

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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CORPORATE ELECTRICAL TECHNOLOGIES, INC.,

Index No.: 651444/2015

Plaintiff,

Motion Sequence No. 2

-against-

**STRUCTURE TONE, INC., MACY'S, INC.,
MACY'S EAST, INC., TRAVELERS CASUALTY
AND SURETY COMPANY OF AMERICA, PYRAMID
FLOOR COVERING INC., and COOPERFRIEDMAN
ELECTRIC SUPPLY CO., INC.,**

Defendants.

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**PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR SANCTIONS
DUE TO SPOILIATION BY MACY'S**

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted by Plaintiff Corporate Electrical Technologies, Inc. (“CET”) in support of its motion for an Order pursuant to CPLR § 3126(1) imposing the sanction of a negative inference at trial and in dispositive motions against Defendants Macy’s Inc. and Macy’s East, Inc. (collectively “Macy’s”), and awarding attorneys’ fees for the costs of this motion, due Macy’s their spoliation of evidence by allowing the automatic destruction of emails relevant to the dispute in this action.

CET is an electrical contractor that was hired to perform the electrical work for the fast-track renovation of the basement of Macy’s flagship store at Herald Square into a retail space for high-end men’s clothing designers (the “Project”). Work started in late June 2014 and had to be completed by the end of October, in advance of the holiday season. CET was initially retained by defendant Structure Tone, Inc. (“STI”), which was the nominal general contractor for the Project, to perform approximately \$1 million in electrical work.

Soon after work started, Macy’s took over day-to-day running of the Project from STI, whose poor management had left the Project in chaos and behind schedule.¹ Macy’s directly negotiated with CET, asking it to accelerate the Project by increasing its workforce beyond what was provided in its contract, and by adding nighttime and weekend shifts. Macy’s also asked CET to perform change order work for the clothing designers whose individual shops or “vendor pads” were to fill the Project space. Macy’s agreed to pay CET for this additional work. At the end of CET’s work on the Project, a Macy’s vice-president offered to pay CET \$500,000, as discussed in an internal Macy’s email from April 2015, which confirms that Macy’s acknowledged its financial obligation to CET. CET declined Macy’s offer and brought this action against STI and Macy’s to recover \$1.8 million. CET was been paid only \$379,337 for all

¹ The facts summarized herein are set forth in the accompanying McQuillan Affidavit and Cramer Affirmation.

of its work on the Project, including extra work and overtime. STI and Macy's have asserted that CET is to blame for the delays that plagued the Project, and the need to accelerate work.

This motion is brought because Macy's was unable to produce more than a handful of emails related to CET's work on the Project for the year when the Project was planned and constructed—2014. There should have been hundreds, and perhaps thousands, of such emails. Macy's counsel eventually disclosed that Macy's has an email retention/destruction policy, which it failed to suspend during work on the Project, despite major disagreements with CET while it was working on the Project and before this action was started. Macy's allowed critical emails to be destroyed, even after it knew there was a great likelihood of litigation with CET.

The duty to preserve documents arises when a party reasonably anticipates litigation, at which point it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure preservation of relevant documents. *VOOM HD Holdings LLC v. Echostar Satellite L.L.C.*, 93 A.D.3d 33, 43 (1st Dep't 2012).

Macy's had a duty to preserve its emails concerning the Project starting in September 2014, at which point Macy's was running the Project, and was engaged in intense disagreements with CET over payment. Macy's should have anticipated litigation at that point, based on the following decisions and actions by Macy's:

(i) In an attempt to speed up the Project, in late August 2014 Macy's asked CET to increase the amount of labor it was using. Macy's knew from its role in negotiating CET's scope and reviewing CET's bid that this would require CET to use more labor than it was contractually required to.

(ii) Macy's promised CET in an August 28, 2014 email that "we will not let you get hurt here" from the additional costs of increasing labor on the Project.

(iii) In early September 2014 Macy's hired a second electrical contractor (Shorr Electrical or "Shorr") to perform limited portions of CET's work, with the cost to be paid out of CET's contract.

(iv) Macy's rapidly increased the scope of Shorr's scope of work, over the strenuous objections of CET. By the end of October 2014, Macy's had approved *over \$1 million* of work for Shorr, which Macy's deducted from payments for CET.

(v) Sometime between mid-September and mid-October 2014 Macy's and STI secretly agreed that all payments to CET would be suspended, even though CET continued to work overtime on the Project. During this period Macy's and STI falsely told CET that its payment requests were being processed, in order to keep CET working.

These circumstances, which were of Macy's making, rendered litigation with CET almost inevitable, and should have caused Macy's to place a hold on its automatic destruction of emails related to the Project. Macy's retention/destruction policy provides that all emails are automatically destroyed after only 60 days, except for those put in a special file, which are destroyed after one year. Clearly this policy should have been suspended in the fall of 2014 for communications related to the Project.

