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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

FLAGSHIP THEATRES OF PALM DESERT, LLC, Plaintiff and Appellant, v. CENTURY THEATRES, INC., et al., Defendants and Respondents.	B257148 (consolidated with B259552, B261149) (Los Angeles County Super. Ct. No. SC090481)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allan J. Goodman and H. Chester Horn, Jr., Judges. Reversed.

Perkins Coie, Thomas L. Boeder, Elvira Castillo, Katherine G. Galipeau, Donald J. Kula, Vilma R. Palma-Solana, and Oliver M. Gold for Plaintiff and Appellant.

Norton Rose Fulbright US, Michael A. Swartzendruber, Barton Wayne Cox, Peter H. Mason, and Lesley Holmes for Defendants and Respondents.

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Plaintiff and appellant Flagship Theatres of Palm Desert, LLC ("Flagship"), challenges the trial court's grant of terminating sanctions in favor of defendants Century Theatres, Inc. ("Century") and Cinemark USA, Inc. ("Cinemark") in the antitrust litigation between the parties.[1] While the case was pending, Flagship's co-owner, Brian Tabor, deleted a large number of e-mails from the account he used for both personal and business purposes. Tabor deleted the e-mails deliberately, but he did not do so with the intent of destroying evidence in the case. Rather, the account was failing to deliver mail to him properly, and tech support personnel for his email provider advised him to clear storage space in the account in order to restore its functionality.

We conclude that the remedy of terminating sanctions was overbroad. The lesser sanction of barring plaintiff from presenting evidence for the period for which Tabor's emails could not be replaced would substantially remedy any prejudice to defendants. We thus reverse.

FACTS AND PROCEEDINGS BELOW

A group of investors founded Flagship in 2002 for the purpose of operating a movie theater complex in Palm Desert. This is the only theater that Flagship operates. The ownership group included five individuals, three of whom are relevant to this appeal: Brian Tabor, the primary manager and film buyer for the company; Steve Mason, who was also involved in day-to-day operations but primarily handled big-picture strategy; and the actor Bryan Cranston, who primarily played a passive role but occasionally contacted distributors on behalf of the company. Flagship leased a vacant seven-screen movie theater complex in a shopping mall in Palm Desert, renovated it, and reopened it several months later under the new name Cinémas Palme d'Or (the Palme).

The Palme was unable to obtain as many desirable movies from distributors as it had expected. Flagship's owners attributed this to the presence of a multiplex theater approximately two miles away in Rancho Mirage called Century at the River (the River).

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[1] Flagship initially sued Century. While this litigation was underway, Cinemark acquired Century. This opinion uses the name Century to refer to the company prior to acquisition, and Cinemark afterward.

According to Flagship, prior to 2002, the River and the Town Center (the earlier name of the Palme location) had obtained from distributors the rights to show roughly equal numbers of the most desirable movies. In July 2002, Century, owner of a large chain of movie theaters, purchased the River. Flagship claims that thereafter distributors sent the vast majority of the most commercially successful films to the River.

In 2006, Flagship filed suit against Century and two film distributors, alleging that the defendants had violated the Cartwright Act (Bus. & Prof. Code, § 16700 et. seq.), the Unfair Competition Law (Bus. & Prof. Code, § 17200 et. seq), and had tortiously interfered with Flagship's prospective economic advantage. Flagship's complaint alleged that Century had been engaging in the illegal practice known as "circuit dealing," by which a large theater chain uses its leverage in the broader market to deny a smaller competitor access to desirable movies. (See *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2011) 198 Cal.App.4th 1366, 1375 (*Flagship I*).) According to Flagship, if distributors proposed to license popular films to show at the Palme rather than the River, Century threatened to refuse to show those distributors' films at other theaters that Century owned.

