

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	:	
	:	
RICHARD ROSARIO,	:	
	:	
	:	Plaintiff,
	:	
	:	18 Civ. 4023 (LGS)
	:	
-against-	:	
	:	
	:	<u>ORDER</u>
	:	
CITY OF NEW YORK, et al.,	:	
	:	
	:	Defendants.
	:	
	:	
-----X	:	

LORNA G. SCHOFIELD, District Judge:

WHEREAS, on July 25, 2022, Defendants filed a letter motion (Dkt. No. 425) requesting (i) reconsideration of the Court’s Order, dated July 25, 2022 (Dkt. No. 421), denying Defendants’ motion to compel production of Plaintiff’s communications with non-party witnesses and (ii) sanctions under Federal Rule of Civil Procedure 37, including at least an adverse inference, based on Plaintiff’s deletion of communications with non-party witnesses.

WHEREAS, on July 25, 2022, Plaintiff submitted, via email, to Chambers (i) a letter motion opposing Defendants’ motion for sanctions and (ii) text messages between Plaintiff and non-party witnesses Chenoa Ruiz and Michael Serrano. The letter and text messages are attached to this Order.

WHEREAS, on July 26, 2022, Plaintiff submitted, via email, the attached chart of communications that the expert identified on Plaintiff’s phone.

WHEREAS, a conference was held on July 26, 2022, to discuss the motions. For the reasons discussed at the conference, it is hereby

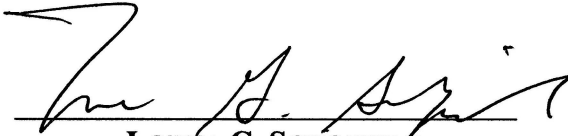
ORDERED that Defendants’ motion for reconsideration is GRANTED. Plaintiff’s expert, Mr. Grant, is directed to conduct a search of Plaintiff’s phone and iCloud account for purposes of identifying communications between January 27, 2021 to the present, between

Plaintiff and individuals who were or are on Plaintiff's witness lists in this action. It is further

ORDERED that Defendants' motion for an adverse inference is **DENIED** without prejudice to renewal following further factual investigation regarding Plaintiff's intent in deleting the text messages and the content of any deleted messages with non-party witnesses. Defendants are permitted to question non-party witnesses regarding any communications they may have had with Plaintiff relating to this action for purposes of impeachment. It is further

ORDERED that by **July 27, 2022**, Plaintiff shall file the letters and accompanying exhibits he previously submitted to Chambers via email concerning the aforementioned motions. If Plaintiff believes any of the materials contain confidential motion, he shall file a motion to seal pursuant to the Court's Individual Rules, explaining why the materials should be afforded confidential treatment.

Dated: July 27, 2022
New York, New York



LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE



July 25, 2022

Via Email: Schofield_NYSDChambers@nysd.uscourts.gov

Honorable Lorna G. Schofield
United States District Judge
U.S. District Court, Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square
New York, NY 10007

Re: *Rosario v. City of New York, et al.*, Case No. 18-cv-4023

Dear Judge Schofield,

Defendants’ extraordinary request for extreme sanctions—up to and including dismissal of the case or preclusion of key evidence—has no legal basis. Because Defendants’ motion addresses the deletion of ESI, Rule 37(e) controls. *See Eur. v. Equinox Holdings, Inc.*, No. 20CV7787JGKKHP, 2022 WL 832027, at *3 (S.D.N.Y. Mar. 21, 2022) (holding since 2015 when Rule 37(e) was amended, it provides the exclusive test for “when corrective measures for spoliation of ESI are appropriate”) (citing 2015 Advisory Notes to Rule 37(e)); *see also Fashion Exch. LLC v. Hybrid Promotions, LLC*, No. 14CV1254SHSOTW, 2019 WL 6838672, at *3 (S.D.N.Y. Dec. 16, 2019) (“Rule 37(e) replaces the prior framework for claims regarding a failure to preserve ESI.”). Under Rule 37(e), no sanction at all is warranted for several reasons.¹

I. The messages are not lost.

First, sanctions under Rule 37(e) are available “only where ESI has been ‘lost’ and ‘cannot be restored or replaced through additional discovery.’” *Goldman v. Sol Goldman Invs. LLC*, No. 20CV06727MKVSN, 2022 WL 2118199, at *3 (S.D.N.Y. June 11, 2022) (quoting Fed. R. Civ. P. 37(e)). Thus even if a party himself has deleted messages, there can be no sanctions if the messages are provided from another source, because they are not “lost.” *Id.* at *4 (holding sanctions are not available where Plaintiff deleted an email that was subsequently

