

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION**

ASHLEY DIAMOND,

Plaintiff,

v.

TIMOTHY WARD, *et al.*,

Defendants.

No. 5:20-cv-00453-MTT

**NOTICE OF FILING JURY INSTRUCTION ON ISSUE OF INVOCATION OF FIFTH
AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AND
REVISED SPOILIATION INSTRUCTION**

Pursuant to the Court's rulings and instructions at the pretrial conference held January 6, 2023, Plaintiff provides the attached instructions for the Court's consideration. Plaintiff hereby withdraws Plaintiff's Request to Charge No. 19.

Respectfully submitted,

January 9, 2023

A. Chinyere Ezie*
Charles Coleman, Jr.*
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Phone/Fax: (212) 614-6467
Email: cezie@ccrjustice.org
Charles@CFColemanJr.com

Caitlin J. Sandley, Ga. Bar No. 610130
Center for Constitutional Rights
P.O. Box 486
Birmingham, AL 35201
Phone/Fax: (212) 614-6443
Email: csandley@ccrjustice.org

/s/ Scott D. McCoy
Scott D. McCoy*
Southern Poverty Law Center
2 South Biscayne Boulevard, Suite 3750
Miami, FL 33131
Phone: (334) 224-4309
Fax: (786) 237-2949
Email: scott.mccoy@splcenter.org

Elizabeth Littrell, Ga. Bar No. 454949
Southern Poverty Law Center
P.O. Box 1287
Decatur, GA 30031
Phone: (404) 221-5876
Fax: (404) 221-5857
Email: beth.littrell@splcenter.org

Bruce Hamilton*
Emma L. Douglas*
Southern Poverty Law Center

201 St. Charles Avenue, Suite 2000
New Orleans, LA 70170
Phone: (504) 352-4398
Phone: (504) 377-6086
Fax: (504) 486-8947
Email: bruce.hamilton@splcenter.org
Email: emma.douglas@splcenter.org

* Admitted *Pro Hac Vice*

Counsel for Plaintiff Ashley Diamond

PLAINTIFF'S REQUEST TO CHARGE NO. 20

Spoliation of Evidence

The parties each have introduced evidence that evidence was lost because the other party failed to take reasonable steps to preserve it or because the other party destroyed it or allowed its destruction.

Each party making this contention has the burden of proving it. The party must prove that (1) the missing evidence existed at one time; (2) that the other party had control over the evidence when it was destroyed or lost; (3) that the other party had a duty to preserve the evidence; (4) that the other party failed to take reasonable steps to preserve the evidence; and (5) that the evidence could not be restored or replaced through additional discovery.

The duty to preserve arises when litigation is pending or reasonably foreseeable at the time the evidence is lost or destroyed. A demand letter triggers a duty to preserve by putting a party on notice of potential litigation, but such a letter is not necessary to trigger the duty. When litigation is reasonably anticipated, a party must preserve what it knows, or reasonably should know, is relevant in the action, or is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request. Relevant evidence includes evidence that has any tendency to make a fact more or less probable than it would be without the evidence.

In addition, the party must also prove that the other party acted with the intent to deprive the party of the information's use in the litigation, also sometimes called bad faith. Bad faith can include failing to suspend automated deletion systems or failing to intervene in routine document retention policies and procedures once litigation is reasonably foreseeable so that evidence is preserved.

If all of this is proved, then you may conclude from the absence of the evidence that the

evidence was unfavorable to the party that caused its loss or destruction.

[*Ala. Aircraft Indus., Inc. v. Boeing Co.*, No. 20-11141, 2022 WL 433457, at *13–15 (11th Cir. Feb. 14, 2022)

O’Berry v. Turner, No. 7:15-cv-64, 2016 WL 1700403, at *2–3 (M.D. Ga. Apr. 27, 2016)

Wilder v. Rockdale Cnty., No. 1:13-cv-2715-RWS, 2015 WL 1724596, at *3 (N.D. Ga. Apr. 15, 2015)

Watson v. Edelen, 76 F. Supp. 3d 1332, 1343 (N.D. Fla. 2015)

Stanfill v. Talton, 851 F. Supp. 2d 1346, 1361–62 (M.D. Ga. 2012) (Treadwell, J.)

Bland v. Sam’s E., Inc., No. 4:17-cv-190 (CDL), 2019 WL 407406, at *2–3 (M.D. Ga. Jan. 31, 2019)

Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, 1376–77 (N.D. Ga. 2008) (finding bad faith when email not preserved before automatic deletion)

Blazer v. Gall, No. 1:16-cv-1046, 2019 WL 3494785, at *4–5 (D.S.D. Aug. 1, 2019) (finding bad faith when defendants took no steps to preserve jail’s video recordings before being overwritten after preservation request)

Storey v. Effingham Cnty., No. CV415-149, 2017 WL 2623775, at *4 (S.D. Ga. June 16, 2017) (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)) (cleaned up.)]

PLAINTIFF'S REQUESTED CHARGE NO. 21

Invocation of Fifth Amendment Privilege Against Self-incrimination

You have heard a witness invoke his/her Fifth Amendment right against self-incrimination. A witness has a constitutional right to decline to answer on the ground that it may tend to incriminate him/her. You may, but need not, infer from such refusal that the answers would have been adverse to the witness's interest.

[*Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (“[T]he Fifth Amendment does not forbid adverse inferences against parties . . . when they refuse to testify in response to probative evidence offered against them” in the civil context)
Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc., 561 F.3d 1298, 1304 (11th Cir. 2009)
Floyd ex rel. Ray v. United States, No. 3:08-cv-122-CDL, 2010 WL 4905010, at *18 (M.D. Ga. Nov. 26, 2010); see also *Brink's Inc. v. City of New York*, 717 F.2d 700, 707 (2d Cir. 1983)]