UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 14-cv-62216-MARRA/MATTHEWMAN

LIVING COLOR ENTERPRISES, INC., a Florida corporation,

Plaintiff,

vs.

NEW ERA AQUACULTURE, LTD., a United Kingdom Private limited company; AQUA-TECH CO., an Illinois corporation; JOHN T. O'ROURKE, an individual; DANIEL LEYDEN, an individual; and WORLD FEEDS, LTD., a United Kingdom Private limited company,

Defendants.
_____/

ORDER DENYING PLAINTIFF'S MOTION FOR SANCTIONS AGAINST DEFENDANT, DANIEL LEYDEN [DE 200]

THIS CAUSE is before the Court upon Plaintiff, Living Color Enterprises, Inc.'s ("Plaintiff") Motion for Sanctions against Defendant, Daniel Leyden ("Motion") [DE 200]. This matter was referred to the undersigned by United States District Judge Kenneth A. Marra [DE 205]. Defendant, Daniel Leyden ("Defendant") has filed a response to the Motion [DE 203], and Plaintiff has filed a reply [DE 204]. The parties have also submitted supplemental memoranda [DEs 230, 231]. This matter is now ripe for review.

I. BACKGROUND

A. The Prior Discovery Motion

In an Order dated February 1, 2016 [DE 191], the Court granted Plaintiff's Motion to Compel Production of Documents [DE 162], as modified by Plaintiff's Response to Order Requiring Response [DE 175]. The Court ordered that Defendant file, on or before February 4, 2016, an affidavit in which he stated, under oath, whether or not he possessed any additional text messages or emails that he had not yet produced to Plaintiff between himself and Mark Vera, between himself and Defendant New Era Aquaculture, Ltd., between himself and Peter Kersh and/or between himself and Tom Noble from the time period of January 1, 2013, through the present. [DE 191]. The Court further ordered that, if Defendant did not possess any additional emails or text messages, he should explain in the affidavit why he did not possess them and what efforts he had undertaken in order to attempt to recover any such emails or text messages. *Id.* Finally, the Court required that Defendant state in the affidavit on or about which dates he had obtained new cell phones between January 1, 2013, and the present. *Id.*

On February 3, 2016, Defendant filed his affidavit [DE 194]. Defendant attested that he has not had access to the Living Color email server since September 2014. *Id.* at ¶ 3. He explained that a search of his personal email revealed one email dated September 25, 2014, between Defendant and John O'Rourke that had not previously been produced by Defendant to Plaintiff. *Id.* at ¶¶ 4-5. A copy of that email was attached to the affidavit. Defendant attested that he had searched his cellular telephone for all text messages exchanged with Mark Vera, John O'Rourke, Julia Vera, Tom Noble and/or Peter Kersh and had only recovered text message exchanges between himself and Mark Vera between January 16, 2016, and the present.

Id. at ¶ 10. Defendant stated that he had provided those text messages to his attorney so that they could be turned over to Plaintiff's counsel. *Id.* Defendant explained that Mark Vera had archived text message exchanges from his own phone onto his computer, that Mr. Vera had delivered all of the text message exchanges to his attorney for delivery to Plaintiff's counsel, and that Defendant believes that these archived text messages constitute all messages exchanged between Defendant and Mr. Vera during the requested period of time. *Id.* at ¶¶ 11-12. Defendant stated that he did not use text messaging to communicate with Peter Kersh or anyone at New Era, but that he may have texted Tom Noble "on a handful of occasions at trade shows in the United States to locate him at the show or hotel. I no longer have any such text messages." *Id.* at ¶ 13. Finally, Defendant explained that he replaced his cellular phone in September 2014 and July 2015, that he did not archive or save text messages on his phones when they were replaced, and that it is his "usual practice to periodically remove text message exchanges from [his] phone to maintain the operational speed and efficiency of [his] phone." *Id.* at ¶¶ 14-15.

