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18232040 [15649.1]

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BIG CITY COFFEE, LLC, dba, BIG CITY
COFFEE & CAFÉ, and SARAH JO FENDLEY,
an individual,

Plaintiffs,

v.

BOISE STATE UNIVERSITY, MARLENE
TROMP, individually and in her official
capacity as President of Boise State University,
LESLIE WEBB, individually and in her official
capacity as Vice President for Student Affairs
and Enrollment Management, ALICIA ESTEY,
individually and in her official capacity as
Vice President for University Affairs and Chief
of Staff, and FRANCISCO SALINAS,
individually and in his official capacity as
Assistant to the Vice President for Equity
Initiatives, and DOES 1-20,

Defendants.

Case No. CV01-21-15332

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SPOILIATION SANCTIONS**

COME NOW Plaintiffs, Big City Coffee LLC dba Big City Coffee & Café (“Big City”) and Sarah Jo Fendley (“Fendley,” and, together with Big City, the “Plaintiffs”), by and through their attorneys of record, Givens Pursley LLP, and hereby submit this Memorandum in Support of Plaintiffs’ Motion for Spoliation Sanctions (“Motion”).

I. INTRODUCTION

Defendants and third-parties witness related to Defendants have deleted emails, texts, etc., despite receiving not one, but two, preservation letters prior to this lawsuit. Defendants and such third-parties testified that they neglected to terminate auto delete functions on their phones, computers, or other devices; this—at least for Defendants—after submitting verified discovery responses stating Defendants did not delete any relevant information.

During the deposition of University President Marlene Tromp (“Tromp”) specifically, she testified she failed to disable the auto delete function on her devices. That is beyond shocking. Tromp failed to do something she was twice instructed to do, and, as a matter of law, had a duty to do the moment litigation was reasonably anticipated.¹ *Colonies Partners, L.P. v. County of San Bernardino*, 2020 WL 1496444 at * 6 (C.D. Cal. Feb. 27, 2020). The Court must put a stop to this and issue sanctions against Defendants and third-parties that have willfully—and, frankly cavalierly—failed to abide by their preservation obligations.

¹ Arguably, Defendants and Boise State University (“Boise State” or “BSU”) could have reasonably anticipated litigation the day after Plaintiffs were removed from campus, given that Boise State hired a public relations firm to deal with the fall out of its actions. *See* Declaration of Michael O. Roe in Support of Plaintiffs’ Motion for Spoliation Sanctions (“Roe Declaration”), Ex. A (excerpts of the Tromp deposition). Furthermore, Boise State should have know litigation was reasonably anticipated when Plaintiffs’ former counsel notified Matt Wilde (“Wilde”), Boise State’s in-house counsel, on October 29, 2020, that Fendley was “getting together her damages.” *Roe Declaration*, Ex. B.

II. BACKGROUND

The relevant background for this Motion is limited. Plaintiffs were “removed” from the Boise State campus in October 2020—Boise State’s words, not Plaintiffs. *See* Appendix 1 (“Big City Coffee has been *removed* as a vendor from Boise State campus, according to Boise State Vice President for Student Affairs and Enrollment Management *Leslie Webb*.”) (emphasis added). That’s Defendant, Leslie Webb (“Webb”).

Ouch.

On March 24, 2021, Plaintiffs filed a notice of tort claim (“Tort Claim”) with the Secretary of State and Boise State, indicating that the state actors at issue/persons involved were Boise State, Trump, Webb, Alicia Estey (“Estey”), and Francisco Salinas (“Salinas”). The Tort Claim contained a section indicating that all of the proposed Defendants, as well as other agents, representatives, and employees of BSU, all have records or files, and such records and files “are considered evidence in this matter.” *See* Roe Declaration, Ex. C at 12. In addition, the Tort Claim states:

Claimants hereby demand that the Defendants and such other persons and entities *preserve any and all electronically stored information and all paper files in their custody, possession or control that may be relevant to the claims described above. This includes, without limitation, emails, word processing documents, in final or draft form, text messages, social media posts, and any other information contained on mobile devices, computer systems and electronic storage systems.* The Claimants intend to seek all such information through the discovery process in any ensuing litigation.

