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

PRESENT: Hon. Saliann Scarpulla *Justice* PART 39

AJ HOLDINGS GROUP LLC,

Plaintiff,

- v -

IP HOLDINGS, LLC AND ICONIX BRAND GROUP, INC.,

Defendants.

INDEX NO. 600530/2009

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion to/for_____

	PAPERS NUMBERED
Notice of Motion — Affidavits – Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the accompanying decision/order.

Dated: 9/15/14

Hon. Saliann Scarpulla, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER/JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 39

----------X

AJ HOLDINGS GROUP, LLC,

Plaintiff,

-against- Index No. 600530/2009

IP HOLDINGS, LLC and ICONIX BRAND GROUP, INC., **DECISION AND ORDER**

Defendants.

----------X

HON. SALIANN SCARPULLA, J.:

In this action, *inter alia,* to recover damages for breach of contract, Defendants IP Holdings LLC ("IP Holdings") and Iconix Brand Group, Inc. ("Iconix") move, pursuant to CPLR 3126, for an order imposing spoliation sanctions, including striking the complaint and dismissing the action, or affording them an adverse inference at trial, and/or awarding them monetary sanctions, on the grounds that plaintiff AJ Holdings Group, LLC ("AJ Holdings") failed to preserve and produce relevant email evidence. AJ Holdings cross-moves for an order, pursuant to CPLR 2221 and 3212, granting renewal of its prior summary judgment motion, and, upon renewal, granting summary judgment in its favor, and dismissing defendants' answer and counterclaims. In the cross motion, AJ Holdings also seeks an order striking the June 17, 2011 affidavit/report prepared by defendants' digital forensics expert, Michael Wudke, president of TransPerfect Legal Solutions Digital Forensics Division ("Wudke report"), and awarding it sanctions for

defendants' frivolous motion practice, equal to the attorneys' fees and costs incurred in opposing both of defendants' spoliation sanctions motions.

AJ Holdings, a limited liability company that ceased operations in 2009, was formed by five principals for the purpose of entering into, and performing, a license agreement with IP Holdings, a wholly-owned subsidiary of Iconix. AJ Holdings' five principals were nonparties Morris Tbeile (AJ Holdings' chairman and chief executive officer), Morris Alfaks, Edward Alfaks, Dib Chaaya, and Salim Mann. Morris Alfaks, Edward Alfaks, Chaaya, and Mann were also officers of nonparty Apollo Apparel LLC ("Apollo Jeans"), a company separate and distinct from AJ Holdings at all relevant times.

In 2007, AJ Holdings and IP Holdings entered into a license agreement. Pursuant to the 2007 license agreement and 2008 amendment agreement (both, "amended license agreement"), IP Holdings, as owner and licensor of the trademark, "MUDD," granted AJ Holdings, as licensee, the exclusive right to use that trademark in the United States, its territories, and possessions, and United States Armed Forces bases worldwide in connection with the manufacture, marketing, distribution, and sale of certain products, including MUDD jeans and swimwear. Pursuant to the terms of the license agreement, the term of the license period ran from February 2007 through June 30, 2011.

By letter dated September 26, 2008, defendants early terminated the amended license agreement, effective immediately. Defendants also admittedly negotiated, and entered into, a license agreement with nonparty Kohl's for the MUDD brand of products.

In February 2009, AJ Holdings commenced this action alleging that, among other things, defendants breached the amended license agreement by: (1) prematurely terminating that agreement; (2) failing to provide it with 90-days prior written notice of such termination; (3) failing to refund it a sum equal to the $2,634,000 drawn down by IP Holdings against a letter of credit; (4) failing to provide AJ Holdings with the required sell-off period; and (5) permitting Kohl's to manufacture, distribute, advertise, market, promote, and sell the trademarked products, prior to the natural expiration of the contractual exclusive license and termination periods. AJ Holdings asserts causes of action for breach of contract, a declaratory judgment, specific performance, injunctive relief, breach of the implied covenants of good faith and fair dealing, fraudulent inducement, and tortious interference.