B. The Pending Motion for Sanctions

On February 5, 2016, Plaintiff filed its Motion [DE 200]. Plaintiff alleges that Defendant knowingly destroyed evidence and is seeking the entry of an Order striking Defendant's pleadings, the entry of a default judgment in Plaintiff's favor due to Defendant's conduct in this case, requiring an adverse interest instruction against Defendant, awarding reasonable attorney's fees and costs caused by Defendant's failure to comply with the Court's Order, and awarding such further and other relief as the Court deems just and proper. *Id.* at pp. 1, 5. Plaintiff asserts that Defendant had an obligation to preserve his text messages and that he destroyed them. *Id.* at p. 2. Plaintiff also contends that Defendant did not state in his affidavit

whether he searched his second personal email address. *Id.* at p. 3. Next, Plaintiff argues that all elements of spoliation are met here because the Defendant's affidavit establishes that there is missing evidence that existed at one time, Defendant had an ongoing duty to preserve the relevant text messages, Defendant's participation in the scheme outlined in the Second Amended Complaint is crucial to Plaintiff's claims against Defendant, the destroyed evidence would have established that Defendant was involved in the scheme to misappropriate Plaintiff's business and customers, and Defendant purposefully destroyed the evidence. *Id.* at p. 4. Plaintiff maintains that Aqua-Tech's production of text messages does not cure Defendant's misconduct. *Id.* at pp. 4-5.

In response, Defendant contends that he has always used the cell phone feature that automatically deletes text messages after 30 days and that he, admittedly, neglected to disable the feature when the lawsuit was filed. [DE 203 at p. 3]. Defendant explains that Plaintiff now has in its possession voluminous text messages between Defendant and Mark Vera despite Defendant's inability to produce the text messages himself. *Id.* at p. 2. Next, Defendant states that he only has one personal email address and that Plaintiff is incorrect in its allegation that he has two. *Id.* at pp. 2-3. Defendant argues that Plaintiff cannot establish the requisite elements for spoliation because it cannot show that the missing evidence is crucial to its ability to prove its *prima facie* claims or that Defendant acted in bad faith by neglecting to archive or save the text messages. *Id.* at pp. 4-6. Defendant concedes, however, that the deleted text messages once existed and that he had a duty to preserve relevant evidence when the lawsuit was filed in October 2014. *Id.* at p. 4. Defendant asserts that Plaintiff has not shown that Defendant deleted any emails or text messages in bath faith or "as an affirmative act to destroy or conceal

evidence that would support or assist the Plaintiff's case." *Id.* at p. 6. Further, Defendant argues that Plaintiff cannot show bad faith based on circumstantial evidence because Plaintiff cannot show that Defendant engaged in an affirmative act causing the evidence to be lost or that his actions cannot be credibly explained as not involving bad faith. *Id.* at pp. 7-8.

In its reply, Plaintiff first emphasizes that Defendant's affidavit does not mention the auto-delete feature on his phone and that, even if Defendant's text messages did automatically delete, he should have turned the feature off, especially when he realized that the text messages were at issue in the litigation. [DE 204 at pp. 2, 4]. Plaintiff asserts that it is still missing the text messages between Defendant and other important individuals, even if Aqua Tech has turned over some of its text messages involving Defendant. *Id.* Plaintiff contends that Defendant has not truly shown that he does not have a second personal email address. *Id.* at p. 3. It insists that "[t]his Court should not be required to rely on Leyden's superficial summary and analysis of the breadth and relevance of his text messages. The destroyed evidence…is crucial to proving Living Color's claims and negative inferences should be drawn for Leyden's failure to produce same." *Id.* at p. 4. Finally, Plaintiff argues that Defendant has a "penchant for misleading Living Color and this Court about the facts of this case and the reasons why he is unable to produce relevant communications. That fact coupled with his text message exchanges with Aqua Tech in which the two attempt to reconcile their stories, leads to the inevitable conclusion that Leyden has been acting in bad faith." *Id.* at p. 5.

C. Parties' Initial Failure to Discuss Recently Amended Rule 37(e)

After reviewing Plaintiff's Motion for Sanctions against Defendant Daniel Leyden, Defendant's Response, and Plaintiff's Reply, the Court noticed that the parties had failed to

address the effect of the recently amended Federal Rule of Civil Procedure 37(e) on this matter which deals with the alleged spoliation of electronically stored information ("ESI"). The Court, therefore, issued an Order requiring supplemental briefing [DE 227]. Both parties complied and filed supplemental memorandum [DEs 230, 231].

In Defendant's supplemental brief, he argues that Rule 37(e) does apply to this matter and that the Eleventh Circuit case law has been superseded by the amended rule. [DE 230, pp. 1-2]. He concedes that the information sought was electronically stored information, that he had a duty to preserve evidence starting on September 5, 2014, and that he negligently failed to preserve the ESI. *Id.* at pp. 2-4. Defendant argues, however, that the ESI has been replaced because Plaintiff has received the ESI from another source. *Id.* at pp. 4-6. He also contends that Plaintiff has not been prejudiced because Defendant had no duty to preserve until September 5, 2014, and Plaintiff's claims are based upon conduct that occurred before September 26, 2014. *Id.* at pp. 6-7. Defendant contends that Plaintiff was also not prejudiced because Aqua Tech provided the missing text messages to Plaintiff. *Id.* at p. 7. Finally, he explains that there is no evidence that Defendant intentionally lost the ESI. *Id.* at pp. 7-8.