Roe Declaration, Ex. C at 12 (emphasis added).

Plaintiffs then sent a litigation hold letter (“Litigation Hold Letter”) to Wilde on October 12, 2021, asking BSU and its affiliates honor their preservation obligations. The Litigation Hold Letter (again, the second preservation letter) states:

As you are likely aware, the *courts have become increasingly vigilant in applying strict standards that require the preservation of both paper documents and ESI that may be relevant to litigation. Generally, upon either reasonable anticipation or actual notice of litigation, a party to litigation has a duty to take affirmative steps to preserve all potentially relevant evidence, even if that party has a document retention policy or automatic deletion policy in place that conflicts with such duty to preserve.* Once the duty is triggered, courts have imposed severe sanctions in cases where a party has failed to preserve potentially relevant evidence. Noncompliance can result in sanctions, together with the creation of a legal presumption that any ESI or physical documents not preserved contained information that is harmful to the non-compliant party.

Roe Declaration, Ex. D at 1 (emphasis added).

In Defendants' discovery, Webb, Estey, and Salinas all attested, in verified interrogatory responses, that they did not destroy any documents. *See* Roe Declaration, Ex. E (excerpts from relevant discovery). However, at each Defendant's deposition, they testified that they did, in fact, delete text messages. Webb testified as follows, when asked about her text messages concerning Plaintiffs:

Q. Okay. Do you still have that text message?

A. No, I don't have it. I looked for it.

Q. How come? I mean, do you delete your text messages?

A. *Oh, yeah. I don't keep -- I don't have enough -- it is -- it is an old one. I don't have enough like, what's it called, storage, memory. Yeah. And that was from four years ago.*

See Roe Declaration, Ex. F (Webb deposition excerpts) (emphasis added). Salinas testified similarly, when asked about text messages relative to Plaintiffs' removal from campus:

Q. Do you still have those text messages?

A. *No.*

Q. And why is that?

A. *Because I've got a different phone than back then.*

Q. Oh, when did you switch phones?

A. After I moved to Spokane, my son came home for Christmas and we both got new phones.

Q. I assume you didn't print or save any of the texts?

A. *Oh, no.*

Q. Back when you had your old phone during this time in 2020, did you delete texts regularly?

A. *Yes.*

Q. Was that your practice?

A. Yeah. Just -- I don't know much about the phones, the way they work, but I know that -- and this may be a misunderstanding -- you only have a limited memory space.

See Roe Declaration, Ex. G (Salinas deposition excerpts) (emphasis added). And, Estey testified at her deposition that she did not disable her auto-delete feature:

Q. BY MR. ROE: And so was it your practice in the summer and fall of 2020 to delete text messages from your phone?

A. I had auto delete turned on. And I don't remember the time period because I've switched phones. But otherwise, my texts would just - - I have just too many to wade through. So yes, it was. I just don't remember in what time increment.

Q. So have you used the auto delete feature continuously since 2020? Is that just what you do?

A. *Oh, for long before then, too, yes. I've always had it turned on.*

See Roe Declaration, Ex. H (Estey deposition excerpts) (emphasis added).

In addition, at Tromp's deposition, Tromp testified that she did not disable the auto delete function on her devices:

Q. Is that the same phone that you owned then? Did you change cell phones between now and then?

A. I did, but my phone was -- I don't know what the technological description is for, but it was just moored onto my new phone.