¹ It is unclear if Defendants are arguing for sanctions on any other basis. Although Rule 37 now provides the explicit framework in this context, Defendants cannot meet any other test for sanctions, either. For example, sanctions under inherent authority require “a particularized showing of bad faith” which Defendants cannot make. *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, No. CV14MD2542VSBSLC, 2022 WL 1082087, at *5 n.7 (S.D.N.Y. Apr. 11, 2022).

produced from another source: “The email was not lost because [the recipient] produced it at his deposition. Therefore, spoliation sanctions may not be awarded for Plaintiff’s failure to produce the May 28 email, and the Court need not inquire into Plaintiff’s state of mind.”); *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, No. 13CV2581PKCJLC, 2021 WL 4190628, at *11 (S.D.N.Y. Aug. 18, 2021) (noting that deleted messages that can be obtained from the other parties are not permanently lost or unrecoverable under Rule 37); *Morgan Art Found. Ltd. v. McKenzie*, No. 18CV4438ATBCM, 2020 WL 5836438, at *19 (S.D.N.Y. Sept. 30, 2020) (holding Rule 37 sanctions were not available because deleted messages which still exist in another account “are not permanently lost, and in fact they have already been produced”).

That is precisely the circumstance here; although Mr. Rosario deleted the text message chains from his own phone, they have been obtained from other participants: Plaintiff’s counsel and John Torres. Because Defendants have not and cannot establish that any relevant messages are “lost” and “cannot be restored or replaced through additional discovery,” their request for sanctions fails at the first step.² See *Watkins v. New York City Transit Auth.*, No. 16 CIV. 4161 (LGS), 2018 WL 895624, at *10 (S.D.N.Y. Feb. 13, 2018) (Defendants have “the burden of establishing the elements of a spoliation claim by a preponderance of the evidence.”).

II. There is no prejudice to cure.

Second, even assuming Defendants could establish that relevant evidence was actually lost (which they cannot), the Court would next have to “find[] prejudice to [Defendants] from loss of the information” before it could “order measures no greater than necessary to cure the prejudice.” Fed. R. Civ. P. 37(e). “Prejudice” in this context requires more than some probative value: “the mere fact that deleted materials were relevant does not itself establish prejudice.” *Pugh-Ozua v. Springhill Suites*, No. 18-CV-1755 (RA), 2020 WL 6562376, at *4 (S.D.N.Y. Nov. 9, 2020). Rather there must be some evidence—beyond pure speculation—that the lost materials would be helpful to Defendants’ case. *Simon v. City of New York*, No. 14-CV-8391 (JMF), 2017 WL 57860, at *7 (S.D.N.Y. Jan. 5, 2017).

Here, Defendants have not been prejudiced because they have the messages at issue. See, e.g., Fed. R. Civ. P. 37(e)(1) advisory committee’s note to 2015 amendment (explaining that ESI “often exists in multiple locations” and so “loss from one source may often be harmless when substitute information can be found elsewhere”). Defendants are also not prejudiced because the Court has already ruled the messages are at best tangentially relevant to the issues to be tried, far more prejudicial than probative under Rule 403, and therefore not themselves admissible. The

² There is no dispute entirety of chain with counsel has been produced. Our understanding is that John Torres intended to produce the entirety of the other two chains through screen shots, and we have produced the entirety of what he sent us to Defendants, which we understand captures the substance of the exchange. To the extent any stray words were cut off by the way he created the screenshots, as Defendants suggest they believe, we can follow up with John Torres, which we had proposed to do once he was in New York next week for his testimony so that we could view his phone ourselves. In the abundance of caution, as other witnesses are traveling to New York, Plaintiff’s counsel is seeking any recent text messages with Plaintiff regarding the case and, if any exist, will produce them.

Court’s ruling—that Defendants may conduct some limited impeachment related to the subject of communications between Mr. Torres and Plaintiff, which they must clear with the Court in advance—already puts Defendants in exactly the same position they would have been in had Mr. Rosario not deleted the texts from his phone. Any additional sanction does not cure prejudice (there is none) but rather would put Defendants in a better position than they would otherwise have been, even though they have not lost access to any evidence. *See Fashion Exch. LLC v. Hybrid Promotions, LLC*, 2019 WL 6838672, at *3 (“A Rule 37(e)(1) sanction may only be imposed upon a finding of prejudice from the loss of the information, and the sanction imposed may be ‘no greater than necessary to cure the prejudice.’” (quoting Fed. R. Civ. P. 37(e))).

III. The extreme sanctions Defendants seek are available only upon a showing by clear and convincing evidence that Plaintiff deleted with an intent to deprive, which Defendants cannot establish.