IP Holdings and Iconix answered the complaint and denied all allegations of wrongdoing. They alleged that AJ Holdings materially defaulted under the amended license agreement by: (1) failing to timely pay in full the royalties due and owing; (2) selling products outside the authorized territory; (3) selling products through unapproved retail outlets; (4) violating noncompete provisions by doing business with contractually-prohibited competitors, including "Hot Kiss"; and (5) illegally trans-shipping products.

Further, IP Holdings and Iconix claimed that AJ Holdings' material defaults permitted them to early terminate the amended license agreement. They maintained that in August and September 2008, AJ Holdings advised IP Holdings that it was experiencing

financial difficulties, and would be unable to perform its monetary obligations imposed by the amended license agreement. IP Holdings and Iconix further alleged that AJ Holdings sought, and consented to, early termination of that agreement in exchange for their recommendation that Kohl's use AJ Holdings as a vendor for the manufacture of MUDD apparel. They interposed a counterclaim for a judgment declaring that, pursuant to the terms of the amended license agreement, certain royalty payments were accelerated, and that defendants were entitled to audit AJ Holdings' financial books and records. They also asserted counterclaims to recover money damages under theories of anticipatory breach and breach of contract, and for reimbursement of attorneys' fees.

By decision and order dated February 7, 2011 (the "prior order"), Justice Barbara R. Kapnick granted IP Holdings and Iconix's CPLR 3126 motion to compel certain paper and electronic discovery to the extent that the court determined that AJ Holdings' duty to preserve electronic data arose on September 29, 2008, the date that AJ Holdings' attorney sent Iconix's attorney an email in which he discussed the alleged premature termination of the amended license agreement. The court further held that the email clearly placed AJ Holdings on notice of potential litigation, giving rise to such duty. The court also directed AJ Holdings to provide defendants' forensic expert access to its desktop computers, laptops, and handheld devices to determine whether any information, [illegible] deleted after September 29, 2008 could be retrieved.

In the prior order, the court also denied the branches of IP Holdings and Iconix's motion to strike the complaint or impose spoliation sanctions, with leave to make a further application, if appropriate, after completion of the forensic examination. The court also denied AJ Holdings' cross motion for summary judgment on the grounds that triable issues existed regarding whether the termination of the lease agreement was consensual.

IP Holdings' and Iconix's forensic examination of AJ Holdings' email was held on March 29, 2011. Wudke examined the available computers and email servers for email sent and received by AJ Holdings' representatives between September 29, 2008, when AJ Holdings' duty to preserve relevant electronic discovery arose, and February 19, 2009, when this action was commenced (the "relevant time frame").

Wudke noted that the examination was limited to the corporate email servers because AJ Holdings failed to preserve evidence that had once existed, including the principals' desktop computers, laptops, and handheld devices that were in use on September 29, 2008. Following the forensic examination, Wudke concluded that, among other things, AJ Holdings did not implement a litigation hold or take any steps, such as backing up, to collect or preserve email on the corporate email servers, and that therefore, email sent and received by AJ Holdings' representatives through the corporate email servers during the relevant time frame was deleted or discarded, and the forensic team was unable to retrieve them.

Wudke also noted that the forensic team was able to retrieve a "handful" of email sent, and received, by four out of five of the principals, whom Wudke referred to as AJ Holdings' email custodians. Wudke concluded that the handful of messages retrieved stood "in stark contrast to the thousands of mail messages sent and received by those same custodians at other times, strongly suggesting that a substantial number of mail items exchanged by [AJ Holdings'] principals after the duty to preserve arose were not properly preserved."

Wudke reported that, following commencement of this action, AJ Holdings "replaced, and discarded, all of the desktop computers used by its principals during the Relevant Time Frame. Because [AJ Holdings] did not preserve any desktop, laptop or handheld devices used in the Relevant Time Frame, I was unable to analyze any of this hardware." Last, Wudke reported that AJ Holdings' "principals and employees sent and received e-mails through AOL accounts (in addition to . . . the corporate e-mail servers) but I was not able to access those accounts . . . in part because the hardware used to send and receive those e-mails were discarded and unavailable for inspection."

