

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

Sarah Smiley,

Plaintiff,

v.

Winrock International Institute for
Agricultural Development,

Defendant.

**Civil Action No. 1:20-cv-00144
(LO/TCB)**

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF
HER MOTION FOR SANCTIONS FOR SPOILIATION OF EVIDENCE**

Plaintiff Sarah Smiley, through undersigned counsel, respectfully submits her Memorandum of Law in Support of Her Motion for Sanctions for Spoliation of Evidence against Defendant Winrock International Institute for Agricultural Development (“Winrock”). This Court should grant Ms. Smiley’s motion and impose sanctions against Winrock for its destruction of electronic evidence after being put on notice of its duty to preserve this evidence, which has significantly prejudiced Ms. Smiley.

INTRODUCTION

Winrock received notice of its duty to preserve all evidence potentially relevant to Ms. Smiley’s claims or Winrock’s defenses on January 9, 2018, when Plaintiff’s counsel sent Winrock a litigation-hold letter. After receiving this notice, Winrock permanently deleted the contents of the Winrock cellphones issued to a number of former employees whom the Parties have jointly identified as electronic document custodians. Winrock knew, or should have known, that the text messages and other electronic data on these cellphones were highly relevant to Ms. Smiley’s claims. Winrock’s actions have severely prejudiced Ms. Smiley, as Winrock has

destroyed evidence potentially responsive to a majority of her discovery requests, including communications about Ms. Smiley, the reason for her termination, her protected activity, *i.e.*, her opposition to Winrock’s fraud, gross mismanagement, and violations of law, rule, and regulation related to a Cooperative Agreement between Winrock and the United States Agency for International Development (“USAID”); Winrock’s diversion of federal funds to establish a private, for-profit entity (“WIN”); and Winrock’s misrepresentations to USAID in its Year 2 Annual Report. *See* Complaint, at ¶¶ 68-116, 145-78. Therefore, Ms. Smiley respectfully requests that the Court impose sanctions against Winrock under Rule 37(e) of the Federal Rules of Civil Procedure.

I. Winrock’s Duty to Preserve Evidence Related to Ms. Smiley’s Claims.

On January 9, 2018, Ms. Smiley’s counsel sent Winrock a letter stating that Ms. Smiley had retained its law firm to represent her with respect to all legal claims that she holds against Winrock based on its unlawful termination of her on December 29, 2017. *See* Bernabei Ltr. to Ferguson & Van Wyck (Jan. 9, 2018) (excerpts attached as “Exhibit A”). In addition to the cover letter, Ms. Smiley provided a copy of her draft administrative complaint to be filed with the USAID’s Office of Inspector General (“OIG”), which detailed her retaliation claim under the National Defense Authorization Act, 41 U.S.C. § 4712.¹ The cover letter also explained:

Winrock has an obligation to implement a litigation hold and preserve all evidence, including electronic evidence, that is or may be relevant to the claims and defenses arising out of Ms. Smiley’s employment. Although we believe your duty to preserve relevant documents arose prior to this letter, to the extent that you have not been doing so, you should retain all documents relevant to Ms. Smiley and her employment with Winrock.

Id. at 2.

¹ Ms. Smiley was not required to administratively exhaust her claim for retaliation under the False Claims Act, 31 U.S.C. § 3730(h).

This letter triggered Winrock’s duty to preserve all evidence, including electronic evidence, potentially relevant to this matter. *See Steves & Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 106 (E.D. Va. 2018) (“Courts in the Fourth Circuit have found that the receipt of a demand letter, a request for evidence preservation, a threat of litigation, or a decision to pursue a claim will all trigger the duty to preserve evidence.”). Winrock’s duty to preserve applied to the evidence it knew, or reasonably should have known, “is relevant in the [anticipated] action, is reasonably calculated to lead to the discovery of admissible evidence, [or] is reasonably likely to be requested during discovery.” *Id.* at 107 (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 496 (E.D. Va. 2011)).

Given the retaliation claim and supporting facts detailed in Ms. Smiley’s draft complaint (which is substantively similar to the operative complaint filed in this Court), it should have been abundantly clear to Winrock that all communications pertaining to Ms. Smiley, her employment with and termination from Winrock, and the illegal conduct that she reported at Winrock were relevant or potentially relevant to this matter. Therefore, Winrock should have been preserving all such evidence since at least January 9, 2018, if not before.