There is no basis for the sanctions Defendants seek. The extreme sanctions Defendants seek—including an adverse inference instruction or dismissal of a claim or the action as a whole—are available “only upon a finding that [Plaintiff] acted with the intent to deprive [Defendants] of the information’s use.” Fed. R. Civ. P. 37(e)(2); *see also Watkins v. New York City Transit Auth.*, No. 16 CIV. 4161 (LGS), 2018 WL 895624, at *10 (S.D.N.Y. Feb. 13, 2018) (“Litigants in the Second Circuit seeking sanctions under Rule 37(e)(2) now have the burden of proving ‘intent to deprive,’ rather than ordinary or gross negligence.”) (cleaned up); *see also Eur*, 2022 WL 832027, at *4 (“[T]he Court must be careful not to impose any measures taken to cure spoliation under subsection (e)(1) that has the effect of the sanctions specified under subsection (e)(2) of the Rule, which are reserved for those cases where there is a finding of ‘intent to deprive.’”).

Defendants bear the burden of proving this ‘intent to deprive’ by clear and convincing evidence. *Eur.*, 2022 WL 832027, at *4. Importantly, “the intent contemplated by Rule 37 is not merely the intent to perform an act that destroys ESI but rather the intent to actually deprive another party of evidence.” *Leidig v. Buzzfeed, Inc.*, No. 16CIV542VMGWG, 2017 WL 6512353, at *11 (S.D.N.Y. Dec. 19, 2017). Such intent could be inferred “when the data loss cannot be credibly explained other than by bad faith.” *CBF Industria de Gusa S/A*, 2021 WL 4190628, at *18. Thus, for example, if the evidence “clearly and convincingly show[s] that Defendants sought out emails that could disadvantage them in this case, and then chose those particular emails to delete, for the purpose of keeping them out of [the opposing party’s] hands” that could satisfy the burden. *Lokai Holdings LLC v. Twin Tiger USA LLC*, No. 15CV9363 (ALC) (DF), 2018 WL 1512055, at *16 (S.D.N.Y. Mar. 12, 2018).

On the other hand, if there is no evidence of selective deletion, or if the evidence is capable of more than one interpretation, that would not support a finding of “intent to deprive.” *Id.* Similarly, a party’s attempts to retrieve destroyed ESI weigh against a finding of “intent to deprive.” *See CBF Industria de Gusa S/A*, 2021 WL 4190628, at *19.

Here, the record does not support a finding of “intent to deprive” by any standard, certainly not by clear and convincing evidence as would be required. There was no selective deletion; the record is clear that as a result of his paranoia and the memory of having all of his

communications monitored while he was in prison, Mr. Rosario routinely clears his phone of *all* of his text messages. There is nothing nefarious about this; nor is there any requirement that he preserve the vast majority of messages he sends, as they are not related to this case. The messages at issue here themselves demonstrate Mr. Rosario was not in a stable frame of mind when the texts were sent, and by the time he had calmed down to the point that counsel could remind him of the obligation to preserve these texts, Mr. Rosario had already followed the practice he uses with his other communications and deleted them. Most importantly, in the middle of this text chain Mr. Rosario copied in his counsel, which is completely inconsistent with any intent to hide this exchange from Defendants. Mr. Rosario then voluntarily produced his cell phone to a forensic expert to attempt to recover the texts.³

In short, Defendants fall far short of their burden in justifying any of the extreme sanctions they seek. *See, e.g., Rhoda v. Rhoda*, No. 14 CIV. 6740 (CM), 2017 WL 4712419, at *1 (S.D.N.Y. Oct. 3, 2017) (“The adverse inference instruction is an ‘extreme sanction and should not be given lightly.’”); *Fashion Exch. LLC v. Hybrid Promotions, LLC*, No. 14-CV-1254 (SHS), 2021 WL 1172265, at *7 (S.D.N.Y. Mar. 29, 2021) (“‘[P]reclusion is an extreme sanction and, before ordering preclusion, a court must consider less extreme’ sanctions.”).