Following completion of the forensic examination, IP Holdings and Iconix again moved for spoliation sanctions, including striking the complaint and dismissing the action, affording them an adverse inference at trial, and/or imposing monetary sanctions, on the grounds that AJ Holdings failed to preserve and produce relevant email evidence.

AJ Holdings cross-moved for leave to renew its prior summary judgment motion, and for an order striking the Wudke report, and imposing monetary sanctions on IP Holdings and Iconix for frivolous motion practice. Following oral argument on these motions held on December 12, 2011, Judge Kapnick determined that a hearing on the spoliation issue must be held.

A bench hearing on the spoliation issue was held before Judge Kapnick on February 6, March 23, March 27, and March 30, 2012. During the spoliation hearing, the court heard testimony from Morris Alfaks, Edward Alfaks, Chaaya, and Mann, AJ Holdings' five principals, its IT manager Issam Kadamani, Andrew Miltenberg, Esq., a partner at Nesenoff & Miltenberg LLP, its legal counsel, and Wudke. The parties submitted posthearing briefs summarizing the evidence, and setting forth proposed findings of fact and conclusions of law.

On April 1, 2014, this court heard oral argument on the motions, and, by bench order issued on that date (1) denied that branch of AJ Holdings' cross motion for renewal of its prior summary judgment motion, on the ground that AJ Holdings failed to present any new evidence or law in support of the cross motion; and (2) reserved decision on the motion for spoliation sanctions and on the branches of the cross motion for sanctions and to strike the Wudke report.

Discussion

IP Holdings and Iconix now contend that the evidence presented at the spoliation hearing demonstrated a complete failure by AJ Holdings to preserve electronic evidence relevant to this action. They further contend that such failure demonstrates AJ Holdings' blatant disregard for the evidence preservation responsibilities placed on litigants, and that AJ Holdings now seeks a multimillion dollar judgment, after having destroyed electronic evidence crucial to the defense of this action.

Specifically, IP Holdings and Iconix maintain that, among other things, the hearing testimony established that AJ Holding (1) did not implement a litigation hold to preserve existing electronic information on or after September 29, 2008, the date when it could reasonably have anticipated litigation; (2) had no practice or mechanism in place during the relevant time frame for backing up its principals' emails, including emails sent over a company or AOL email server; and (3) did not save the desktops, laptops, or Blackberries used by its principals, from which emails otherwise deleted from a server potentially could have been recovered through forensic work. They also contend that the evidence established that all five of AJ Holdings' principals were frequent email users, and that all five were involved in matters relating to the license agreement underlying this litigation,

AJ Holdings claims that the Wudke report must be stricken on the ground that Wudke's threshold assumptions are incorrect, and that Wudke's conclusions are not based on a preponderance of the evidence.

The court first finds that the branch of AJ Holdings' cross motion to strike the Wudke report is denied. "[T]he determination of whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court, the provident exercise of which will not be disturbed absent a serious mistake or an error of law." *Guzman v. 4030 Bronx Blvd. Assocs. L.L.C.*, 54 A.D.3d 42, 49 (1st Dept 2008) *citing Meiselman v. Crown Hgts. Hosp.*, 285 N.Y. 389, 398-399 (1941). The expert who is permitted to testify "should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." *Matott v. Ward,* 48 N.Y.2d 455, 459 (1979).

AJ Holdings does not contest Wudke's background and qualifications. In any event, Wudke's curriculum vitae demonstrates that he is fully qualified to act as a computer forensic examiner, electronic discovery consultant, and testifying expert. Moreover, as discussed below, Wudke's forensic investigation, analysis, and conclusions as set forth in the Wudke report and in Wudke's testimony during the spoliations sanctions hearing meet the requisite standards and have a rational basis, and, therefore, may be considered by this court.

The court next finds that the branch of defendants' motion for spoliation sanctions is granted. "Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence . . . before the adversary has an opportunity to inspect them." *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 173 (1st Dept 1997).