Plaintiff argues in its supplemental brief that the newly amended Rule 37(e) does apply in this case, and that sanctions should be imposed under the rule. [DE 231 at pp. 1-2]. Plaintiff asserts that Defendant failed to take reasonable steps to preserve ESI that cannot be restored or replaced through additional discovery. *Id.* at p. 3, fn. 1. Plaintiff explains that a subpoena to Defendant's cell phone carrier yielded no results and that Plaintiff is still entitled to "other communications that Leyden had with other potential witnesses regarding the circumstances at issue in this case." *Id.* Next, Plaintiff asserts that Defendant's policy to delete text messages

is an "affirmative, intentional, and, frankly cavalier act and places Leyden's actions squarely within the sanctionable conduct of Rule 37(e)(2)." *Id.* at p. 3. Plaintiff maintains that, even if the Court finds that Defendant acted negligently rather than intentionally, the Court should impose sanctions under Rule 37(e)(1) because Plaintiff was prejudiced by the missing text messages. *Id.* at pp. 4-5.

II. ANALYSIS

Plaintiff's Motion alleges the destruction or spoliation of Defendant's text messages. "Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Graff v. Baja Marine Corp.*, 310 Fed.Appx. 298, 301 (11th Cir.2009) (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999)). As of December 1, 2015, when considering a claim of spoliation in a case involving ESI, courts look to the newly amended Rule 37(e).[1] As text messages constitute electronically stored information, the newly amended Federal Rule of Civil Procedure 37(e) applies in this case. *See, e.g., Marten Transport, Ltd. v. Platform Advertising, Inc.*, Case No. 14-cv-02464-JWL-TJJ, 2016 WL 492743, at *4 (D. Kan. Feb. 8, 2016).

A. Rule 37(e)

Recently amended Rule 37(e) states that if "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take

[1] The Motion for Sanctions in this case was filed after December 1, 2015. Regardless, even if the Motion had been filed prior to the amendment taking effect, "[u]nder 28 U.S.C. § 2074(a) and the Supreme Court orders dated April 29, 2015, the amendments govern all proceedings commenced on or after December 1, 2015, and all proceedings then pending 'insofar as just and practicable.'" *Marten Transport, Ltd. v. Platform Advertising, Inc.*, Case No. 14-cv-02464-JWL-TJJ, 2016 WL 492743, at n.10 (D. Kan. Feb. 8, 2016). The Court finds it just and practicable to rely upon the newly amended Rule 37(e) in this case.

reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court" may take certain actions. The new version of Rule 37(e) next states that 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.

The Advisory Committee's notes to the 2015 amendment explain that the newly amended rule "forecloses reliance on inherent authority or state law to determine when certain measures would be used."[2] Fed. R. Civ. P. 37(e) Advisory Committee's notes to 2015 amendment.

B. Preliminary Spoliation Questions

When confronted with a spoliation claim, the Court must first make some preliminary determinations under Rule 37(e) before turning to subsections (e)(1) or (e)(2).

Does the alleged spoliation involve ESI?

If the alleged spoliation involves ESI, then Rule 37(e) applies. In this case, the alleged spoliated items were text messages, which constitute ESI. Therefore, the Court must proceed to the next step and answer the following three questions under Rule 37(e):

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[2] Newly amended Rule 37(e) specifically relates solely to ESI and not to non-ESI such as tangible documents or evidence. One question that will surely arise in the future is whether there are now two standards for spoliation depending on whether the allegedly spoliated item constitutes ESI or non-ESI. Clearly, when confronting a spoliation claim in an ESI case, a court must first look to newly amended Rule 37(e) and disregard prior spoliation case law based on "inherent authority" which conflicts with the standards established in Rule 37(e). But in non-ESI spoliation claims involving a tangible document or evidence, do courts continue to rely on "inherent authority" and spoliation case law, even if the standards differ from the new spoliation standards established in Rule 37(e)? That issue will have to be addressed and resolved by the various Circuits as spoliation case law develops in light of the newly amended Rule 37(e). *See, e.g. Best Payphones, Inc. v. City of New York*, 1-CV-3924(JG)(VMS); 1-CV-8506(JG)(VMS); 3-CV-0192(JG)(VMS), 2016 WL 792396, at *3 (E.D.N.Y. Feb. 26, 2016) ("Thus as the law currently exists in the Second Circuit, there are separate legal analyses governing the spoliation of tangible evidence versus electronic evidence.").

