At a Special Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Cortland County Courthouse, in the City of Cortland, New York, on the 11th day of May 2020.

PRESENT: HON. MARK G. MASLER
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CORTLAND

RADIATION ONCOLOGY SERVICES OF CENTRAL NEW YORK, P.C. and MICHAEL J. FALLON, M.D.,

Plaintiffs

v.

OUR LADY OF LOURDES MEMORIAL HOSPITAL, INC., KATHRYN CONNERTON, LISA HARRIS, M.D., and JAN DOMBROWSKI, M.D.,

Defendants.

DECISION AND ORDER

Index No. EF15-462
RJI No. 2015-0326-M

APPEARANCES:

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Via NYSCEF

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MARK G. MASLER, J. S. C.

Michael Fallon is a physician specializing in radiation oncology and the sole shareholder of Radiation Oncology Services of Central New York (ROSCNY). From June 1, 2001 through April 10, 2015, ROSCNY was the exclusive provider of radiation oncology services at Our Lady of Lourdes Memorial Hospital, Inc. (Lourdes) pursuant to a written agreement dated June 19, 2001, as subsequently amended (the Coverage Agreement). Lourdes suspended Fallon's clinical privileges on April 10, 2015 and plaintiffs commenced this action on July 24, 2015. Although Lourdes conditionally restored Fallon's clinical privileges on August 10, 2015, it terminated the Coverage Agreement on August 11, 2015. Plaintiffs thereafter served an amended complaint, and the parties have engaged in vigorously-contested and extensive disclosure for nearly five years. Plaintiffs now move for an order compelling defendants to produce their litigation hold, including all related electronically stored information (ESI), and for sanctions based on seven specific instances of alleged spoliation of evidence.

Litigation holds are generally protected from disclosure by the attorney-client privilege or as attorney work product unless a preliminary showing of spoliation is made (see Tracy v NVR, Inc., 2012 WL 1067889, * 6 [WDNY 2012]; Major Tours, Inc. v Colorel, 2009 WL 2413631, * 2 - * 3 [DNJ 2009]; see e.g. VOOM HD Holdings LLC v EchoStar Satellite L.L.C., 93 AD3d 33 [2012] [considering the details of the purported litigation hold based on the failure to preserve ESI after litigation should reasonably have been anticipated and the failure to prevent permanent deletion of emails for four months following commencement of the action]; Zubulake v UBS Warburg LLC, 229 FRD 422 [SDNY 2004] [considering the details of the litigation hold based on a showing that at least one e-mail had never been produced]; Keir v Unumprovident

Corporation, 2003 WL 21997747 [SDNY 2003] [considering emails pertaining to defendant's preservation efforts based on a determination that electronic records which had been ordered preserved had been erased]). Production of a litigation hold may be ordered upon a preliminary showing of spoliation because its scope and effect bear directly on the state of mind of the party with control of the destroyed evidence, which is a critical element in determining whether spoliation sanctions are warranted, and, if so, in assessing an appropriate sanction (see Tracy v NVR, Inc., 2012 WL 1067889 at * 6).

In that regard,

> "[a] party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense' (VOOM HD Holdings LLC v EchoStar Satellite L.L.C., 93 AD3d 33, 45 [2012], quoting Zubulake v UBS Warburg LLC, 220 FRD 212, 220 [SDNY 2003]). Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed (see Zubulake, 220 FRD at 220). On the other hand, if the evidence is determined to have been negligently destroyed, 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]).

Thus, a litigation hold must be produced upon a preliminary showing of spoliation to provide a proper record for consideration of whether spoliation sanctions are warranted, unless the party that had been in control of the destroyed evidence can establish, as a matter of law, that spoliation sanctions are unwarranted regardless of the adequacy of the litigation hold.

In support of the motion, plaintiffs have identified seven specific instances of alleged spoliation of evidence. Plaintiffs first identify an email dated June 18, 2015 from Dr. Blansky, who held several positions at Lourdes, including Chair of the Investigative Committee that was

given the task of investigating Dr. Fallon, and Kathryn Connerton, CEO of Lourdes. The email was sent from Blansky's private Gmail account to Connerton's private Gmail account. Defendants produced a printed copy of the email, which included an attachment with notes summarizing a three-hour long meeting that Blansky had with Dr. Dombrowski, a radiation oncologist at the University of Rochester whom Lourdes had retained to review Fallon's work. The notes included Blansky's conclusions regarding the potential revocation of Fallon's privileges and termination of his position as medical director. However, defendants are unable to produce any ESI for the email, which Connerton candidly admits to having deleted immediately after receipt.