IV. Defendants should not be permitted to question Plaintiff about the destruction.

Plaintiff concedes Defendants should be permitted to question about the substance addressed in the texts that relates to this case—in other words, whether the witnesses have ever asked for or received any benefit for their testimony, and the nature of their relationship to Mr. Rosario. But there is no basis to permit questioning about the deletion of the texts themselves. That would amount to a discovery sanction, which as explained above is not merited under Rule 37(e). In other words, it is a sanction greater than necessary to cure the prejudice, which is impermissible. *See Fashion Exch. LLC v. Hybrid Promotions, LLC*, 2019 WL 6838672, at *3 (“A Rule 37(e)(1) sanction may only be imposed upon a finding of prejudice from the loss of the information, and the sanction imposed may be ‘no greater than necessary to cure the prejudice.’” (quoting Fed. R. Civ. P. 37(e))). Furthermore, permitting questioning about the deletion would falsely suggest the deleted texts are far more probative than they are, as well as introducing a confusing sideshow into the trial, about a dispute that is irrelevant. It would also improperly suggest litigation misconduct, where there is none.

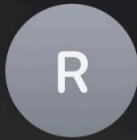
³ Defendants’ mention of the 2019 deletion of Instagram posts has no bearing on this issue. After maintaining an active and public social media profile for years, Mr. Rosario decided it was exacerbating symptoms of his PTSD and made it private. Plaintiff’s counsel attempted to download the entirety of the history of his posts so that they could then be produced to Defendants; believing this had been done Mr. Rosario subsequently deleted his account. Counsel later learned that among the hundreds of downloaded posts we had inadvertently missed some of the Instagram content. In other words, the error there was counsel’s, not Mr. Rosario’s. And there is no evidence any of the deleted posts—which Defendants had had access to while the posts were public—were in any way relevant to this suit.

Respectfully submitted,

/s Anna Benvenuti Hoffmann
Anna Benvenuti Hoffmann

Counsel for Plaintiff

Cc: all counsel



Richard >

Tue, Jun 28, 5:32 PM

Hey. I'm back and my lawyers say they have been texting but you never respond. Is everything alright?

Hi Chenoa, we're going to trial on July 25, when could I give you a call at your convenience to discuss possibilities for your testimony? Thank you so much. Emma

I'll reach out to you as soon as I'm free.

Delivered

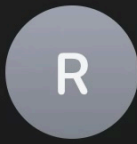
Okay, thank you! I really appreciate it.

Yes everything is good and I did respond to them and I told them that I'll reach out to them when I was free.



iMessage





Richard >



Yes everything is good and I did respond to them and I told them that I'll reach out to them when I was free.

Okay.

Remember we are 3 weeks away from the trial. So if you don't want to take part. Just tell them Chenoa. They can't prepare for you to testify if they can't talk to you to schedule a date. So. Whatever you feel in your heart you want to do. Go for it. It's not changing my life either way. It's just making my lawyers life that much difficult as they prepare for one of the biggest trials in New York. This is not a trial for peanuts.

That said. Nothing but love and respect for you no matter what you decide to do.

I will call them.



iMessage





Rich >



Thu, Jul 7, 5:04 PM

Yoooo. Call me if you're free.

Fri, Jul 8, 8:12 PM

Your the last solid, straight up dude I know from Deltona bro. These Niggaz are bitches.

You're the realest my gee. That's straight up.

Rob fucked up putting me in this spot and he admits he got emotional but doesn't take responsibility.

He did say That he never mentioned my name. And I told him it'd come back to me. Bro. I went to see him to show him love and he put me in the middle knowing his brother.

Fri, Jul 8, 10:20 PM

Yo we at an other spot having drinks, I work tomorrow from 6 am to 10p, I'll hit you up on the way home or Sunday morning.

No worries. Just don't flip on me.



iMessage





Rich >



Yo we at an other spot having drinks, I work tomorrow from 6 am to 10p, I'll hit you up on the way home or Sunday morning.

No worries. Just don't flip on me. That would break my heart.

God bless. And enjoy.

Sat, Jul 9, 9:07 AM

By the way. Explain to Rob how I also knew about the house you didn't want your parents to give him. And the car. How would I know that. You're a certified bitch Johnny. And your brother is an emotional mess. Like me. But you're a lying pig. And the only truth you've ever spoken got me home you bitch made Nigga. Now. Whether you testify or not. Deal with my lawyers fag. I'll pray for you my man. You have a rotten heart and God knows how to handle pieces of shit like you. You and your whole family including your dusty Cuban wife your brother stripped clothes off when you went on a shopping spree with your parents card. You faggots. Handle va



iMessage





Rich >

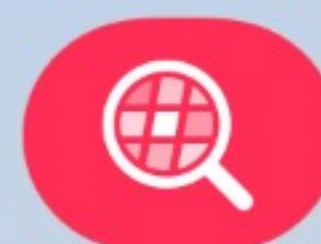


Cuban wife your brother stripped clothes off when you went on a shopping spree with your parents card. You faggots. Handle ya business. I have problems with my family. But I'll never slander my brother and talk about family business. I used to speak to you because I thought you were my friend. But now I u set stand who you are and rest assured me and you are not ever going to sit at the same table you faggot bitch detective. You fucking Carn artist. And I was never in my feelings for you but talking to me you broke ass pig. You can't live or move like me and you think not talking to me affected my life faggot. I was under the impression we were friends you bitch. And believe me I regret that because this conversation would have never taken place. And I'm going to share this with your parents since I won't be there to put you on blast you bitch Nigga. Have a good life you fucking no good piece of shit.