II. Winrock’s Failure to Preserve Electronic Evidence.

On April 22, 2020, Ms. Smiley served her Amended First Set of Requests for the Production of Documents (“Amended RPDs”) on Winrock. Ms. Smiley’s instructions defined “document” as including “text messages,” “social media messages,” and “telephone messages.” *See* Pl.’s Amended First Set of Requests for Production of Documents (Apr. 22, 2020) (attached hereto as “Exhibit B”) at 4-5 ¶ A. Her instructions further defined “communications” as including those made “by text message.” *Id.* at 5 ¶ C.

Among other documents, Ms. Smiley requested: (1) all text messages sent to or from Ms.

Smiley's Winrock-issued cellphone (Request No. 6); (2) all communications related to the termination of Ms. Smiley's employment (Request Nos. 11 and 32); and (3) all documents related to WIN (Request Nos. 13, 14, and 31).

As undersigned counsel has detailed in prior briefings, Winrock grossly delayed, and continues to delay, its producing of responsive documents, and, although Ms. Smiley's counsel has made repeated attempts to resolve these issues without the Court's involvement, as of September 2020, Winrock still had yet to produce any text messages or other electronic communications from over-the-top applications obtained from the Winrock cellphones issued to Ms. Smiley or Winrock's other designated custodians who either worked in Bangkok on Winrock's Asia Innovative Farmers Activity ("AIFA") project, worked on another Winrock project that shared office space with AIFA, or worked in Winrock's U.S. headquarters or other U.S. offices.² These over-the-top applications include iMessage, WhatsApp, Facebook Messenger, and Line. Winrock employees used these applications often.

During the Parties' meet and confer on September 23, 2020, undersigned counsel asked Winrock's counsel for a date certain by which it would produce responsive documents from the Winrock-issued cellphones. Winrock's counsel claimed that Winrock never issued a cellphone to Mr. Sparks and needed to check on the status of Ms. Smiley's Winrock-issued cellphone. Winrock's claim that it did not issue a cellphone to Mr. Sparks contradicts an email that Winrock itself produced in discovery, which states that Winrock issued Mr. Sparks a Samsung mobile phone in August 2017, with the following phone number: 065-6285131. *See* August 30-31, 2017

² The custodians include: "William Sparks; Sarah Smiley; Ben Amick; Jeffrey Apigian; Sam Bona; Joyjit Deb Roy; Amanda Hilligas; Hoeung Hun; Mary Jane Jamar; Alex Loken; Meghan MacBain; DeAnn McGrew; Saifullah Abu Saleh Muhammad; Mike Myers; Jenjira Namjatturas; Maksudur Rahman; Regina Rice; Jennifer Snow; Amar Thing; Stephen Walls; and Tarinee Youkhaw." *See* Proposed Joint Discovery Plan (Doc. 20) (Sept. 2, 2020) at 6 § 2(C).

Email Chain (attached as “Exhibit C”).³ The telephone number that corresponds to the Winrock cellphone subsequently appears in Mr. Sparks’ signature block. *See, e.g.*, Sparks Email (Dec. 4, 2017) (attached as “Exhibit D”) (listing his phone number as “tel: +66-(0)65-628-5131”).

Winrock’s counsel also admitted that Winrock made no attempt to search the Winrock-issued cellphones of the other custodians for responsive documents, but then agreed that it would do so. *See* Kabat Ltr. to Maiolo, Bernas & Frye (Sept. 24, 2020) (attached as “Exhibit E”) at 3.

However, six days later, on September 29, 2020, Winrock’s counsel notified undersigned counsel that it did not have Ms. Smiley’s cell phone, and alleged that she took her Winrock-issued cellphone with her when she left – a contention that she expressly denies.⁴ Further,

³ After reviewing this document, Winrock’s counsel changed its explanation, and claimed that Mr. Sparks never used his Winrock-issued cellphone, but instead used his personal cellphone for work purposes. However, on information and belief, Winrock reimbursed Mr. Sparks for the work-related charges that he incurred on his personal cellphone. *See* USAID AIFA Memorandum to File (Sept. 15, 2017) (attached as “Exhibit I”) at WIN01_00046289 (“AIFA has agreed to provide mobile phones and reimburse staff up to a monthly rate of 1,000THB. This reimbursement is for professional use only and will include cell phone service, continued activation of SIM card, as well as data plans to allow for connection to WINROCK INTERNATIONAL on-line information and email.”).