For the next two years, the case proceeded through discovery, and each side requested and received documents from the other. Most notably, in December 2006, defendant Universal Film Exchanges LLLP (Universal) served a set of requests for production in which it requested numerous categories of documents from Flagship. Among many other categories of documents, Universal requested "all emails between Plaintiff and any motion picture distributor referring or relating to" the Palme. In addition, Universal requested all emails referring or relating to the River. In response to the requests from Universal and other co-defendants in the case, Flagship produced emails and other documents in the spring of 2007, dating from the inception of Flagship. From the date of production in 2007 until the trial court granted summary judgment in July 2008, no defendant moved for further production.

No court order required the parties to preserve documents, but Flagship's principals were aware of their duty not to destroy potential evidence in the case. Tabor

and Mason had long contemplated filing suit against Century, and as early as the spring of 2004, they orally agreed to preserve all documents that might be relevant to any such lawsuit.

Flagship voluntarily dismissed the distributors from the case and added Cinemark as a defendant following Cinemark's acquisition of Century, and alleged that Cinemark engaged in the same unlawful practices as had Century. In 2008, the trial court granted Century's motion for summary judgment. We reversed the judgment in 2011, remanding the case to the trial court for further proceedings. (*Flagship I*, *supra*, 198 Cal.App.4th 1366.)

In the summer of 2012, Tabor began experiencing problems sending and receiving email. Tabor used the same AT&T email account for both his personal and business dealings. A customer service agent at AT&T told him that his inbox had grown too large, and that in order to restore functionality, he would need to delete emails. Tabor deleted thousands of messages from his account in chronological order beginning with emails sent and received in the 1990's and ending at February 19, 2009. Tabor did not have a backup copy of the emails he deleted.

Shortly thereafter, Cinemark filed a new discovery request asking for documents including Tabor's emails. Tabor realized that by deleting his emails, he had violated his obligation to preserve documents relevant to the lawsuit. He and Mason and Flagship's attorneys spent hours attempting to recover the deleted emails, but without success.

The scope of the loss of Tabor's emails is as follows: For the period before the spring of 2007, Tabor permanently deleted all emails from his account. Before the deletion, however, Flagship had produced his emails, with some minor exceptions discussed below, in response to Universal's requests for production in 2007. This production of documents still exists and is available to Cinemark. Universal's requests for production in 2007 were sufficiently broad as to encompass essentially all emails that Cinemark now believes are relevant to defend their case. For the period between the spring of 2007 and February 19, 2009, Tabor's emails have been permanently deleted, and no emails from this time period were produced to Universal. Cinemark has managed

to obtain some emails from this period through other sources, including from the distributors with whom Tabor corresponded and from Mason, to whom Tabor often sent copies of his email correspondence. Tabor's mass deletion of emails did not affect any emails dated after February 19, 2009.

When Cinemark learned that Tabor had deleted the emails, it moved for sanctions. The trial court denied the motion because it was unable to fully evaluate the extent of prejudice to Cinemark. Subsequently, Cinemark renewed its motion for sanctions. This time, the trial court granted the motion. Although the court concluded that the emails had not been deleted maliciously, it nonetheless granted terminating sanctions, concluding that no lesser sanction would remedy the prejudice to Cinemark. In addition, the court granted attorneys' fees and costs in favor of Cinemark.

DISCUSSION

I. *Terminating Sanctions*

An order imposing sanctions is reviewed for abuse of discretion. (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223-1224 (*Williams*).) A trial court abuses its discretion in imposing terminating sanctions if lesser sanctions would adequately protect the non-offending party from prejudice. (*Caryl Richards v. Superior Court* (1961) 188 Cal.App.2d 300, 305.) Tabor's actions in 2012 most likely destroyed some emails that might have been helpful to the defendants, although not necessarily admissible as evidence in the case. As a result, Cinemark likely suffered some prejudice, and it is entitled to a remedy to compensate for this prejudice. But the potential for prejudice is limited to the period between the spring of 2007 and February 19, 2009 because the relevant emails outside that period, with some minor exceptions, were saved. Accordingly, the trial court abused its discretion by not limiting appropriate sanctions to the period between the spring of 2007 and February 19, 2009.