Q. So do you delete text messages regularly?

A. *I do. I did -- I did -- for years, I would just go down and just delete everything, and now that there's auto delete, I have auto delete.*

Q. Okay. And when did you implement auto delete?

A. I don't know. Whenever it became available. I don't know when that was.

Q. Was it after summer of 2020 or before?

A. I don't really remember.

Q. But you have auto delete now?

A. *Mm-hm.*

See Roe Declaration, Ex. A (excerpts from Tromp's deposition) (emphasis added). In Tromp's case, we know she was in the habit, in 2020, of exchanging text messages with third parties regarding BSU matters. *See* Roe Declaration, Ex. I (Tromp's text messages with third-parties).

Although Ms. Griswold testified that she did not have any text messages relative to Big City Coffee, we'll never know given that she also regularly deletes text messages:

Q. And do you preserve your text messages or do you delete those?

A. I regularly update my phone. I don't like to keep a lot of junk in there. *So I you know regularly clean out my text messages.*

Q. Do you delete all of your text messages?

MS. DUKE: Object to the form.

THE WITNESS: *I have deleted many text messages. That's just normal for me with my phone with how I keep my phone records.*

See Roe Declaration, Ex. J (excerpts from Griswold's deposition) (emphasis added).

Additionally, both Tromp² and Griswold³ testified that they do not even remember seeing a litigation hold notice. *See* Roe Declaration, Exs. A and J, respectively.

III. LEGAL STANDARDS

“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” *Colonies Partners*, at * 6. “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.” *Id.* (quoting *In re Napster, Inc. Copyright Litig.*, 462 F.Supp.2d 1060, 1067 (N.D. Cal. 2006)).

Spoliation is a rule of evidence applicable at the discretion of the trial court. *Bromley v. Garey*, 132 Idaho 807, 812, 979 P.2d 1165 (1999) (citing *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995)). The doctrine of spoliation provides that when a party with a duty to preserve evidence intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party. *Id.* (citing *Stuart v. State*, 127 Idaho 806, 816 (1995)). Therefore, two elements are required for a spoliation inference: (1) intentional destruction, and (2) a duty to preserve evidence.

In the context of stopping any auto-delete or auto-erase function on a device, *Paisley Park Enterprises, Inc. v. Boxill*, 330 F.R.D. 226 (D. Minn. 2019) is instructive. There, the

² “Q. Okay. Well, it reiterates what we call litigation hold, which is fairly routine. It is the law, but lawyers exchange in lawsuits -- and it basically tells each other don't be destroying evidence in the case. And what this letter to Matt Wilde does is just reiterate our prior request from March 24th because Boise State's website had been altered relative to this dispute. Do you know anything about that? MS. DUKE: Object to the form. Assumes facts not in evidence. THE WITNESS: I'm not aware of that, no.”).

³ “MR. ROE: The question is this, in litigation, this Exhibit 167 that I showed you, you looked at. That's called a litigation hold letter. And in anticipation of litigation parties are supposed to to preserve evidence. My question is does your office generally partake in the preservation of evidence. . . . Q. And to be clear, you have not seen Exhibit 167 before? A. I am not familiar, having seen this document. I do not recall if I have seen it before.”

Court found that the spoliating party failed to take reasonable steps to preserve text messages from key custodians when it failed to suspend the auto-delete function. According to the Court:

There is no doubt that Staley and Wilson are the types of persons likely to have relevant information, given their status as principals of RMA and owners of Deliverance. Nor can there be any reasonable dispute as to the fact that their text messages were likely to contain information relevant to this litigation. In fact, Boxill and other third parties produced text messages that they sent to or received from Staley and Wilson. Neither party disputes that those text messages were relevant to this litigation. Thus, the RMA Defendants were required to take reasonable steps to preserve Staley and Wilson's text messages.

The RMA Defendants did not do so. First, Staley and Wilson did not suspend the auto-erase function on their phones. Nor did they put in place a litigation hold to ensure that they preserved text messages. The principles of the "standard reasonableness framework" require a party to "suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 327 F.R.D. 96, 108 (E.D. Va. 2018) (citation and internal quotation marks omitted). It takes, at most, only a few minutes to disengage the auto-delete function on a cell phone. It is apparent, based on Staley's affidavit, that he and Wilson could have taken advantage of relatively simple options to ensure that their text messages were backed up to cloud storage. (ECF No. 395, pp. 7-9). These processes would have cost the RMA Defendants little, particularly in comparison to the importance of the issues at stake and the amount in controversy here. Failure to follow the simple steps detailed above alone is sufficient to show that Defendants acted unreasonably.