⁴ Ms. Smiley’s position is supported by numerous documents, including those produced by Winrock. In particular, when completing Ms. Smiley’s “Separation Checklist,” Mr. Sparks confirmed that she had returned all Winrock equipment. *See* Smiley Employee Termination/Separation Checklist (attached as “Exhibit J”) at WINROCK000000813. Likewise, on January 5, 2018, Briana Tyler, HR Coordinator for Winrock, confirmed via email that “Sarah Smiley turned in all equipment before her last day 12/27/2017.” *See* Jan. 4-8, 2018 Email Exchange (attached as “Exhibit K”) at WIN01_00043491. Additionally, per Winrock policy, Ms. Smiley could not have received her final paycheck if she did not return all equipment, and she did receive this paycheck. *See* Rice Ltr. to Smiley & Annex 1 (Dec. 6, 2017) (attached as “Exhibit L”) at WINROCK000000816 (“Your final paycheck will not be cut until all WI materials have been collected”); *see also* Jan. 5-16, 2018 Email Exchange (attached as “Exhibit M”) at WIN01_00043795 (“Tamala should check in with Mary Jane before any final payment to Sarah, but there are no issues of outstanding equipment or etc. from the programs side.”); Smiley Final Paycheck (Jan. 5, 2018) (attached as “Exhibit N”). More recently, after Winrock belatedly claimed that Ms. Smiley never returned her Winrock cellphone, Ms. Smiley’s former colleague, Niramon Passananont, confirmed via text message that she had witnessed Ms. Smiley doing so at

Winrock's counsel stated that it "does not have the capability to search the messages of company cellphones, and so cannot produce any such records." *See* Frye Ltr. to Kabat (Sept. 29, 2020) (attached as "Exhibit F") at 2. In response, undersigned counsel asked Winrock's counsel to "[p]lease explain why Winrock cannot search the text messages on the custodians' Company cellphones, which is routinely done as part of electronic discovery." *See* Kabat Ltr. to Maiolo & Frye (Sept. 30, 2020) (attached as "Exhibit G") at 2.

By letter dated October 19, 2020, Winrock's counsel finally admitted, *for the first time in this litigation*, that "the cellphones of other custodians have been recycled to other users and were wiped prior to being transferred to new users. Therefore, Winrock no longer has the ability to search them as the records have been deleted." *See* Frye Ltr. to Kabat (Oct. 19, 2020) (attached as "Exhibit H") at 1.

In fact, on information and belief, as of January 9, 2018, all but three (Stephen Walls, Hoeung Hun, and Ms. Smiley) of the agreed-upon custodians were still employed by Winrock. Therefore, Winrock wiped the contents of the Winrock-issued cellphones used by the custodians who have since left Winrock *after* being put on notice of its duty to preserve all evidence related to Ms. Smiley's claims. Given that the custodians all worked directly with Ms. Smiley on Winrock's AIFA project, worked on another Winrock Project that shared office space with AIFA,⁵ or were otherwise involved in her termination from Winrock's U.S. headquarters,

the time of her termination. *See* Smiley Text Messages with Passananont (Sept. 22-27, 2020) (attached as "Exhibit O") at SMILEY_006847-48.

⁵ Specifically, Meghan MacBain worked on Winrock's Counter-Trafficking in Humans Project, which shared office space with AIFA. During USAID OIG's investigation of Ms. Smiley's administrative complaint, it interviewed Ms. MacBain. She told OIG that she was aware that Ms. Smiley had concerns about WIN's development, and that Ms. Smiley was vocal about her concerns that WIN was a for-profit entity, which violated Winrock's agreement with USAID. *See* USAID OIG Report of Investigation (Mar. 8, 2019) (excerpts attached as "Exhibit P") at 10.