It is also evident that Macy's "automatic" email destruction policy was only selectively applied because Macy's has produced several hundred emails from 2014 which either concern construction in other areas of the Macy's building, or if they relate to the Project, are between Macy's and the men's clothing designers ("vendors") for which Macy's was constructing individual in-store shops or "vendor pads". The fact that Macy's was able to retain emails from 2014 with its vendors underscores its culpability in failing to take steps to preserve other emails concerning work at the same time on the same project.

The emails that Macy's allowed to be destroyed are relevant to this action. This is evident not only from the circumstances, but also from certain emails Macy's produced from 2015, the year after the Project was completed, which demonstrate that the emails Macy's destroyed or failed to produce from 2014 would have been highly relevant and would have supported CET's claims. For example,

(i) A March 17, 2015 internal Macy's email discussed Macy's negative evaluation of STI management in 2014. This supports CET's position that the Project delays Macy's and STI were seeking to blame on CET, which were used to justify a \$1 million backcharge against CET, were in fact caused by STI's mismanagement. Given the importance of this subject it is highly likely that there were internal Macy's emails in 2014 discussing the specific problems that STI was having at the Project.

(ii) An April 24, 2015 internal Macy's email discusses Macy's offer to pay CET \$500,000 for its work on the Project. This supports CET's position that Macy's made verbal and written promises to pay CET for its overtime costs and extra work. There were undoubtedly other internal Macy's emails in 2014, as well as emails with STI, discussing the evaluation of CET's frequent requests for payment in the fall of 2014.

There must also have been emails in 2014 concerning other critical topics related to the Project that would have been discussed by Macy's internally or with STI, including, especially the decision that Macy's and STI made in September or October 2014 to stop payments to CET. Only one email referring to the decision was produced—by STI.

Macy's failure to suspend the automatic destruction of its emails in 2014, when it was engaged in highly contentious relations with CET, is especially egregious because Macy's policy called for automatic destruction of emails after such a short time that the policy appears designed

to make it almost impossible for any adversary to obtain Macy's internal emails through discovery.

STATEMENT OF FACTS

The relevant facts are summarized below and are set forth more fully in the accompanying Affidavit of Ray McQuillan, CET's chief operating officer, and Affirmation of Steven Cramer.

I. CET'S CONTRACT, THIS ACTION, AND DISCOVERY

A. CET's Contract

In June 2014, after negotiations with Macy's and STI, CET entered into an agreement with STI to perform electrical work on the Project. CET, Macy's and STI exchanged documents with the agreed scope and price of CET's work on the Project. (McQuillan Aff., ¶ 7, Exh. A.) However, CET and STI never agreed on a formal written subcontract with general conditions because CET would not accept language in STI's standard form that would have required CET to absorb all additional cost of overtime made necessary by delays and accelerated work.²

In the absence of any limiting contractual language, CET was and is entitled to seek payment for overtime work beyond what it had provided for in the original Contract.

CET's contract with STI was in the amount of \$1,028,388, and included overtime for 2 men for the anticipated 17 week duration of the Project. (McQuillan Aff., ¶ 8.) CET submitted contract change notices for its additional work. Twenty-three of CET's contract change notices were approved, in the amount of \$256,326, increasing the contract value to \$1,284,714. Five contract change notices in the amount of \$291,160 were never approved. CET also submitted

² After CET had been on the job for two months, STI sent its standard subcontract to CET. CET crossed out extensive provisions in the subcontract, including those requiring CET to absorb all overtime costs, and added a provision that CET would be reimbursed for overtime. CET sent the signed subcontract back to STI, but STI never returned the revised contract with its signature, and instead continued to ask CET to sign and return the original version of the subcontract. No formal written subcontract was agreed to by the parties. (McQuillan Aff., ¶ 10.)

requests for payment of its actual overtime and acceleration costs, in the amount of \$780,727, which were not approved. The claims are now superseded by CET's expert report, which calculates that CET has a labor inefficiency claim against STI and Macy's of \$754,029. (McQuillan Aff., ¶ 56.)

B. This Action

CET commenced this action with the filing of the Summons and Complaint on April 29, 2015. (Exh. S) In its Complaint CET sought recovery on its \$1.85 million Lien against the Project, as well as an additional damages, based on various causes of action.

STI served an answer to the Complaint in which it denied the substantive allegations and asserted a set-off and counterclaim in the amount of \$360,000 for costs incurred to complete the electrical work on the Project, and a second counterclaim in the amount of \$859,727 for willful exaggeration of mechanic's lien. (Exh T)

C. Macy's Motion To Dismiss

Macy's responded to the Complaint with a motion to dismiss CET's causes of action for breach of contract, quantum meruit, and foreclosure of CET's lien. This Court issued a decision on November 25, 2015 (Hon. Jeffrey K. Oing)(Exh. U) in which it (i) granted Macy's motion to dismiss CET's breach of contract claim, and (ii) denied Macy's motion to dismiss the quantum meruit and lien foreclosure causes of action. Thereafter, Macy's served an answer in which it denied the substantive allegations in the Complaint and asserted a setoff and counterclaim alleging that CET's lien was wilfully exaggerated. (Exh. V)

D. CET's First Document Demand To Macy's

In February 2016 this firm served its first document demand on Macy's, (Exh. W)(the "CET First Demand"). The CET First Demand included the following definition of "Document":

“Document” means any kind of writing, drawing, graph, chart, photograph, recording, computer file, electronic transmission or any other type of data compilation from which information can be obtained or translated, **including without limitation e-mails** (with attachments)

CET First Demand, Par. 7 (Exh. W).