In *Zubulake v. UBS Warburg LLC* (220 F.R.D. 212, 220 [SDNY 2003]), the Southern District court set forth three factors ("the *Zubulake* factors") to be considered in determining whether spoliation has occurred and whether sanctions are appropriate.

> "A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (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. In this circuit, a 'culpable state of mind' for purposes of a spoliation inference includes ordinary negligence. When evidence is destroyed in bad faith (*i.e.*, intentionally or willfully), that fact alone is sufficient to demonstrate relevance. By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions."

Zubulake v. UBS Warburg LLC, 220 F.R.D. at 220 (footnotes deleted); *Ahroner v. Israel Discount Bank of N.Y.*, 79 A.D.3d 481, 482 (1st Dept. 2010).

> "A 'culpable state of mind' for purposes of a spoliation sanction includes ordinary negligence. In evaluating a party's state of mind, *Zubulake* and its progeny provide guidance. Failures which support a finding of gross negligence, when

> the duty to preserve electronic data has been triggered, include: (1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail."

VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 45 (1st Dept 2012) (internal citations omitted).

> "The 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.' Where the client is a business, its managers, in turn, are responsible for conveying to the employees the requirements for preserving evidence. Thus, '[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.' When the failure to meet these obligations results in the destruction of evidence, sanctions are warranted. And though the nature of the sanction depends in part on the state of mind of the destroyer, some remedy may be appropriate even where the destruction is merely negligent."

Chan v. Triple 8 Palace, Inc., 2005 WL 1925579, at *6, 2005 U.S. Dist. LEXIS 16520, *17-18 (SDNY 2005)(internal citations omitted); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. at 218. However, the failure to issue a written litigation hold on the electronic discovery does not constitute gross negligence per se. *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 118 A.D.3d 428 (1st Dept 2014).

The evidence adduced at the spoliation hearing satisfies the first *Zubulake* factor. That evidence conclusively demonstrates that AJ Holdings' five principals, Tbeile, Morris Alfaks, Edward Alfaks, Chaaya, and Mann, were key players in the underlying dispute

involving defendants' early termination of the amended license agreement and, therefore, bore an obligation to preserve their email relevant to a potential lawsuit during the relevant time frame.

The duty to preserve email is borne by those:

> "individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses. The duty also includes documents prepared *for* those individuals, to the extent that those documents can be readily identified (*e.g.*, from the 'to' field in emails). The duty also extends to information that is relevant to the claims or defenses of *any* party, or which is relevant to the subject matter involved in the action. Thus, the duty to preserve extends to those employees likely to have relevant information – the key players in the case."

Zubulake v. UBS Warburg LLC, 220 F.R.D. at 217-218 (internal quotation marks omitted) (emphasis in original). AJ Holdings admits that Tbeile is AJ Holdings' email custodian, and may be considered a key player for purposes of this discussion.

Morris Alfaks, Edward Alfaks, Chaaya, and Mann each admit that each is a principal of AJ Holdings. In addition, AJ Holdings identified all five of its principals as persons who met and/or communicated with IP Holdings and Iconix's representatives concerning the license agreement, the amendment agreement, the termination of those agreements, and AJ Holdings' actual or potential business relationship with Kohl's.

Contrary to AJ Holdings' repeated contention that neither Morris Alfaks, Edward Alfaks, Chaaya, nor Mann may be considered key players in AJ Holdings' business affairs, it is irrelevant to this discussion that their day-to-day responsibilities concerned

Apollo Jeans' business exclusively, and that they sat in Apollo Jeans offices and used Apollo Jeans equipment. Notwithstanding the alleged day-to-day focus of these four principals, the evidentiary record clearly demonstrates that they were vitally concerned with the AJ Holdings amended license agreement and its termination, and had control over relevant email. Therefore, they were obligated to preserve all relevant electronic information sent or received by them during the relevant time frame.

