UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	SA CV 19-01514-DOC (DFMx)	Date:	January 20, 2021
Title	Jeremy Holloway v. County of Orange et al.		

Present: The Honorable	Douglas F. McCormick, United States Magistrate Judge
Nancy Boehme	Not Present
Deputy Clerk	Court Reporter
Attorney(s) for Plaintiff(s):	Attorney(s) for Defendant(s):
Not Present	Not Present
Proceedings:	**(IN CHAMBERS) Order re Plaintiff's Facebook Account**

I. BACKGROUND

In 2019, Defendants propounded Requests for Production of Documents ("RFPs") on Plaintiff. RFP No. 48 sought Plaintiff's "entire Facebook profile/website/webpage(s)." Dkt. 101, Ex. A at 88-89. On December 3, 2019, Plaintiff objected to RFP No. 48 on various grounds but did not otherwise respond or produce any documents. See id. at 89-90. In July 2020, Plaintiff was served with Defendants' Supplemental Disclosures, which included download pages from Plaintiff's (at the time) public Facebook account. See id., Ex. F at 142-59.

On August 14, 2020, Defendants deposed Plaintiff. During the deposition, Plaintiff indicated that he recently deleted his Facebook account because it was "making him upset." Id., Ex. E at 136. Defendants' attempt to clarify when and why Plaintiff deleted his account was stymied by Plaintiff's counsel's objections. See id. at 57-69.[1]

On October 22, 2020, Defendants filed a motion to compel Plaintiff to, among other things, provide a supplemental response and produce responsive documents to RFP No. 48. See Dkt. 101 at 2-3. Defendants also sought sanctions for spoliation of evidence. See id. at 3. Defendants asserted that Plaintiff admittedly deleted his Facebook account in order to keep several posts critiquing law enforcement from being seen by a jury. See id. at 31-34. During a telephonic hearing, the Court suggested that Defendants' request for Plaintiff's entire Facebook account was facially overbroad but could be narrowly tailored to require some production. See Dkt. 133.

[1] Plaintiff's counsel's deposition conduct is extensively documented in the Court's January 11, 2020 Order, which granted Defendants' motion for sanctions. See Dkt. 144.

Because the status of the account was unclear, however, the Court deferred ruling on RFP No. 48. See id.

Plaintiff's counsel later represented that Plaintiff's Facebook account had been permanently deleted, prompting the Court to order Plaintiff to submit a declaration "confirming that his Facebook account has been permanently deleted (not temporarily deactivated) and describing the circumstances under which such deletion occurred, including the approximate date." Dkt. 137. In his declaration, filed on December 29, 2020, Plaintiff stated that he: (1) left Facebook in mid-2020 in response to the George Floyd and Breonna Taylor incidents and resulting protests; (2) does not recall the exact date when he closed his Facebook account; (3) did not believe his personal Facebook account was relevant to this lawsuit; and (4) was unsuccessful in his attempt to retrieve the account because it had been permanently deleted. See Dkt. 143.

II. LEGAL STANDARD

For a finding of spoliation, a party must show that "(1) the party with control over the evidence had an obligation to preserve it at the time of destruction; (2) the evidence was destroyed with a 'culpable state of mind'; and (3) the evidence was relevant to the party's claim or defense." In re Hitachi Television Optical Block Cases, 2011 WL 3563781, at *5 (S.D. Cal. Aug. 12, 2011) (quoting Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)). Once spoliation is shown, the guilty party has the burden of demonstrating that no prejudice resulted from the spoliation. See id. at *6. "Prejudice is determined by looking at whether the spoliating party's actions impaired the non-spoliating party's ability to go to trial, threatened to interfere with the rightful decision of the case, or forced the non-spoiling party to rely on incomplete and spotty evidence." Id. (citing Leon v. IDX Systems Corp., 464 F.3d 951, 959 (9th Cir. 2006)).

Spoliation sanctions can "include assessing attorney's fees and costs, giving the jury an adverse inference instruction, precluding evidence, or imposing the harsh, case-dispositive sanctions of dismissal or judgment." Compass Bank v. Morris Cerullo World Evangelism, 104 F.Supp.3d 1040, 1052-53 (S.D. Cal. 2015) (citation omitted). The destruction of evidence does not require bad faith to warrant evidentiary sanctions. See Hitachi, 2011 WL 3563781, at *6. "Sanctions may be imposed on a party that merely had notice that the destroyed evidence was potentially relevant to litigation." Id.

III. ANALYSIS

Here, Defendants have presented evidence supporting a finding of spoliation of evidence. With regard to the first element, Plaintiff had control over his Facebook account and had an obligation to preserve it at the time of the filing of the complaint in August 2019, and certainly no later than when Defendants served RFP No. 48. "As soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action." In re Napster, Inc., 462 F.Supp.2d 1060, 1067 (N.D. Cal. 2006). This preservation

obligation runs first to counsel, "who has a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction." Surowiec v. Capital Title Agency, Inc., 790 F.Supp.2d 997, 1006 (D. Ariz. 2011).