The CET First Demand also defined “Communication” as follows:

“Communication” means Documents, as defined above, transmitting information in the form of facts, ideas, inquiries or otherwise.

CET First Demand, Par. 11 (Exh. W).

In the CET First Demand, CET explicitly requested that Macy’s produce the following communications, which would include e-mails, between Macy’s and third parties, as well as internal Macy’s communications:

3. Communications between Macy’s and Structure Tone concerning the Project.
4. Communications between Macy’s and any of the vendors for which work was being performed at the Project. (Par. 4)
5. Communications sent internally between Macy’s employees and consultants concerning the Project.
16. Documents concerning Corporate Electrical’s scope of work on the Project.
17. Documents concerning the evaluation of Corporate Electrical’s work on the Project.

Exh. W.

E. Macy’s Incomplete First Document Production

Macy’s initial document production, consisting of a variety of documents including emails, was made on June 9, 2016, consisting of approximately 18,000 pages with Bates numbers between M00001 and M18082 (the numbering of the produced documents was not

continuous). On September 20 and 22, 2016 Macy's produced two additional flash drives with a variety of documents, including emails, consisting of approximately 50,000 pages, with Bates numbers between M018083 and M107241. (Cramer Aff., ¶ 13)

After this office reviewed and searched the Macy's production, we discovered that there was a striking absence of emails from 2014, the critical year when virtually all of CET's work on the Project was performed. We were only able to locate approximately 320 emails sent during 2014 out of approximately 68,000 pages. (Cramer Aff., ¶ 14.)

What appeared to be entirely lacking from the 2014 emails were internal Macy's emails. There were no internal emails discussing the serious delays in the Project, or the evaluation of STI's management of the Project, or the steps needed to accelerate the Project, or Macy's negotiations with CET, or CET's requests for payment, or Macy's response, or Macy's decision to stop payment to CET during the Project. (Cramer Aff., ¶ 15)

There were virtually no emails referring to Shorr, even though Macy's had decided to backcharge CET for over \$1 million of Shorr's electrical work on the Project, over CET's strenuous objections. (Cramer Aff., ¶ 16)

As for external emails, there are a handful of emails between Macy's and CET, STI and others concerning a few discrete issues, such as negotiating CET's scope of work before the Project started, or addressing specific problems such as overfilled electrical conduit. (Cramer Aff., ¶ 17)

There is a complete absence of the voluminous emails that we know were exchanged with STI and other parties by Macy's field project manager Erik Carlson, its senior project manager Kenneth Capra, and its director of construction, Tony Riese. These should have been produced by Macy's as well as by STI. (Cramer Aff., ¶ 18)

F. Macy's Failure To Alert CET Of Missing Emails

At the time of Macy's document productions, Macy's counsel did not inform this office of any missing documents, or that there were any categories of documents it was unable to produce. (Cramer Aff., ¶ 19)

On February 13, 2017 this office sent an email informing counsel for Macy's of the lack of critical emails in Macy's document production, especially emails from 2014, and the lack of emails between certain employees of Macy's who were heavily involved on the Project. (Exh. X)

On February 23, 2017 Macy's counsel stated for the first time (more than five months after the emails were produced) that Macy's was unable to provide emails from 2014 because they had been automatically deleted, pursuant to Macy's document retention policy. This office sent counsel for Macy's a confirming email on February 28, 2017. (Exh. Y)((Cramer Aff., ¶ 21)

G. Macy's Document Retention Policy

On March 3, 2017 Macy's counsel provided a copy of Macy's email retention/destruction policy, which is dated February 1, 2002. (Exh. Z) It states that all emails are automatically deleted after 60 days unless moved to a "Business Critical Folder" where they will be maintained for up to a year, and then automatically deleted. It reads in part:

All emails will automatically be deleted sixty (60) days from the date displayed in the Notes date column unless it is Business Critical. Business critical is defined as an email necessary to an on-going project, e.g., budgets, contracts, key correspondence, etc., or needed for legal reasons.

Any business critical email that must be retained beyond the sixty (60) day retention period must be moved to the folder within Notes called Business Critical . . .

All emails moved to the Business Critical folder will be automatically deleted twelve (12) months from the date displayed in the Notes date column.

While the Company strongly discourages the retention of any business critical email beyond the twelve (12) month retention period, if an exceptional need for the email remains beyond this period, the email may be saved as a Word document on the user's network drive, a floppy disk or printed and saved in paper form.

Exh. Z (emphasis added).