Morris Alfaks executed the license agreement on behalf of AJ Holdings, was designated on that agreement as the person to receive notices on behalf of AJ Holdings, and executed the amendment agreement on behalf of AJ Holdings. In addition, he testified that he was personally involved in the negotiation of the license agreement, and met with defendants to discuss the terms of that agreement. Morris Alfaks also testified that he was personally handed the letter terminating the amended license agreement while at a meeting with two Iconix representatives, and discussed the termination and related money issues during meetings held at Iconix offices with nonparty Yehuda Shmidman, Iconix's then chief operating officer. Morris Alfaks also testified that he, Edward Alfaks, Chaaya, and Mann met with defendants after the termination of the amended license agreement, and discussed among themselves how to get their money back.

Edward Alfaks, Chaaya, and Mann were also each personally involved in matters concerning the amended license agreement. Edward Alfaks testified that he attended approximately three meetings with defendants regarding the amended license agreement,

and that he, Morris Alfaks, Mann, and Chaaya were present at face-to-face and telephonic meetings with Iconix because they were owners of AJ Holdings whose financial interests were affected by its business relationship with Iconix. Chaaya testified that he met with Iconix to discuss the MUDD license, and attended multiple meetings with defendants' representatives regarding the amended license agreement. Mann testified that he personally met with defendants after they terminated the amended license agreement to see whether they would give back the $2.6 million that AJ Holdings had paid Iconix.

Contrary to AJ Holdings' contention, the server over which the emails were sent, or received, and the physical location of the digital equipment, are not dispositive with regard to any determination regarding the principals' status as key players, or any inference regarding the emails' content. For example, the evidence demonstrates that Morris Alfaks, using the apollojeans@aol.com email address, and while presumably sitting in the Apollo Jeans office, sent and received emails that unquestionably concerned AJ Holdings' business, including the termination of the amended license agreement and the circumstances surrounding it.

The testimony by Morris Alfaks, Edward Alfaks, Chaaya, and Mann that each does not use email in dealing with each other is self serving, and directly contradicted by the forensic evidence included in the Wudke report that conclusively demonstrates that each maintained email accounts, had thousands of emails on his hard drive, and was a regular

email user. In addition, as has been seen, Morris Alfaks sent, and received, emails that directly concerned AJ Holdings' business.

Contrary to AJ Holdings' contention that Morris Alfaks, Edward Alfaks, Chaaya, and Mann had a limited command of written and spoken English, and were "merely" investors who relied solely on Tbeile to run the AJ Holdings business, the record conclusively demonstrates that each principal was a sophisticated businessman whose English was more than adequate to permit each to understand the relevant documents, the topics discussed at AJ Holdings business meetings, and to have received, read, and written emails concerning the license agreement, its amendment, and the termination of that agreement.

Next, testimony adduced at the spoliation hearing satisfies the second *Zubulake* factor. The evidentiary record conclusively demonstrates that Tbeile, Morris Alfaks, Edward Alfaks, Chaaya, and Mann permitted the destruction of relevant email with a culpable state of mind, by taking no steps during the relevant time frame to implement a litigation hold or to collect or preserve their emails from automatic deletion by the servers, despite having received repeated warnings from legal counsel. Inasmuch as computer systems and servers often have automatic deletion features that periodically purge electronic documents such as email, it is necessary for a party facing litigation to take active steps to halt that process or take steps to otherwise preserve the email. *See VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d at 44.

Miltenberg, AJ Holdings' attorney, testified that he met with AJ Holdings' principals, and discussed the need for document preservation regarding the amended license agreement and its termination when he was retained in February 2009, more than four months after September 29, 2008, the day that the duty to implement a litigation hold arose. Miltenberg further testified that he periodically reminded AJ Holdings to save everything, and throw out nothing. However, although a verbal litigation hold was discussed, the testimony adduced at the hearing demonstrates that none of the five principals implemented it.

Kadamani, AJ Holdings' IT manager, testified that he was not informed of the existence of this action until the day before his deposition was taken on June 22, 2010. Kadamani also testified that none of AJ Holdings' five principals, including Tbeile, who is also a lawyer, instructed him in late 2008 or early 2009 to save or preserve email. Kadamani further testified that Tbeile's emails were not preserved until Tbeile left the company in June 2009, almost nine months after the duty to preserve arose; although any email that Tbeile did not delete would have been preserved on the server to the present day.

