsel learned that data in the houstonwhitney10 account had been deleted by a third party without the knowledge or input of Plaintiff.

Thereafter, Plaintiff's counsel took steps to attempt to recover the contents of the houstonwhitney10 account, including by consulting with internal IT staff and outside forensic experts, but to date these attempts have been unsuccessful. Plaintiff's counsel also took steps to determine whether some or all of the data from the houstonwhitney10 account was preserved elsewhere—for instance, investigating whether it had been downloaded to a device or otherwise backed up electronically. However, Plaintiff's counsel has determined that no backup copies of the contents of the houstonwhitney10 account exist and has exhausted all available avenues for recovering information related to this account.

In the Accounts to which Plaintiff's counsel successfully gained access, any potentially responsive data, to the extent it exists, was preserved. Plaintiff's counsel has no information indicating that any of the information deleted from the houstonwhitney10 account relates to, or otherwise concerns, the facts of this case or the parties' claims and defenses, such that they would have been responsive to discovery. In addition, neither Plaintiff nor Plaintiff's counsel had any role in the deletion of the data from the houstonwhitney10 account. However, now that Plaintiff counsel's preservation efforts with respect to this account have proven unsuccessful, we thought it prudent to update the Court.

Respectfully,

Scott D. McCoy

Scott D. McCoy
Counsel for Plaintiff

cc: All Counsel of Record (via electronic mail)