The only way for a Macy's employee to maintain an email beyond sixty days is to move it to a "Business Critical folder;" and the only way to keep that email beyond one year is to (i) manually save that email as a Word document, (ii) save the email to a floppy disk, or (iii) print the email and save it in a file.

H. CET's Second Document Demand, And Macy's Second Production

In June 2018 CET served a second document demand on Macy's, seeking documents related to specific Project issues ("CET's Second Demand"). (Exh. AA)

In response to CET's Second Demand Macy's produced approximately 7,000 additional pages of documents in July and August 2018, which were divided into three files designated I, II and III. File III contains emails from 2015. (Cramer Aff., ¶ 25)

Files I and II of Macy's second production included approximately 250 email chains from 2014. Virtually all the emails in files I and II from 2014 discuss construction of the vendor pads, the in-store shops being built for different clothing designers in the Project space. CET and Shorr are barely mentioned in any emails. Project electrical work is referred to in only a handful of the email chains. (Cramer Aff., ¶ 26)

The fact that Macy's employees retained so many emails from the period in question that only concern vendor pad work, suggests that Macy's did not apply this automatic deletion policy to all employees or in all instances. Macy's was able to retain emails concerning the Project from 2014 that related to vendor work, even when those emails were to and from a variety of

Macy's employees and consultants.

The Macy's emails in files I and II of its second document production from 2014 did not include any internal Macy's emails concerning STI's progress on the Project, or CET's role on the Project, or how much CET will be paid, nor do they contain any emails with STI concerning those subjects. (Cramer Aff., ¶ 27)

II. THE REASONS MACY'S WAS AWARE OF A POTENTIAL CLAIM BY CET

Macy's had notice of a potential claim by CET, and thus a duty to preserve its emails, well before the filing of CET's mechanic's lien on March 11, 2015 and commencement of this action on April 29, 2015. Macy's should have reasonably anticipated litigation with CET in the fall of 2014, based on the following.

A. Macy's Controlled The Project:

Macy's was running the Project starting in late August 2014, which meant that it was in constant contact with CET, giving CET directions to perform additional work, requesting additional electricians, and making promises of payment. This close involvement by Macy's also meant that it was receiving direct communications from CET requesting payment and objecting to Macy's actions, in particular the \$1 million Macy's sought to deduct from payment to CET. (McQuillan Affidavit, ¶¶ 14 et seq.)

Macy's employee Erik Carlson was their field project manager for the Project and was on the site every day. (Exh DD, p. 16). Before construction started he had been involved in reviewing CET's bid documents to ensure they covered all the work required, and attended a bid leveling meeting with CET. (Exh DD, p. 20-21) Macy's senior project manager, Ken Capra, was personally involved in interviewing and selecting the trade contractors, including CET, for the Project, (Exh. CC, p. 15). He was involved in reviewing CET's bid and pricing before it was

awarded the job (Exh CC, pp. 16-17, 20); and he met with CET six or seven times after they were awarded the job (Exh. CC, p. 17).

There are numerous emails from Carlson demonstrating his close control over the Project, especially after mid-August 2014, including his complete control over the activities of the “general contractor” STI. On September 2, 2014, Carlson sent an email to STI and CET, with copies to other Macy’s employees (Exh. FF), directing STI to perform a detailed list of 16 tasks over the coming days to meet upcoming deadlines, and establishing a daily site walkthrough at 8:00 a.m. with STI, CET and the carpentry contractor, Jacobson. Carlson also directed STI to help CET: “Need STI support to get items of issue out of CET way.” (Exh. FF)

When STI wanted to terminate CET in early October 2014, Macy’s overruled them. (See Exhibits GG, HH.³ Macy’s decision to overrule its nominal general contractor on CET’s role on the Project is a further demonstration of Macy’s total control of the Project.

B. Macy’s Asked CET To Provide More Labor, And Agreed To Pay For It:

After work on the Project fell behind schedule in August 2014, Macy’s asked CET to provide more labor to the Project, including overtime, which Macy’s promised to pay for—in an email and in a telephone conversation.

Macy’s Carlson sent CET’s Ray McQuillan an email on August 28, 2014, with copies to Macy’s senior project manager, Ken Capra, and Macy’s director of construction, Tony Riese (Exh. F) stating Macy’s clear promise to pay CET’s overtime costs to accelerate. Carlson

³ On October 10, 2014 at 9:21 a.m., STI’s Justin Spagnuolo sent a private email to Macy’s Erik Carlson proposing to terminate CET: “Erik, I think we need to pull the plug with ray [McQuillan].” (Exh. GG) Carlson responded a few minutes later by directing Spagnuolo to arrange a meeting in his office at 10:00 a.m. with Shorr, CET and STI. Two hours later, STI again attempted to get CET off the project, with STI’s Kevn Mulvey emailing Macy’s Ken Capra at 11:03 saying “we need to stop CET from doing any more physical work . . . I suggest that Shorr take over 100% of the remaining physical work.” (Exh. HH) That never happened.

discusses the importance of reestablishing a schedule on the Project: “We just need a plan of action to get the west side and east side back on track with each individual crew.” He offered to provide CET with the assistance they needed to work quickly: “Will make sure you are getting all the information you need and when you need it to get us complete on time.” He then exhorted CET to push hard to meet specific deadlines, which he calls “CRITICAL dates that we MUST hit and make sure CET is primed and ready with manpower. If that means working Saturday or moving a foreman to a production night crew, we need to do that.” Carlson concluded by stating that:

If there is costs associated with making this happen, let us know. We will not let you get hurt here and do not want that to be the concern in taking any aggressive course [sic] of action.