Kadamani testified that he advised Wudke during the forensic examination that he had not kept any record of where the principals' computers in use in 2008 and 2009 presently were, and that he may have kept one or two in storage, unless someone else asked for a computer. Edward Alfaks similarly testified that the computers shown to

Wudke were new in 2010 and 2011, and that he had no idea where the computers used in late 2008 and 2009 by himself, Morris Alfaks, Chaaya, and Mann were. He also testified that, if a computer could be fixed, Kadamani kept it, and that, if it could not be fixed, he destroyed it.

AJ Holdings admitted on the record that any email that was sent, or received, by the five principals on the server in use by AJ Holdings or Apollo Jeans during the relevant time frame, and that was subsequently deleted and not backed up, cannot now be retrieved. Further, there is no evidence that AJ Holdings preserved any emails sent, or received, through the AOL accounts maintained by AJ Holdings or Apollo Jeans or the principals.

Wudke concluded from the information revealed by the forensic examination that AJ Holdings "had no backup whatsoever during [the relevant] time frame." Wudke also concluded that none of the principals made any adjustment to the routine deletion of their emails, either when litigation was first anticipated, or after meeting with Miltenberg. Wudke further testified that he was unable to retrieve deleted emails because, at the time that he conducted the forensic examination, Tbiele's Blackberry and laptop, and the desktop computers used by Morris Alfaks, Edward Alfaks, Chaaya, and Mann during the relevant time frame were not saved, or were otherwise not available for inspection. Wudke also testified that Kadamani did not show him a storage room holding ten or eleven old computers.

Wudke's forensic analysis reveals that AJ Holdings preserved merely a fraction of the email sent and received by the five principals during the relevant time frame. His analysis demonstrates that all five principals were regular email users. Wudke also testified about the information revealed by the email distribution bar charts that he developed from the forensic evidence, and annexed to the Wudke report. The charts demonstrate that: Tbeile typically sent or received an average of approximately 2,500 to 3,000 emails per month; Morris Alfaks had approximately 50,000 emails on his computer and that he sent or received more than 7,000 emails in December 2009 alone, and sent or received more than 3,000 emails in six separate months in 2009; Edward Alfaks had at least 43,000 emails on his computer, and sent or received an average of 3,000 emails per month; Chaaya had approximately 33,000 emails on his computer; Mann had approximately 40,000 emails on his computer, and sent or received an average of approximately 2,000 to 3,000 emails per month.

Wudke concluded that there was a noticeable drop in the amount of email sent, and received, by Tbeile during the relevant time frame, and that there must have been more email during that time frame. He also testified that, although Morris Alfaks used email, no email during the relevant time frame was recovered. Wudke similarly testified that he found a fairly small number of emails for Edward Alfaks, Chaaya, and Mann during the relevant time frame, although each was a frequent email user.

The third and last *Zubulake* factor is satisfied by the hearing evidence which demonstrates that the destroyed emails were relevant to defendants' defense of this action.

The testimony cited above conclusively demonstrates that all five of AJ Holdings' principals were grossly negligent in failing to implement a litigation hold, although they were repeatedly advised by AJ Holdings' attorney of the need to preserve electronic evidence. It is well established that the relevance of destroyed evidence, including electronic evidence, is presumed when the destruction of such evidence was the result of gross negligence. *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 A.D.3d at 45. In any event, and assuming that the failure to preserve AJ Holdings' email was merely negligent, the evidence demonstrates that the destroyed email was relevant to the defense of this action, and would have tended to prove that AJ Holdings requested, and consented to, termination of the amended license agreement.