(1) Was the allegedly spoliated ESI evidence that should have been preserved?

Rule 37(e) does not set forth a standard for preservation and does not alter existing federal law as to whether evidence should have been preserved or when the duty to preserve attaches.[3] In the Eleventh Circuit, the test is whether litigation was "pending or reasonably foreseeable" when the spoliation occurred. *Graff v. Baja Marine Corp.*, *supra*, 310 Fed. Appx. at 301. Rule 37(e) does not apply, therefore, when information or evidence is lost before a duty to preserve attaches. In this case, Defendant concedes that certain text messages should have been preserved in relation to this litigation, at least starting on September 5, 2014, and that the evidence—the deleted text messages—did once exist. Thus, it is clear in this case that the ESI should have been preserved in the conduct of this litigation.

(2) Was the allegedly spoliated ESI lost because a party failed to take reasonable steps to preserve it?

The sanctions or curative measures under Rule 37(e) are available only if ESI that should have been preserved "is lost." According to the Advisory Committee Notes: "Because electronically store information often exists in multiple locations, loss from one source may be harmless when substitute information can be found elsewhere." In the instant case, it appears that the great majority of Defendant's text messages were provided to Plaintiff by another party. Accordingly, the great majority of Defendant's text messages were not "lost", and sanctions under Rule 37(e) are simply not available in relation to those text messages. However, since it appears

[3] The Advisory Committee notes do explain, however: "Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. . . . This rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation." Fed. R. Civ. P. 37(e) Advisory Committee's notes to 2015 amendment.

that at least some of the text messages at issue were not replaced and were therefore lost, the Court will continue the analysis under Rule 37(e) and proceed to the third preliminary question.

(3) Is the allegedly spoliated ESI evidence that cannot be restored or replaced through additional discovery?

Rule 37(e) precludes any sanctions or curative measures if the ESI can be restored or replaced through additional discovery. Here, the missing text messages between Defendant and certain individuals cannot be restored or replaced through additional discovery. Plaintiff has already subpoenaed Defendant's cell phone provider, and the provider was unable to provide any additional information. The answer to the question is, therefore, "yes", that is, the allegedly spoliated ESI cannot be restored or replaced through additional discovery.

The answers to the above questions determine the Court's next step

If the answer to any of questions 1-3 is "no", then the Court need proceed no further under Rule 37(e), and a motion for spoliation sanctions or curative measures must be denied. If the answer to all three of the questions is "yes", however, then the Court must analyze the facts at hand under subsection (e)(1) if there is a finding of "prejudice" or under subsection (e)(2) if there is a finding of "intent to deprive." Since, in this case, the answer to question 1 is "yes", the answer to question 2 is "yes" (in part), and the answer to question 3 is "yes", the Court will next analyze both the (e)(1) and (e)(2) factors.

C. Rule 37(e)(1)

With respect to Rule 37(e)(1), the committee notes explain the following regarding the "prejudice" language in the rule:

> The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not

> lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Fed. R. Civ. P. 37(e) advisory committee's notes to 2015 amendment. Additionally, in the Eleventh Circuit, "prejudice" was already a factor in assessing whether spoliation sanctions are appropriate. *See, e.g., McLeod v. Wal-Mart Stores, Inc.*, 515 F.App'x 806, 808 (11th Cir. 2013).

Here, the Court sees no prejudice suffered by Plaintiff. And, if there was any prejudice to Plaintiff at all, it was so minimal that the Court does not find it necessary to order measures to cure the alleged prejudice. Plaintiff argues in its Motion that "Leyden's participation in the scheme outlined in the Second Amended Complaint [D.E. 118] is crucial to Plaintiff's claims against Leyden and the evidence would have established he was involved in the scheme to misappropriate Plaintiff's business and customers." [DE 200 at p. 4].[4] This is an extremely conclusory statement that really does not establish any prejudice to Plaintiff. Plaintiff has not explained any direct nexus between the missing text messages and the allegations in its Complaint.

In Plaintiff's supplemental brief, it argues that, due to the spoliation of evidence, Plaintiff does not know when and how Aqua Tech and Defendant met. [DE 231 at pp. 4-5]. Plaintiff does not explain how the missing text messages would establish this fact. Additionally, it appears that the vast majority of the missing text messages have been provided to Plaintiff by Aqua Tech and so they are not truly "lost." The asserted loss of the few remaining text messages, between

[4] In its reply, Plaintiff makes a similarly conclusory statement: "This Court should not be required to rely on Leyden's superficial summary and analysis of the breadth and relevance of his text messages. The destroyed evidence consisting of Leyden's communications with Tom Noble and other third parties is crucial to proving Living Color's claims and negative inferences should be drawn for Leyden's failure to produce same." [DE 204 at p. 4].