330 F.R.D. at 233; *see also Apple Inc. v. Samsung Electronics Co.*, 881 F. Supp. 2d 1132, 1149 (N.D. Cal. 2012) ("In light of its biweekly automatic destruction policy, Samsung had a duty to verify whether its employees were actually complying with the detailed instructions Samsung claims it communicated to them.[] As far as the court can see, Samsung did nothing in this regard.[] Samsung failed to send litigation hold notices in August 2010, beyond a select handful of employees, when its duty to preserve relevant evidence arose. Samsung provided no follow-up,

and instead waited to send such notices and to follow-up with individual employees for seven more months, after Apple filed its complaint. And again, at all times, Samsung never checked whether even a single Samsung custodian was at all in compliance with the given directives, while at all times the 14-day destruction policy was in place. *This is more than sufficient to show willfulness.*”) (footnotes omitted) (emphasis added); *Posner v. Hillstone Rest. Grp., Inc.*, No. 2:19 CV 00507, 2022 WL 705602 at *4 (E.D. Cal. Mar. 9, 2022) (“Further, ‘when a company or organization has a document retention policy, it is obligated to suspend that policy and implement a litigation hold to ensure the preservation of relevant documents after the preservation duty has been triggered.’”) (citing *Apple*, 881 F. Supp. 2d at 1137 (citation and internal quotation marks omitted)).

IV. ARGUMENT

A. Defendants and Others Intentionally Destroyed Evidence in This Case.

The above points are undisputed: (1) Plaintiffs sent the Tort Claim and that Tort Claim contained ESI preservation language—pre-suit; (2) Plaintiffs sent the Litigation Hold Letter advising Defendants to preserve all relevant materials (days after filing suit); and (3) Defendants and third-party witnesses related to Defendants ignored the two admonitions from Plaintiffs’ counsel to preserve information and, in fact, deleted potential evidence in this case.

To be sure, intent is difficult to prove. It is a rare instance that someone is going to text another person and state: (1) they engaged in nefarious action; and (2) did so intentionally. Of course, we might be able to find that out, but for the fact that Defendants and third-parties deleted communications that could substantiate our position. Regardless, the cases cited above, which are factually on point, squarely support that the acts on which the Motion is based were intentional.

This case has been pending for years. To find out in 2024, after sending a preservation reminder twice in 2021 that Plaintiffs' preservation requests—and Defendants' duties to preserve—have been ignored is staggering and cannot be anything other than intentional. This point is corroborated by Nicole Nimmons, who testified that BSU attempts to recode information to avoid public records requests:

Q. Okay. So this -- this Google document entitled, "Big City Coffee and Cafe," you worked on it. Do you know whether Alicia Estey, Marlene Tromp and Lauren Griswold also worked on it?

A. Yes. Lauren worked on it, as well as Alicia Estey, in accordance with the history of the document and the edits it took -- that took place in it, including changing the name of the Google document to be, I believe, B, space, C, space, C. Wherein it was -- when I was asked about this specific document, I was unable to locate it for some time *because the title had been altered*.

Q. What was the new title?

A. The new title was B, space, C, space, C, I believe.

Q. And who made that change?

A. I believe it was Alicia -- no. I believe it was -- it was -- I believe it was Lauren who changed the title of it.

Q. Okay. Do you know why they changed the title?

MR. HEPWORTH: Objection to form, foundation.

MS. KRUG: Join.

THE WITNESS: *I believe it was for it not to be put forth in a public records request.*

Roe Declaration, Ex. K (excerpts of deposition of Nicole Nimmons) (emphasis added).