The scarcity of email from the relevant time fame recovered for four of the five principals, in contrast to their regular use of email as established by the forensic evidence adduced at trial, clearly demonstrates that a large number of emails were destroyed, either intentionally or inadvertently, before they could be reviewed for relevance and subject to discovery in this litigation. As noted above, the record contains email evidencing that the principals communicated by email about the amended license agreement, its termination, and meetings with defendants regarding those topics. Emails have been found between Tbeile and Morris Alfaks that directly concern the underlying dispute, including the

defense arising out of AJ Holdings' alleged consent to the termination of that agreement in exchange for a recommendation to Kohl's.

Last, the parties dispute which, if any, sanctions are appropriate in the circumstances presented here. IP Holdings and Iconix contend that the continued and blatant disregard by AJ Holdings of its duty to preserve relevant electronic evidence mandates striking the complaint, and dismissing this action. In the alternative, they seek an adverse inference at trial, and in connection with AJ Holdings' summary judgment motion, that the destroyed email contained evidence supported the defenses to the claims. IP Holdings and Iconix also seek a monetary award equal to the cost of the forensic examination and the attorneys' fees that they expended in both spoliation sanctions motions.

In opposition, AJ Holdings contends that sanctions are not appropriate on the grounds that Morris Alfaks, Edward Alfaks, Chaaya, and Mann are not email custodians for AJ Holdings, and, in any event, they did not use email to communicate AJ Holdings' business, and that all Tbeile's relevant emails were preserved.

"The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for the spoliation of evidence." *Holland v. W.M. Realty Mgt., Inc.*, 64 A.D.3d 627, 629 (2nd Dept 2009); CPLR 3126. Such sanctions include:

> "precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the

> trial of the action. . . . Where appropriate, a court can impose the ultimate sanction of dismissing the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party."

Ortega v. City of New York, 9 N.Y.3d 69, 76 (2007)(internal citations omitted). The First Department, Appellate Division has held "that destruction or loss of evidence should be rendered costly enough an enterprise that it will not be undertaken, inasmuch as it often leaves the offended party prejudicially bereft of appropriate means to confront a claim with incisive evidence and turns trials into speculative spectacles based on rank swearing contests." *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d at 174 (internal quotation marks and citation omitted).

An adverse inference that the missing emails would have favored IP Holdings and Iconix is appropriate. When it failed to preserve the email of all five principals, AJ Holdings placed IP Holdings and Iconix at an undue disadvantage in establishing their defense based on AJ Holdings' alleged prior knowledge of, and agreement to, the termination of the amended license agreement. Although AJ Holdings repeatedly represents that it preserved, and voluntarily produced, some 7,900 of Tbeile's emails created during the relevant time frame, the record demonstrates that Wudke discovered the email in personal and offline storage files during the course of the forensic examination.

Moreover, monetary sanctions against AJ Holdings equal to the cost of the forensic examination and the reasonable attorneys' fees expended by IP Holdings and

Iconix in twice moving for spoliation sanctions are appropriate here. The failure by AJ Holdings to implement the litigation hold repeatedly recommended by its attorneys directly resulted in the destruction of relevant email, and caused IP Holdings and Iconix to expend significant sums in experts' and attorneys' fees.

Last, that branch of the cross motion for monetary sanctions against IP Holdings and Iconix is denied.

In accordance with the foregoing, it is hereby

ORDERED that defendants IP Holdings LLC and Iconix Brand Group, Inc.'s motion is granted to the extent that spoliation sanctions consisting of an adverse inference at trial and on any summary judgment motion, that plaintiff AJ Holdings Group, LLC failed to preserve relevant email, and monetary sanctions in favor of defendants and against plaintiff are granted; and it is further

ORDERED that the portion of defendants IP Holdings LLC and Iconix Brand Group, Inc.'s motion to recover the forensic experts' fees and reasonable attorneys' fees as monetary sanctions is severed and the issue of the amount of these fees is referred to a Special Referee to hear and report; and it is further

ORDERED that plaintiff AJ Holdings Group, LLC 's cross motion is denied in its entirety; and it is further

ORDERED that defendants' counsel shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, upon the Special Referee Clerk in

the General Clerk's Office (room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the court.

Dated: New York, NY
September 15, 2014

ENTER:

Saliann Scarpulla, J.S.C.