Winrock had a duty to preserve the contents of the custodians' cellphones to identify any evidence potentially relevant to Ms. Smiley's claims. In fact, Ms. Smiley frequently communicated with several of the custodians, including Mr. Sparks and Ben Amick, AIFA's Regional Innovations Director, on her Winrock cellphone, via text message and other over-the-top applications, such as WhatsApp and Facebook Messenger. Moreover, Mr. Sparks preferred to communicate with Ms. Smiley via text message, rather than through email, including on topics that are highly relevant to this litigation, such as AIFA's Year 2 Annual Report and other AIFA-related projects and events that occurred in late 2017, *i.e.*, the time period in which Ms. Smiley engaged in protected activity. By wiping the contents of the custodians' cellphones, Winrock has deprived Ms. Smiley of significant information necessary to prove her claims.

During the Parties' meet and confer on October 30, 2020, Winrock's counsel stated that they would provide Ms. Smiley's counsel with additional information regarding the deleted cell phone evidence after they discussed the issue with a Winrock employee on November 4, 2020. Therefore, in a follow-up letter, Ms. Smiley's counsel stated that "we will delay in filing the motion [for sanctions] until November 5, 2020, unless Winrock reports on November 4 that it is now able to retrieve and produce the contents of the cellphones." *See* Kabat Ltr. to Maiolo & Frye (Oct. 30, 2020) (attached as "Exhibit Q"). To date, Winrock has not responded.

III. This Court Should Award Sanctions Under Rule 37(e)(1) to Cure the Prejudice Caused by Winrock's Spoliation of Electronic Evidence.

Under Federal Rule of Civil Procedure 37(e), "If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party

She also said that Ms. Smiley had complained to Mr. Sparks about AIFA employees spending their time developing WIN. She further stated that Ms. Smiley said that Winrock's 2017 Annual Report included misrepresentations, and that Mr. Sparks had "made stuff up." *Id.*

failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery,” the Court may order sanctions against that party. *See* Fed. R. Civ. P. 37(e). Here, Winrock was on clear notice of its duty to preserve the electronic evidence at issue, but, in violation of its duty, destroyed that evidence. The evidence cannot be obtained through other means, because Winrock has stated that it is unable to request the cell phone records from its own provider for the Winrock employees who used Winrock-issued cell phones. *See* Exhibit H, at 1 (“Winrock has no legal control over the service provider in Thailand, and does not have the practical ability to get the documents.”).

Under Rule 37(e)(1), the Court should find that Winrock prejudiced Ms. Smiley by failing to preserve electronic evidence. Once the Court makes this finding, it may exercise broad discretion to order “a range of measures” to cure the prejudice, “such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies.” *Id.* at 37(e)(1) & Advisory Committee Note (2015).

Sanctions are warranted under Rule 37(e)(1) because Winrock has clearly prejudiced Ms. Smiley by permanently deleting the data contained on the Winrock cellphones of the custodians who *it agreed* were relevant. The data contained on these cellphones, including text messages and messages sent through over-the-top applications – which, as the discovery in this case demonstrates, Ms. Smiley and her colleagues frequently used to communicate while they were abroad – included numerous communications regarding Winrock’s illegal conduct that Ms. Smiley reported and opposed. As noted above, Winrock had the duty, after receiving the litigation hold letter, to examine the contents of the custodians’ cellphones for relevance to Ms.

Smiley claims, but never did so before completely wiping the contents of those cellphones.

Among other lost evidence, Winrock destroyed evidence of Ms. Smiley's electronic messages with the custodians about AIFA-related issues and the Year 2 Annual Report, in which Winrock made false representations to USAID. *See* Complaint, at ¶¶ 90-116. Moreover, even at this early stage of litigation, Winrock's explanation for terminating Ms. Smiley has already repeatedly shifted – ranging from alleged budget cuts, to performance issues, to shifts in the direction of the AIFA project – such that the communications sent or received by Winrock managers regarding Ms. Smiley's termination likely would have revealed that these shifting explanations were pretextual, and that Winrock terminated Ms. Smiley in retaliation for her protected activity. But Winrock conveniently destroyed all of these communications, leaving Ms. Smiley without this critical evidence that could have demonstrated that the true reason for her termination was retaliatory. As this Court has long recognized, “[i]t is difficult to imagine conduct that is more worthy of being considered litigation misconduct or more worthy of sanction than spoliation of evidence in anticipation of litigation because that conduct frustrates, sometimes completely, the search for truth.” *Samsung Electronics Co., Ltd. v. Rambus, Inc.*, 439 F. Supp. 2d 524, 535 (E.D. Va. 2006), *vacated on other grounds*, 523 F.3d 1374 (Fed. Cir. 2008).