(Exh. F, emphasis added.) Carlson explained at his deposition that this statement meant Macy’s would “help him out” (Exh DD, p. 67). Carlson acknowledged that “help out” meant paying CET: “Q: Meaning paying him for it, additional work money? A: Correct.” (Exh DD, p. 68.)

Macy’s also promised to pay CET for its costs to accelerate in a telephone conversation around the end of August between Ray McQuillan and Macy’s project manager Erik Carlson and senior project manager Ken Capra. (McQuillan Aff., ¶ 32.)

The acceleration of the Project meant CET was going to have to increase its job costs to pay for more workers and cover overtime work. (McQuillan Aff., ¶ 26).

Macy’s intention to increase the workforce was underscored on August 29, 2014, when Carlson sent CET an email invitation to a meeting for the purpose of discussing “current status and game plan” and how to “move forward to get the LL [Lower Level] project BACK on schedule.” In that invitation Carlson directed CET to come to the meeting with a “fully vetted game plan for **manning the job day, night weekend as required.**” (Exh. D, emphasis added).

C. Macy's Hired A Second Electrical Contractor And Backcharged CET

Macy's hired a second electrical contractor, Shorr Electrical ("Shorr") to perform work from CET's contract. While CET initially agreed to hand over a discrete portion of its work to Shorr, Macy's steadily pushed to expand Shorr's scope during the last two months of the Project. CET strenuously objected, including in emails. Eventually, Macy's approved over \$1 million in Shorr work tickets for work that CET disputed. (McQuillan Aff., ¶ 36 et seq.)

Macy's paid Shorr directly for the work taken from CET's scope, and backcharged STI for those payments, with STI in turn backcharging CET for the same amount. (Exh CC, p. 216)(Exh BB, p. 127). The work being performed by Shorr was on a time and materials basis (Exh BB, p. 113), while CET's work was for a stipulated sum. Therefore, Shorr had no incentive to work efficiently. (McQuillan Aff., ¶ 41.)

D. CET Objected To Macy's Use of Shorr Starting In September 2014

CET made it clear that it objected to the increasing scope of work being given to Shorr, for which CET was supposed to be backcharged. Less than two weeks after Shorr started work, CET wrote, on **September 11, 2014**:

I will do the rest. No need for shorr. It wasn't an open ticket.

(Exh. J, p. 2, emphasis added).

The same day, STI responded that "I completely disagree . . . Shorr is needed on the project to get across the finish line." (Exh. J) Macy's Ken Capra was copied on this email exchange, in which it was clear that CET's objections to Shorr's increasing scope were being ignored, and that CET was being backcharged for Shorr's work against its will.

The very next day, **September 12, 2014**, CET sent an email to Ken Capra of Macy's and to STI strenuously objecting to more work being given to Shorr than originally agreed to:

This is going way to fast. I have agreed to certain things but again, **it's not an open check book.** . .

The way this is being handled is a disaster in the making . . .

There is no way this is fair and I cannot except[sic: accept] an open ticket, especially when I have been complaining from the beginning we were working out of sequence. There is a lot of this I didn't have in my Proposal . . .

I am not absorbing the lost productivity from the shotgun approach.

(Exh. K, emphasis added).

At this point, Macy's should have suspended the automatic deletion of its emails. Macy's actions after September 12, 2014 indicate it was only becoming more aggressive and antagonistic towards CET's interests.

On September 25, 2014, Macy's project manager Carlson wrote to Shorr that "it was our intention that you install ALL lighting on the project," (Exh. II) even though installation of lighting was part of CET's scope of work and only a small portion had been given to Shorr with CET's consent. (Exh. I, McQuillan Aff., 37.)

Macy's Carlson steadily signed a total of a \$1,037,987 worth of Shorr work-tickets throughout September and October 2014 (Exh DD, p. 101) all of which Macy's backcharged to CET, through STI.⁴

Macy's senior project manager, Kenneth Capra, admitted that CET was being forced to accept the removal of its scope and takeover by Shorr. Capra testified "First he [McQuillan/CET] agreed with Shorr stuff, and then he didn't." (Exh CC, p. 199.)⁵

⁴ STI's Gambardella testified that "Shorr was working directly for Macy's, and they were back charging us, and that was understood that was cost incurred because of work that CET was contracting." Exh BB, p. 100.

⁵ STI's senior account executive, Nikles Gambardella, explained that "It was always understood when Shorr was brought on board that they would be there until the end with or without CET to complete the project because the move in date had to be met." (Exh BB, p. 115).