Within the 2007 to 2009 period, all of the emails from Tabor's account were deleted, and with only a few exceptions, they cannot be recovered.[2] Cinemark argues that the deletion of these emails has prejudiced its entire defense, including issues of liability, causation, and damages. According to Cinemark, Flagship prejudiced Cinemark's defense as to liability by destroying emails in which distributors stated that they chose to license films to the River rather than the Palme for business reasons, not because of coercion. Cinemark argues that Flagship prejudiced its defense as to causation by destroying emails explaining Flagship's strategy regarding the movies it wanted to license or not license. With respect to damages, Cinemark argues that it could have shown that Flagship attempted to license too few popular films to garner the potential revenues Flagship's expert witness believed the Palme could have achieved if not for Cinemark's alleged malfeasance. Cinemark has recovered some examples of each of these kinds of emails in Tabor's surviving emails, and believes that if not for the deletion, many more would have survived. Because Cinemark was the victim of Flagship's deletions and because at least some of Cinemark's proposed defense theories are plausible, we must assume that the missing emails would have provided Cinemark with some useful information.[3] For its part, Flagship contends that sanctions are unnecessary because it does not need Tabor's emails to prove its own case and that Cinemark's own communications with distributors should be the heart of Cinemark's

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[2] The only emails from the 2007 to 2009 period that Cinemark has access to are those obtained from the parties with whom Tabor was corresponding. That includes some emails Tabor sent to distributors, and other emails in which Tabor included Mason as a "cc" recipient. We have no reason to believe, however, that these exceptions accounted for more than a small portion of the emails from this period.

[3] This is not to imply that all the missing emails would have been admissible evidence in the case. For example, Cinemark contends that emails from distributors stating business reasons for rejecting Flagship's offers will aid them in disproving liability and causation. If, however, these emails are proffered by Cinemark for the truth of the assertion that the distributors' rejections were for business reasons, they would be inadmissible hearsay, but they might nevertheless be useful in allowing Cinemark to develop evidence in the case or possibly be admissible for some other purpose of which we are not aware.

defense. Nonetheless, Cinemark has the right to attempt to prove its defenses on any plausible theory, however weak it might seem to Flagship. Because Flagship is the party responsible for the loss of emails, we must give the benefit of the doubt to Cinemark. On the theories Cinemark has chosen, the loss of emails from 2007 to 2009 may impair its ability to defend itself. In consequence, it is entitled to an appropriate remedy preventing Flagship from presenting evidence or collecting damages covering this time period.

Cinemark, however, argues that it is entitled to terminating sanctions, not only sanctions limited to the 2007-2009 period, because Flagship's 2007 production was incomplete.[4] According to Cinemark, in 2007, Flagship produced only 150 emails Tabor sent or received. By contrast, five years later in 2012, Flagship included 25,000 of Tabor's emails in its response to discovery.

Without a detailed description of the 25,000 emails themselves we can reach no conclusions about why they were more numerous than the 2007 production. It is possible, for example, that Flagship was overly liberal in its 2012 production, and that the 2007 production, albeit narrower, included all the documents to which defendants were entitled. Universal's request for production was wide ranging and included a request for every email Tabor sent to or received from a distributor, along with other categories that include virtually all documents Cinemark now argues are relevant to this

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[4] Cinemark contends that it is entitled to terminating sanctions under *Williams*, *supra*, 167 Cal.App.4th at p. 1227, in which the court held that upon a proper showing from the defendant, it falls to the plaintiff to disprove the prejudicial effect of the spoliation. The court reasoned that "burden shifting is proper when one[] party['s] wrongdoing makes it practically impossible for the plaintiff to prove its case." (*Id.* at p. 1226.) We disagree. Here, Flagship did not engage in the wrongdoing the court condemned in *Williams*. (See *id.* at p. 1224 [inferring that plaintiff cherry-picked favorable documents, then allowed the rest to be destroyed]; see also *R.S. Creative v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 490-492; *Electronic Funds Solutions v. Murphy* (2005) 134 Cal.App.4th 1161, 1184.). Furthermore, as we describe in this opinion, the destruction of documents was limited, and the state of the record shows that it was not practically impossible for Cinemark to defend its case.

case. There is good reason to believe that relatively few relevant emails for the period before 2007 are missing. Distributors had a strong incentive to preserve emails they received from Tabor. As early as 2005, they knew that Flagship was contemplating litigation against them.