The second instance of alleged spoliation is a memorandum of an email from Dr. Barrett, a member of the Lourdes medical staff, to Blansky dated April 19, 2015, in which Barrett expressed several concerns with the ongoing process of reviewing Fallon. Only a printed copy of the memorandum was produced and defendants are unable to produce any ESI for this document. At the end of the Barrett email were notes that appear to have been added by Blansky evincing disagreement with Barrett and stating that "I wanted to advise you of these concerns." Although this comment suggests that Blansky forwarded the email and notes, there is nothing in the printed copy to indicate who might have received them.

In both of these first two instances, plaintiffs argue that the failure to produce ESI for the emails constitutes spoliation, specifically asserting that the lack of ESI deprived them of learning whether Connerton engaged in further relevant communications regarding Fallon through her private Gmail account – with Blansky or others – or whether Blansky may have shared the Barrett email with Connerton or others. Defendants' assertion that there has been no spoliation

because hard copies containing the content of the emails have been produced is unavailing as printing paper copies of the emails and permanently deleting the associated ESI potentially deprived the emails of significant evidentiary value (see Harry Weiss, Inc. v Moskowitz, 106 AD3d 668, 669 [2013], citing Matter of Irwin v Onondaga County Resource Recovery Agency, 72 AD3d 314, 321-322 [2010]; Sekisui American Corp. v Hart, 945 F Supp 2d 494, 506 n 71 [SDNY 2013]).

Nonetheless, defendants could preclude production of the litigation hold by establishing, as a matter of law, at least one of the following elements for each item of destroyed evidence: (1) that they had no obligation to preserve the evidence at the time of its destruction; (2) that the evidence was destroyed through no fault or wrongdoing whatsoever, even negligence; or (3) that the missing evidence was not relevant to plaintiffs' claims. Defendants do not dispute that there was an obligation to preserve the first two emails as evidence when they were destroyed. At oral argument, defendants' counsel conceded that the duty to preserve evidence relevant to this action arose not later than when Lourdes's General Counsel, Delphine O'Rourke, received a letter from plaintiffs' prior attorney, Bruce Wood, advising that Fallon intended to pursue litigation. The Wood letter appears to have been sent by email on April 15, 2015 (see Dkt. No. 81). Defendants have not established that the ESI was destroyed without culpable conduct on their part, including freedom from negligence; indeed, Connerton admits to affirmatively deleting the first email. Nor have defendants excluded the possibility that ESI for the two emails would, as plaintiffs contend, provide evidence relevant to plaintiffs' claims – a determination that may well turn on whether plaintiffs can establish entitlement to a presumption of relevancy by showing that the ESI was intentionally or wilfully destroyed by defendants.

Thus, by establishing the destruction of the ESI associated with these two emails, plaintiffs made a preliminary showing of spoliation sufficient to compel production of defendants' litigation hold, which will afford the parties a full and fair opportunity to litigate the issue of spoliation sanctions. Based on this determination, it is not presently necessary to review the remaining five instances of alleged spoliation. Accordingly, plaintiffs' motion is granted to the extent of ordering defendants to produce the litigation hold and is otherwise held in abeyance. Within 15 days from the date of this decision and order, defendants shall file copies of all written documents constituting the litigation hold and shall provide plaintiffs' counsel with all associated ESI. The portion of plaintiffs' motion seeking spoliation sanctions shall be held in abeyance to allow for further submissions from the parties addressing the effect of the litigation hold on the potential imposition of sanctions. Plaintiffs shall file their supplemental submission within 30 days after receiving the litigation hold. Defendants shall file their opposing submission within 30 days after plaintiffs' supplemental submission is filed, and any reply shall be filed within 15 days thereafter. Oral argument will be scheduled at a later date.

Finally, numerous disclosure motions were made in this action. At oral argument, counsel stated that there may issues related to disclosure that were presented by motion that have yet to be decided or otherwise resolved. To facilitate completion of disclosure, within 30 days from the date of this order, counsel shall separately submit written summaries specifically identifying all disclosure issues that are claimed to remain outstanding and the motion or motions in which they were raised.

This decision constitutes the order of the court. The filing of this decision and order, or transmittal of copies hereof, by the court shall not constitute notice of entry (see CPLR 5513).

Dated: June 9, 2020
Cortland, New York

ENTER

Hon. Mark G. Masler
Supreme Court Justice

The following documents were filed with the Clerk of the County of Cortland:

- Notice of motion dated February 27, 2020.
- Affidavit of William J. Leberman, sworn to February 27, 2020, with Exhibits A-S.
- Affirmation of Jeanette N. Warren dated April 24, 2020, with Exhibits A-BB.
- Affidavit of Kathryn Connerton, sworn to April 22, 2020, with Exhibit A.
- Affidavit of Anthony Martino, sworn to April 24, 2020, with Exhibits A-C.
- Reply affirmation of William J. Leberman dated April 29, 2020.
- Decision and Order dated June 9, 2020.