On December 9, 2014 CET sent a letter to STI, with a copy to Macy's, explaining why CET was owed almost \$1 million at that point (Exh. N).

If Macy's had stopped the automatic deletion of its emails on December 9, 2014, emails that were less than sixty days old would have been preserved, including emails from most of October and all of November 2014. Macy's took no action, and those emails were destroyed.

E. Macy's And STI Stopped Paying CET While It Was Still Working

Macy's aggressive and antagonistic approach to CET included stopping payments to CET sometime after mid-September 2014. This is significant because Macy's knew that CET was continuing to perform work on the Project based on its belief that it would be receiving payments, unaware of the decision by Macy's and STI. CET had even increased its labor at Macy's request in early September 2014 (Exh. H), and continued working on the Project with significant labor through late October 2014. CET also returned to the Project in early 2015 to perform work so STI and Macy's could obtain the final electrical sign-off required by the NYC Department of Buildings. (McQuillan Aff., ¶ 64).

On October 17, 2014 STI sent an internal email confirming an earlier decision not to pay CET any more on the Project:

As discussed his [CET's] account is on hold-no further payments.

(Exh. O, emphasis added.) The same week this email was written CET was performing work on the Project on a daily basis with crews of between ten and fifteen electricians. (Exh. H).

The decision not to pay CET any more **“was a combination and agreement by Macy's and Structure Tone. Macy's was in agreement with that.”** (Exh BB, p. 139, emphasis added).

The person at Macy's involved in the decision not to pay CET was Macy's senior account executive, Ken Capra. (Exh BB, p. 139). Gambardella further testified that the decision

was made sometime between the last payment made to CET, on September 16, 2014, and the October 17, 2014 email (Exh. O). (Exh. BB, p. 139-40.)

In the construction industry, as in any industry, the decision not to pay a party that is continuing to perform work is an invitation to litigation, especially when the party is told the falsehood that it is going to be paid.

On October 13, 2014 CET wrote to STI and Macy's (Erik Carlson) asking for the status of payment, including the balance of payment for work in August, and payment for September. Erik Carlson responded that there would be an "early payment" to CET and that "**it is in process**" (Exh. P, p. 3, emphasis added), which was not true.

The next day, October 14, 2014, in response to CET's email, STI's Nikles Gambardella, wrote that "[r]egarding the balance, Macy's and STI reviewed and determined billing for September and **the requisition is in processing by Macy's** . . . We will review further with Macy's and then we can coordinate/meet with you." (Exh. P, p. 1, emphasis added.) The highlighted statement in this email, which was also sent to Macy's Ken Capra and Erik Carlson, was also not true.

In response to another CET query about payment, on October 31, 2018 STI's Nikles Gambardella repeated the false statement that CET's "**September requisition is pending.**" (Exh. 54, emphasis added.) Ken Capra was again copied on the email.

Macy's misinformed CET about the status of payment and allowed STI to do the same. Thus, Macy's knew in the middle of October that CET thought it was going to be receiving payments that would not be forthcoming—which could lead to litigation.

Macy's field project manager, Erik Carlson and its senior project manager, Ken Capra, knew in October 2014 that (i) regular payments to CET had been stopped while CET continued

to work; (ii) CET had provided extra labor at Macy's request, based on Macy's promise of additional payment; (iii) Macy's and STI had made false statements to CET about the status of its payment requests; (iv) Macy's, over CET's objections, was charging CET for what would amount to over \$1 million for work of another contractor, Shorr.

Macy's Director of Construction, Tony Riese, was aware at least of Macy's promise on August 28, 2014 to pay CET for increasing its workforce. (Exh. F) Because of his position he must have also been aware that Macy's had unexpectedly paid over \$ 1million to Shorr and would be seeking to recover it from CET, while payments to CET had stopped.

III. MACY'S MISSING EMAILS ARE RELEVANT TO THIS ACTION

Macy's has produced emails from 2015, a few of which indicate what issues would have been discussed in their 2014 emails, had they been produced.

A. STI's Poor Management Skills

A Macy's internal email in 2015 discussed problems with STI's construction management skills when they were working on the Project. Macy's Director of Construction, Tony Riese, stated in a March 17, 2015 email that STI was out of their element in two respects—working in retail, and in an enclosed construction site. He explained that “at the beginning they were not strong in retail construction. They also had trouble working in a closely occupied space with the store team and SPACE team on top of their every move.” Riese explained that in light of these weaknesses, Macy's stepped in and “made team moves and basically changed all [STI] team members but three (highlighted in yellow).” (Exh. KK) The STI team members who Macy's apparently removed included three who worked on the Project: Nikles Gambardella, Kevin Mulvey and Eric Gulak. (Exh. KK).

Strikingly, Macy's evaluation of STI's poor performance on the job is similar to CET's,

but there are no emails on the topic from 2014.

If Macy's was unhappy with STI and replaced most of its project management team, those issues must have been discussed at the time, both internally and with STI. There are no emails reflecting that.