Q. BY MR. ROE: Are you aware of other instances where BSU uses codes to *evade public disclosure*?

MS. KRUG: Object to the form.

THE WITNESS: *I've been asked and told not to put things in writing at times because of public records requests and documentation.*

Roe Declaration, Ex. K (excerpts of deposition of Nicole Nimmons) (emphasis added).

In other words, the misconduct at issue is not isolated, and Defendants and third-parties under their control are entitled to no benefit of the doubt. Based on the above discussion, Plaintiffs respectfully request that: (1) the Court award Plaintiffs fees and costs; (2) Plaintiffs be permitted to present to the jury the fact that Defendants and third-parties affiliated with the Defendants destroyed evidence; and (3) Defendants receive an adverse jury instruction.

Such remedies have been used in similar situations. *See First Am. Title Co. v. Norwest Title Ins. Agency, LLC*, 2016 WL 4548398 *6 (D. Utah Aug. 31, 2016) (non-spoliating party allowed to present evidence and argument to jury regarding the spoliating party's electronically stored information); *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 199 F. Supp. 3d 958, 986 (E.D. Va. 2016), *aff'd in part, rev'd in part*, 881 F.3d 293 (4th Cir. 2018) (court allowed party to argue spoliation during opening arguments and gave instruction alerting jury to fact of spoliation); *Alsadi v. Intel Corp.*, No. CV-16-03738-PHX-DGC, 2020 WL 4035169, at *1–5 (D. Ariz. July 17, 2020).

V. CONCLUSION

Plaintiffs ask that the Court grant the Motion.

DATED this 29th day of April, 2024.

GIVENS PURSLEY LLP

By /s/ Michael O. Roe
Michael O. Roe – Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of April, 2024, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SPOILIATION SANCTIONS** to be served by the method indicated below, and addressed to the following:

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/s/ Michael O. Roe
Michael O. Roe

Appendix 1

TRENDING

Remembering John Freemuth's legacy at Boise State and beyond

Black Lives

< >

(<https://web.archive.org/web/20201029165239/https://arbiteronline.com/2020/05/30/remembering-john-freemuths-legacy-at-boise-state-and-beyond/>) ([https://www.facebook.com/blacklivesmatter/](https://web.archive.org/web/20201029165239/https://www.facebook.com/blacklivesmatter/)) ([https://www.instagram.com/blacklivesmatter/](https://web.archive.org/web/20201029165239/https://www.instagram.com/blacklivesmatter/)) ([https://twitter.com/blacklivesmatter/](https://web.archive.org/web/20201029165239/https://twitter.com/blacklivesmatter/)) ([https://www.youtube.com/watch?v=...](https://web.archive.org/web/20201029165239/https://www.youtube.com/watch?v=...))



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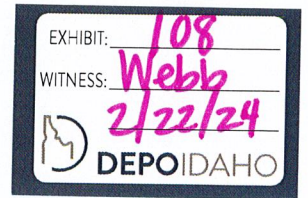


NEWS (<https://web.archive.org/web/20201029165239/https://arbiteronline.com/category/news/>)

📅 October 28, 2020

BREAKING: Big City Coffee removed as vendor from Boise State campus

By Ashley L. Clark (<https://web.archive.org/web/20201029165239/https://arbiteronline.com/author/ashleyclark/>)



🔍 (<https://web.archive.org/web/20201029165239/https://arbiteronline.com/2020/10/28/breaking-big-city-coffee-removed-as-vendor-from-boise-state-campus-#8barments>)

Photo by Drew Marshall

Big City Coffee has been removed as a vendor from Boise State campus, according to Boise State Vice President for Student Affairs and Enrollment Management Leslie Webb.

The announcement was made in an [Inclusive Excellence Student Council \(IESC\) meeting](https://web.archive.org/web/20201029165239/https://www.boisestate.edu/asbsu/files/2020/10/10272020_IESC-Minutes.pdf)

(https://web.archive.org/web/20201029165239/https://www.boisestate.edu/asbsu/files/2020/10/10272020_IESC-Minutes.pdf), an organization within the Associated Students of Boise State (ASBSU) on Oct. 27.