Defendant and individuals named "Peter" and "Paul", has not truly prejudiced Plaintiff as the Court finds Defendant's description of the missing text messages to be credible and therefore finds that the content of the text messages would not have been relevant in this case. The asserted missing text messages appear to be unimportant, and the abundance of preserved information appears sufficient to meet the needs of Plaintiff. The Court does not find spoliation sanctions to be proper pursuant to Rule 37(e)(1).

D. Rule 37(e)(2)

Next, the Court shall consider the "intent to deprive" standard laid out in Rule 37(e)(2), which permits more severe spoliation sanctions.[5] The committee notes explain that the amended Rule is intended to reject cases in certain Circuits that "authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence." Fed. R. Civ. P. 37(e) advisory committee's notes to 2015 amendment.

In the case at hand, the Court does not find any direct evidence of either "intent to deprive" or bad faith.[6] In Defendant's affidavit, he stated that he regularly deletes text messages in order to keep his phone running efficiently. In Defendant's response to the Motion, defense counsel explained that Defendant had activated a setting on his phone prior to this litigation that

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[5] While (e)(2) does permit more severe spoliation standards, the Advisory Committee was careful to explain that courts "should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss." Fed. R. Civ. P. 37(e) Advisory Committee's notes to 2015 amendment.

[6] It appears to this Court that the "intent to deprive" standard in Rule 37(e)(2) may very well be harmonious with the "bad faith" standard previously established by the Eleventh Circuit. *See Managed Care, supra.* The "bad faith" standard has caused some confusion among district courts in the Eleventh Circuit, but one such court in a recent opinion dealing with spoliation of non-ESI material, after analyzing the issue at length, concluded that "bad faith", in the spoliation context, means "culpability and resulting prejudice" without any finding of "malice" necessary. *See Austrum v. Fed. Cleaning Contractors, Inc.*, Case No.: 14-cv-81245-KAM, 2016 WL 93404, at *6 (S.D. Fla. Jan. 8, 2016). However, the effect, if any, that recently amended Rule 37(e) has on Circuit case law in non-ESI spoliation cases remains to be determined in an appropriate case. *See* fn 2, *supra.*

automatically deletes text messages after 30 days. While Plaintiff believes that the two explanations in Defendant's affidavit and response to Plaintiff's Motion are vastly different, the Court does not. It appears that defense counsel was simply expanding upon Defendant's explanation of how he manages his text messages. Regardless, it is common practice amongst many cell phone users to delete text messages as they are received or soon thereafter. There is nothing nefarious about such a routine practice under the facts presented here.

While Defendant clearly had an obligation to retain the relevant text messages after this lawsuit was initiated, the Court finds that Defendant simply acted negligently in erasing the text messages either actively or passively. Defendant is an individual who appears to be a relatively unsophisticated litigant. At worst, his actions were negligent. The amended Rule 37(e) does not permit an adverse inference instruction or other severe sanctions for negligence. There is no evidence that Defendant intentionally deleted the text messages in order to deprive Plaintiff of the information's use in litigation. There is no evidence that he intended to deprive Plaintiff of the text messages or that he acted in bad faith. No sanctions should be imposed pursuant to Rule 37(e)(2).

E. Second Personal Email Address

Finally, Plaintiff raises an issue pertaining to the prior discovery motion, asserting that Defendant failed to search his second personal email address. However, the Court does not see any merit in Plaintiff's argument. The Court believes, based on Defendant's explanation in his response to the Motion, that the two personal email addresses belonging to Defendant are interchangeable, and Plaintiff has not provided any evidence whatsoever that they are not or that additional relevant emails exist in the alleged second email account. Defendant has not

committed any discovery violation in this regard. Moreover, to the extent that Plaintiff may be indirectly seeking spoliation sanctions or other sanctions based upon the asserted failure of Defendant to search all of his email addresses, the Court denies any such requested relief for the same reasons that spoliation sanctions should not be awarded regarding the text messages.

III. CONCLUSION

In light of the foregoing, it is **ORDERED** and **ADJUDGED** that Plaintiff's Motion for Sanctions against Defendant, Daniel Leyden [DE 200] is **DENIED**.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 22nd day of March, 2016.

WILLIAM MATTHEWMAN
United States Magistrate Judge