This is consistent with testimony from CET's Ray McQuillan, that when he met with Macy's to discuss problems on the Project they told him that STI was new to retail, were getting their feet wet, and that though STI was difficult to work with, CET should keep going and that Macy's would not let them get hurt. (Exh. EE, p. 110).

Because Macy's destroyed all its internal emails from 2014, CET has been deprived of seeing the emails that would have supported CET's position that STI's poor management caused numerous problems for CET and the entire Project.

B. Macy's Acknowledgment Of Responsibility To Pay CET

A second internal Macy's email from April 2015 indicates another area where Macy's emails from 2014, if they were available, would have been relevant and would have supported CET's position. On April 23, 2015, Macy's executive Bernie Reiss sent an email asking other Macy's executives for more information on Macy's offer to pay CET \$500,000 for its work on the Project. Reiss asks in the email:

What was total contract? What did we pay them? What is basis of our \$500 k offer?

(Exh. Q, p. 2) He then requests a meeting. Macy's Ken Capra, who was copied on the email, testified that there was a conference call to discuss the offer. (Exh. CC, p. 207)

This email supports the deposition testimony of CET's Ray McQuillan that he had several meetings with Joe Flaherty, Macy's Vice President of Construction, without STI being present, at which Flaherty offered to pay CET \$500,000 for CET's work on the Project.

(McQuillan Aff., ¶ 66)(Exh EE, p. 111-113).

It is impossible to believe there was only one internal Macy's email discussing this substantial offer of payment by Macy's to CET. Additional emails from the end of 2014, when CET first received the offer (McQuillan Aff., ¶ 66) would confirm CET's position that Macy's promised to pay CET for its acceleration costs and change order work done for Macy's vendors.

C. Macy's Acknowledgment Of Delays Due To Poor Light Fixture Storage

Macy's Field Project Manager Erik Carlson, who continued working for Macy's on other construction projects in the Herald Square building after the Project was completed, sent an email to STI in 2015 in which he referred to a condition that had plagued the Project and caused CET significant delays—mis-delivery of light fixtures.

Carlson wrote on March 20, 2015:

Do not want to risk fixtures being lost or damaged throughout the build[ing] like last year.

(Exh. LL.)

This support's CET's claim that it spent hundreds of hours trying to locate fixtures that were mis-delivered to other projects in the building, or that had been moved during construction because there was no designated storage area, and that CET's request for a designated area for storage of light fixtures was denied. (McQuillan Aff., 54)

The circumstances of the Project indicate that there must be many other areas where CET was not lucky enough to have found a 2015 email referring to the previous year, but where Macy's personnel discussed issues relevant to CET's claims, which have all now been erased.

ARGUMENT

POINT I

CET HAS SATISFIED THE THREE-PART TEST FOR SANCTIONS DUE TO SPOILIATION

The basis of CET's motion is CPLR 3126, which provides that where a party willfully fails to meet a discovery obligation, the court may, among other things, grant an order that the issues related to the withheld documents are to be resolved in favor of the party seeking the discovery.

What constitutes a "willful" failure to disclose information has been interpreted broadly by courts, with case law identifying varying degree of willfulness, including negligence, as explained below.

A. The Three-Part Test For Sanctions

It is well-established that awarding sanctions for the spoliation of evidence requires the satisfaction of a three-part test:

(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003). The Appellate Division, First Department has held that *Zubulake* provides the appropriate spoliation standard for New York state courts. *VOOM HD Holdings LLC v. Echostar Satellite L.L.C.*, 93 A.D.3d 33, 36 (1st Dep't 2012). *See also, Pegasus Aviation I, Inc. v. Varig Lgistica S.A.*, 118 A.D.3d 428, 437 (1st Dep't 2014).

Macy's' destruction of the relevant emails satisfies all three elements of the test.

B. Macy's Had A Duty to Preserve Its Emails

Macy's was aware by September 2014 that its emails were likely to be relevant to future litigation with CET, and therefore had an obligation to take steps to preserve those emails.

The trigger for taking steps to prevent automatic destruction of relevant material is not the commencement of litigation, but a company's awareness of possible future litigation:

The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or **when a party should have known that the evidence may be relevant to future litigation.**

Zubulake, 220 F.R.D. at 216 (internal citations and quotation marks omitted)(emphasis added).

The duty to preserve is triggered when there is a credible probability of future litigation:

A reasonable anticipation of litigation arises **when an organization is on notice of a credible probability that it will become involved in litigation**, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.

VOOM HD Holdings LLC v EchoStar Satellite L.L.C., 93 AD3d 33, 43 (1st Dept 2012) *quoting* *Zubulake*, 220 FRD at 269 (emphasis added).

When a party becomes aware of possible future litigation, it is critical to stop automatic destruction of emails:

Once a party reasonably anticipates litigation, **it must suspend its routine document detention/destruction policy** and put in place a 'litigation hold' to ensure the preservation of relevant documents.