Further, the examples of missing emails that Cinemark cites do not suggest a widespread or deliberate lack of compliance by Flagship. The most useful pre-2007 document for Cinemark was an email Tabor wrote to a Sony employee requesting that Sony license the films "Big Fish" and "Mona Lisa Smile" to the Palme. In the email, Tabor wrote, "I will not be asking for, nor expecting, most Sony product, as this is not a typical mainstream venue. Please continue to sell Century Theatres at the River all of the very commercial titles." Yet this email dated from 2003, three years before Flagship filed its initial complaint in this case, and several months before Tabor and Mason testified that they first contemplated filing suit. Tabor might have deleted it before he had any reason to believe he needed to preserve it for purposes of litigation.

The other emails Cinemark has cited do not significantly favor Cinemark. In one, Tabor wrote to a distributor that he had been pleasantly surprised by how well the film "John Tucker Must Die" performed at the Palme, despite the fact that the movie was primarily aimed at a teen audience, not the upscale adult audience that typically attends movies at the Palme. This email might be useful to Cinemark to show that Flagship had marketed the Palme as primarily an arthouse venue, or, from Flagship's perspective, it might show that the Palme was interested in teen movies and capable of generating high ticket sales with them. In another email, Tabor cited statistics showing that in the case of two previous movies, "Veronica Guerin" and "Step Into Liquid," the films performed better at the Palme than they had in earlier weeks when shown at the River or another area theater. This document might be useful to show, given an equal playing field, Flagship was capable of competing against the River and generating strong revenues. In another email that Tabor failed to preserve, he informed an employee of NBC Universal that he had mailed her a check for $1,245.60. In all, we see no evidence that Tabor's

failure to preserve a few emails from before 2007 was anything other than occasional and inadvertant.

Finally, Cinemark contends that terminating sanctions are appropriate because the loss of emails made it impossible for Cinemark to defend against Flagship's claims of damages. Flagship's expert witness theorized that, because the Palme had approximately 40 percent of the seating capacity that existed between the two theaters, it should have been able to obtain approximately 40 percent of the revenues that the two theaters generated. The expert suggested that Flagship could measure its damages by the shortfall of revenues below 40 percent. Cinemark alleges it intended to attack this theory by showing that Flagship believed that many of the most lucrative mainstream Hollywood blockbusters were a poor fit for Flagship's intended audience and therefore did not attempt to license these films. If Flagship declined a sufficiently large number of these high-grossing movies, it would become implausible for Flagship to generate 40 percent of the total revenue of the two theaters.

We disagree. In its decision, the trial court wrote, "in order to support their expert's theory, plaintiffs 'must be able to establish that they actually sought to license and play enough films to generate 40% of the cumulative box office grosses.' " The court was mistaken. The number of films Flagship requested is not necessarily reflective of the Palme's box office potential if not for alleged misconduct by Cinemark. For example,Tabor and Mason might have realized that distributors were unwilling to give them certain kinds of movies and simply stopped requesting them, even if they would have gladly played those movies at the Palme. Indeed, Universal Studios informed Flagship in no uncertain terms that it planned to license all of its films exclusively to the River. Flagship suggests it will present testimony that it stopped requesting films from Universal Studios because it would have been pointless to continue making requests in light of this communication. (See *Charles Rubenstein, Inc. v. Columbia Pictures Corp.* (D. Minn. 1959) 176 F.Supp. 527, 536 [rejecting a defendant's argument to be dismissed

from a circuit dealing case on the ground that the plaintiff had not requested better runs for the defendant's movies because any request would have been futile].)[5]