For the second element, Defendants have presented evidence demonstrating that the account was destroyed with a "culpable state of mind." Plaintiff was served with RFP No. 48 seeking his Facebook account in 2019 but did provide substantive responses or produce any documents. Less than a year later, he permanently deleted the account. See Dkt 101, Ex. E at 136 ("Yes, I did recently delete my Facebook account."). That Plaintiff may have deleted his account over societal issues and not with the intent to destroy evidence is not dispositive; to the contrary, Plaintiff's "conscious disregard" of his discovery obligations is sufficient to show a culpable state of mind. See Apple Inc. v. Samsung Elecs. Co., 888 F.Supp.2d 976, 998 (N.D. Cal. 2012); see also Reinsdorf v. Sketchers U.S.A., Inc., 296 F.R.D. 604, 626 (C.D. Cal. 2013) (culpable state of mind may be demonstrated by ordinary negligence). Additionally, it is worth repeating that Defendants' efforts to elicit the circumstances surrounding the deletion were stymied by Plaintiff's counsel's improper objections. See Dkt. 144 at 24-26 (recounting counsel's disruptive behavior during questions about Plaintiff's Facebook account).

The third element is satisfied as Defendants have presented evidence showing that the deleted evidence was relevant to Plaintiff's claims of emotional distress and whether he was biased against law enforcement. Plaintiff responds that the posts collected by Defendants are irrelevant because they were made by Plaintiff after the events at issue in this case. But that does not mean that there are no relevant Facebook posts that pre-date this lawsuit. Indeed, we will never know the answer to that question given that all potentially relevant posts have been permanently deleted by Plaintiff. Given the nature of the litigation and of the evidence that has been deleted, the Court finds that Plaintiff's actions have "forced [Defendants] to rely on incomplete and spotty evidence." Hitachi, 2011 WL 3563781, at *6.

In sum, Plaintiff had an obligation to preserve his Facebook account, he deleted the account with a culpable state of mind, and the account was relevant to Defendants' claims. Accordingly, the Court finds that an adverse inference regarding Plaintiff's deleted Facebook account is appropriate. See Nutrition Distrib. LLC v. PEP Research, LLC, No. 16-2328, 2018 WL 3769162, at *18 (S.D. Cal. Aug. 9, 2018) (finding an adverse inference regarding Defendants' deleted social media posts appropriate); Painter v. Atwood, No. 12-01215, 2014 WL 1089694, at *9 (D. Nev. Mar. 18, 2014) (same, noting that "[a]lthough Plaintiff's counsel may have failed to advise Plaintiff that she needed to save her Facebook posts and of the possible consequences for failing to do so, the deletion of a Facebook comment is an intentional act, not an accident, and the Court cannot infer that Plaintiff deleted Facebook comments . . . for an innocent reason").

IV. ORDER AND RECOMMENDATION

Based on the foregoing, IT IS HEREBY ORDERED that Defendants' motion for sanctions based on spoliation of evidence is GRANTED.

IT IS FURTHER RECOMMENDED that the District Judge give the following adverse inference instruction:

> Plaintiff has failed to preserve relevant evidence for Defendants' use in this litigation by deleting his Facebook account. This is known as the "spoliation of evidence."
>
> I instruct you, as a matter of law, that Plaintiff failed to preserve evidence after his duty to preserve arose. You may presume that Defendants have met its burden of providing that following two elements by a preponderance of the evidence: First, that relevant evidence was destroyed after the duty to preserve arose. Evidence is relevant if it would have clarified an issue at trial and otherwise would naturally have been introduced into evidence. Second, the lost evidence was favorable to Defendants.
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> Whether this finding is important to you in reaching your verdict in this case is for you to decide. You may choose to find it determinative, somewhat determinative, or not at all determinative in reaching your verdict.

Objections to this order shall be filed within fourteen (14) days of the date of this order.[2]

[2] The Court has authority to order the sanctions outlined in this section without a recommendation to the District Judge. See Fed. R. Civ. P. 72(a) (providing that non-dispositive matters are those that are "not dispositive of a claim or defense of a party"); Oracle USA, Inc. v. SAP AG, 264 F.R.D. 541, 545 (N.D. Cal. 2009) (holding that discovery sanctions in general are non-dispositive unless imposition of the sanction would be dispositive of a party's claim or defense). However, because the language of the instruction presents an issue of trial management, the Court believes that the better practice is to present these rulings to the District Judge in the form of a recommendation. The Court expresses no view on whether the District Judge must resolve any objections to these recommendations in advance of trial, or what standard the District Judge should apply in resolving any such objections.