In order to cure the severe prejudice that Winrock's spoliation of evidence has caused her, and to deter it from future litigation misconduct, Ms. Smiley respectfully requests that the Court issue the following sanctions against Winrock under Rule 37(e)(1):

1. Instruct the jury (a) that Winrock destroyed electronic evidence, such as text messages and other messages exchanged through over-the-top applications contained on the cellphones of former Winrock employees, and (b) that the jury may infer that Winrock destroyed this evidence because it would have supported Ms. Smiley's claim that Winrock terminated her employment in retaliation for her protests of Winrock's illegal activities;

2. Permit Ms. Smiley's counsel to present argument to the jury, including during opening statements, regarding the loss of this evidence;
3. Preclude Winrock's counsel from presenting argument to the jury that the destroyed evidence was favorable to Winrock; and
4. Award Ms. Smiley the reasonable attorney's fees and costs incurred in bringing this motion.

These sanctions would “serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine,” which are “designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and[,] (3) restore the prejudiced party to the same position he [or she] would have been in absent the wrongful destruction of evidence by the opposing party.” *Jenkins v. Woody*, C.A. No. 3:15-cv-355-MHL, 2017 WL 362475, at *12 (E.D. Va. Jan. 1, 2017) (quotations and citations omitted). Moreover, Judge Lauck of this District has already recognized that these curative measures are appropriate under Rule 37(e)(1), in ordering sanctions against a defendant under Rule 37(e)(1), including by (1) issuing instructions to the jury that the defendant did not preserve video evidence and that it may consider this fact in rendering its verdict; (2) permitting the parties to present evidence about the destruction of evidence at trial; (3) precluding evidence or argument that the destroyed evidence was favorable to the defendant; and (4) awarding fees and expenses to the plaintiff. *See id.* at *18. Hence, similar sanctions are warranted against Winrock in this litigation.

IV. Should This Court Find that Winrock Intentionally Destroyed the Evidence at Issue, it Should Alternatively Order Sanctions Under Rule 37(e)(2).

In the alternative, if this Court finds that Winrock “acted with the intent to deprive” Ms. Smiley of the evidence that it destroyed, Rule 37(e)(2) authorizes the use of additional “specified and very severe measures to address or deter failures to preserve electronically stored

information.” Fed. R. Civ. P. 37(e)(2), Advisory Committee Note (2015). A finding of intentionality does not require a showing of bad faith. *See Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008); *Trigon Ins. Co. v. United States*, 204 F.R.D. 77, 287 (E.D. Va. 2001). Nor does it require a showing of prejudice, “because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position.” Fed. R. Civ. P. 37(e)(2), Advisory Committee Note (2015). If intentionality is found, the Court 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.” *Id.*, Rule 37(e)(2)(A)-(C).

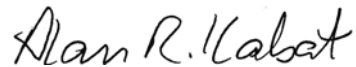
Sanctions under Rule 37(e)(2) would be appropriate here, where Winrock destroyed the contents of the custodians’ Winrock-issued cellphones knowing full well that it was under a duty to preserve all evidence related to Ms. Smiley’s claims. Under these exceptional circumstances, it appears that Winrock intentionally deprived Ms. Smiley of the ability to use this evidence to prove her claims, because the evidence – including internal communications between Winrock managers – would have demonstrated that Winrock’s alleged non-retaliatory reasons for terminating Ms. Smiley are mere pretext for its retaliation against her. Should the Court find that sanctions under Rule 37(e)(2) are warranted, it should grant Ms. Smiley’s request that an inference in her favor be presented to the jury that the destroyed evidence would support her retaliation claims, and the Court should presume the same.

CONCLUSION

For the foregoing reasons, the Court should order an inference in Plaintiff's favor to present to the jury as sanctions against Defendant for its spoliation of evidence, and further award Plaintiff the reasonable attorney's fees and costs incurred in making this motion.

DATED: November 6, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November 2020, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system which will send a copy to:

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