Cinemark also contends that it suffered prejudice because of other instances where Flagship failed to preserve documents. In these instances, the information was preserved elsewhere. For example, Tabor acknowledged that he routinely threw away handwritten notes from conversations with distributors regarding terms of exhibition after entering this information into a spreadsheet, and he destroyed physical printouts of the same spreadsheet after entering data regarding payments to distributors into the digital version of the spreadsheet. There is no reason to believe that Cinemark was prejudiced by this business practice, however, because the information contained in the notes was transferred to the spreadsheet. This data was key to Flagship's operation, as it included information such as which movies to play in which theaters, and how much each distributor was owed. Because a central part of the distributors' businesses required them to keep track of this kind of information, it would have been difficult for Tabor to alter or falsify this information without the distributors noticing.

In addition, distributors have produced a few emails from Mason that are no longer in his account, despite the fact that Mason testified in his deposition that he never deleted any messages from his email account. They are only a handful, and they do not provide meaningful support for Cinemark's position. We have no reason to believe that the deletion of these emails were anything other than occasional oversights. Tabor admitted that, in addition to his mass deletion of emails, he sometimes deleted emails on an individual basis when he believed they were "junk" or "duplicative." Cinemark has produced no evidence to suggest that these emails would have been valuable. Given the apparent small scale and innocuousness of the deletion of emails outside the 2007-2009 time frame, there is no justification for additional sanctions.

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[5] The trial court's grant of terminating sanctions was based largely on its misinterpretation of this evidentiary point. This error alone would justify reversal. (See *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1341 [" 'A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand.' "])

Finally, Cranston acknowledged that he failed to preserve handwritten notes that he took during conversations with studio executives. These notes were so sporadic that their loss could not significantly prejudice Cinemark.

II. *Attorneys' Fees*

In addition to challenging the award of terminating sanctions, Flagship contends that if terminating sanctions are reversed we should reverse the award of attorneys' fees. We agree.

Because we reverse the attorneys' fee order in its entirety, we need not evaluate the trial court's interpretation of the application of Code of Civil Procedure section 2023.030, subdivision (a) to the facts of this case. Upon remand, the trial court must consider the attorneys' fee matter de novo, keeping in mind both the application of that section and our evaluation of the prejudice to Cinemark from the destruction of documents.

III. *Conclusion*

By granting terminating sanctions in a case in which the prejudice to the non-offending party can be ameliorated by a more limited remedy, the trial court abused its discretion. Consequently, we reverse the judgment. On remand the trial court shall order as a sanction for its spoliation of evidence that Flagship is prohibited from offering evidence of acts, events, or communications occurring during the period between spring 2007[6] and February 19, 2009, and is further precluded from claiming damages for this period. If, however, Cinemark offers evidence at trial relating to acts, events, or communications for this time period that, in the view of the trial court, is more than nonsubstantive, peripheral, or foundational, then Flagship may also present evidence and seek damges pertaining to this time period. Because the court's award of attorney's fees and costs was based on the grant of terminating sanctions, it too is reversed.

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[6] The trial court shall determine the exact date in the spring of 2007 at which point Flagship's initial production of documents stopped.

DISPOSITION

The judgment of the trial court is reversed. On remand the trial court shall order as a sanction for its spoliation of evidence that Flagship is prohibited from offering evidence of acts, events, or communications occurring during the period between spring 2007 and February 19, 2009, and is further precluded from claiming damages for this period. If, however, Cinemark offers evidence at trial relating to acts, events, or communications for this time period that, in the view of the trial court, is more than nonsubstantive, peripheral, or foundational, then Flagship may also present evidence and seek damages pertaining to this time period. Further, the trial court shall consider de novo whether to grant attorneys' fees. Appellant to recover its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.