In a [Facebook post](https://web.archive.org/web/20201029165239/https://www.facebook.com/62232870730/posts/10158482343670731/?d=n) made by Boise State (<https://web.archive.org/web/20201029165239/https://www.facebook.com/62232870730/posts/10158482343670731/?d=n>), the university confirmed that Big City Coffee requested to be let out of its contract with Boise State.

The post stated: "As a popular local vendor in the community, Big City Coffee was invited onto our campus. The business opened this fall. Our students hold a wide range of opinions about this business. After some students began speaking out against the owner's personal beliefs, we explained that we could not violate the First Amendment Rights of anyone on campus. Following that, the owner requested to be let out of the contract. We agreed to the owner's request."

[Big City Coffee was brought onto Boise State campus](https://web.archive.org/web/20201029165239/https://arbiteronline.com/2020/09/29/big-city-coffee-replaces-starbucks-in-albertsons-library-on-campus/) (<https://web.archive.org/web/20201029165239/https://arbiteronline.com/2020/09/29/big-city-coffee-replaces-starbucks-in-albertsons-library-on-campus/>), at the beginning of fall semester to replace the Starbucks located in Albertsons Library. [Members of the IESC and ASBSU have vocalized their dislike for the company since September.](https://web.archive.org/web/20201029165239/https://www.boisestate.edu/asbsu/files/2020/09/09012020_IESC-Meeting-Minutes.pdf) (https://web.archive.org/web/20201029165239/https://www.boisestate.edu/asbsu/files/2020/09/09012020_IESC-Meeting-Minutes.pdf)

Since its introduction, the coffee shop has received significant backlash from students and community members regarding the owner's support and display of Thin Blue Line flags, imagery that has historically been used as a counterprotest to the Black Lives Matter movement.

However, the owner of Big City Coffee has stated that her support for law enforcement stems from her husband, a Boise Police officer who was [shot five times and lost his leg after an encounter in 2016](https://web.archive.org/web/20201029165239/https://idahonews.com/news/local/bpd-looking-for-suspect-involved-in-shooting-near-emerald-orchard-streets) (<https://web.archive.org/web/20201029165239/https://idahonews.com/news/local/bpd-looking-for-suspect-involved-in-shooting-near-emerald-orchard-streets>) with a recently released prison inmate.

Additionally, students had also voiced concerns over an [Instagram post made by the owner of Big City Coffee](https://web.archive.org/web/20201029165239/https://www.instagram.com/p/CGoKtDNNpfv/) (<https://web.archive.org/web/20201029165239/https://www.instagram.com/p/CGoKtDNNpfv/>) that features a screenshot of a student's personal Snapchat post in which the student expressed frustration about Big City Coffee's stance on police, specifically in regards to the Black Indigenous People of Color (BIPOC) community.

In an email sent to ASBSU members and Boise State President Marlene Tromp, ASBSU Vice President ██████████ said: "This post is extremely harmful, using a student's personal social media post to diminish and devalue student voice, in order to boast their brand and their contract with Boise State. Not only is this post harmful to students, especially our BIPOC students, it is extremely inappropriate and disparaging. Fee paying students should not be at the liberty for a social media smear by a company contracted with the University."

**This article was updated on Oct 28, 2020 at 9:42 p.m. with new information regarding Big City Coffee's decision to be released from contract per the Boise State University Facebook post*



Photo by Drew Marshall

[BIG CITY COFFEE \(HTTPS://WEB.ARCHIVE.ORG/WEB/20201029165239/HTTPS://ARBITERONLINE.COM/TAG/BIG-CITY-COFFEE/\)](https://web.archive.org/web/20201029165239/https://arbiteronline.com/tag/big-city-coffee/)

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📅 October 27, 2020

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📅 October 26, 2020

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