Zubulake, 220 F.R.D. at 218. It is "well-settled that a party must suspend its automatic deletion function" in anticipation of litigation. *Ocwen Loan Servicing, LLC v. Ohio Pub. Employees Ret. Sys.*, 49 Misc. 3d 1219(A), 28 N.Y.S.3d 649 (Sup. Ct. N.Y. Co. 2015).

Macy's should have suspended the automatic destruction of its emails in September 2014, after it received emails from CET strongly objecting to Macy's use of Shorr to perform electrical work that CET would be charged for. See Statement of Facts, Section II, D, above.

C. Macy's Destroyed Emails With A Culpable State of Mind

Macy's failure to suspend its automatic email destruction in the fall of 2014, in light of its intense dispute with CET, was either grossly negligent, or at the very least negligent.

Courts have established that "willfulness" warranting a spoliation sanction under CPLR 3126 can be found based on "intentional or willful conduct, gross negligence, or ordinary negligence," and sanctions are appropriate "even if the destruction occurred through negligence rather than willfulness..." *Pegasus Aviation I, Inc. v. Varig Lgistica S.A.*, 118 A.D.3d 428, 437 (1st Dep't 2014)(quoting *Samaroo v. Bogopa Serv. Corp.*, 106 A.D.3d 713, 714 (2d Dep't 2013)).

Behavior that constitutes gross negligence can include "(1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail." *VOOM HD Holdings LLC*, 93 A.D.3d at 45. Where destruction of evidence is caused by intentional or willful conduct, or gross negligence, then the relevance of the destroyed documents is presumed. *VOOM HD Holdings LLC*, 93 A.D.3d at 45. Thus, Macy's failure to institute a litigation hold constitutes gross negligence, and the relevance of the missing documents is presumed.

Even if Macy's destruction of the emails was not intentional or grossly negligent, it was certainly negligent, in which case "the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense." *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-548 (2015).

This is hardly a bar to spoliation sanctions. In fact, "this Court [First Department] has frequently upheld orders striking pleadings or granting negative inference charges in cases of

inadvertent destruction of evidence.” *320 W. 13th St., LLC v. Wolf Shevack, Inc.*, 105 A.D.3d 586, 587, 964 N.Y.S.2d 38, 39 (1st Dep’t 2013). “[D]eletion, even when it is merely negligent, and without any intent to destroy documents, is sanctionable.” *Kohan v Nehmadi*, No. 104259/11, 2017 WL 2444795, at *9 (Sup. Ct. N.Y. Co. 2017). “[A]dverse inference charges have been found to be appropriate even in situations where the evidence has been found to have been negligently destroyed.” *Pegasus Aviation I, Inc.*, 26 N.Y.3d at 554.

D. The Destroyed Emails Were Relevant To Future Litigation

The emails that Macy’s allowed to be destroyed were relevant to CET’s claims, as discussed above in the Statement of Facts, Section III.

Courts are lenient in determining whether a party has met the burden of proving the relevance of documents that no longer exist:

Although plaintiffs now complaint that relevance cannot be established in the absence of the [destroyed information], it is the peculiarity of many spoliation cases that the very destruction of the evidence diminishes the ability of the deprived party to prove relevance directly, so that plaintiffs’ objection will not, under these circumstances, impede a finding of relevance

Sage Realty Corp. v. Proskauer Rose LLP, 275 A.D.2d 11, 17, 713 N.Y.S.2d 155 (1st Dep’t 2000). Based on the *Sage* court’s reasoning, this Court, in *915 Broadway Associates LLC v. Paul, Hastings, Janofsky & Walker, LLP*, 34 Misc. 3d 1229(A), 2012 N.Y. Slip Op. 50285[U], (Sup. Ct. N.Y. Co. 2012), determined that:

[C]ourts will usually reject an argument that the deprived party cannot establish the relevance of the evidence.

E. Alternative Relief

If the Court determines that an adverse inference is not warranted as a matter of law, it is requested that the question of whether Macy’s had a duty to preserve its emails, when that duty arose, and whether Macy’s acted culpably should be submitted at the time of trial to the jury or

fact-finder. *See, Siras Partners LLC v. Activity Kuafu Hudson Yards LLC*, 2018 WL 4743371 (Sup. Ct. N.Y. Co. 2018).

If the Court finds an adverse inference is appropriate, it is requested that it also award CET the costs of making this motion. *915 Broadway Associates LLC* at *13.

CONCLUSION

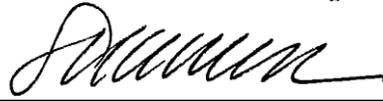
Macy's is responsible for the absence of relevant emails from its document production and should be sanctioned. Macy's had knowledge of an actual conflict with CET in September 2014, which should have caused it to suspend the automatic destruction of emails related to the Project at that time, in light of the high probability of litigation.

For the foregoing reasons and based upon the authorities cited herein, it is respectfully requested that the Court grant Corporate Electrical Technologies, Inc.'s motion and award such other relief as the Court deems appropriate.

Dated: New York, New York
December 21, 2018

Respectfully submitted,

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