Me and Rob just spoke and he's my dude. He understands.



iMessage





Rich >



Sat, Jul 9, 11:30 PM

That's cool, you gave Johnny a piece of your mind though

Thu, Jul 14, 6:01 AM

What's good my gee. I just saw two missed calls. Please give me some good news.

Hit you with the three rings. Checking your sleep status. I be in bed by nine.

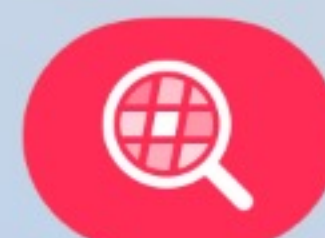
Yo

What's some bro, just getting up, they sent some dates, will send back one today. Saturday thru Wednesday

Okay. God bless. I'll share something with you if you swear to not ever mention my granddaughter to no one except your wife and kids. I'll share a pic. Not only would my eldest daughter kill me if she found out I shared a pic. But I'm overprotective about her. Imagine my new baby girl.



iMessage





Rich >



What's good my gee. I just saw two missed calls. Please give me some good news.

Hit you with the three rings. Checking your sleep status. I be in bed by nine.

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Don't swear. Just give me your word.

No doubt, you got my word

That's cool



iMessage





Rich >



I've been in tears of joy. I just started crying again.

Damn bro, God Bless her. I would've been too

I just want to move on and see her grow up. I'm tired bro. 26 fucking years.

That's awesome bro, enjoy.

Thank you. Only a chosen few will look at her and meet her one day. You're family bro. You. I can't ever thank God enough for meeting you.

Thanks bro, appreciate that. I feel the same, circle is small and your in it. It's one of those things that I look forward to, being a grandfather.

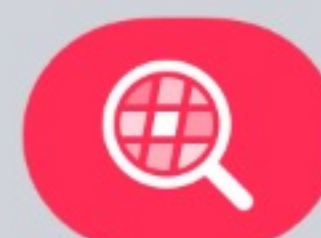


You know I want that boy though, since I didn't have my own, but I'll be bless with a healthy baby either way.

Yeah. Basically I'm looking for a boy also. She's going for it a year apart.



iMessage





Rich >



Yeah. Basically I'm looking for a boy also. She's going for it a year apart. She birthed at home. All natural. With them wet nurses. My daughter planned this shit for 3 years after being with her man for 3 years and it's all working out the baby is 100 healthy. Una prietita.

Call me if you can. I'm going in this 2.5 jog

I'll hit you up after work

Sun, Jul 17, 2:32 PM

Flight 2847

[View health and travel restrictions](#) >

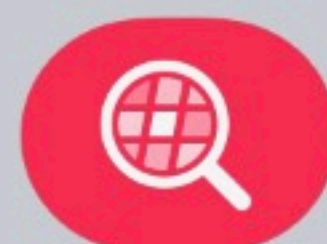
[Are you REAL ID ready?](#) >

<p>Depart</p> <p>8:33 AM</p> <p>Dallas/ Fort Worth</p>	<p>Arrive</p> <p>1:04 PM</p> <p>New York</p>										
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Passengers	Seats
Michael Serrano	30A



iMessage





July 22, 2022

Via email: Schofield_NYSDChambers@nysd.uscourts.gov

Honorable Lorna G. Schofield
United States District Judge
U.S. District Court, Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square
New York, NY 10007

Re: *Rosario v. City of New York, et al.*, Case No. 18-cv-4023

Dear Judge Schofield:

The following chart is Plaintiff’s best attempt to describe the text messages recovered from Plaintiff’s phone. Plaintiff’s expert, Jerry Grant, is still in custody of the phone. Upon the Court’s request, Plaintiff’s counsel contacted Mr. Grant, who had to pull the data again. There were parts of four text message chains recovered, all dated July 18. Plaintiff’s expert has informed Plaintiff’s counsel that he will be able to provide more information between 9:30am and 10:00a.m.

Participant	Dates	General Subject Matter
Nick Brustin	July 18	
Woman 1 ¹	July 18	Personal nature
Woman 2	July 18	Personal nature
(non-identifiable)	July 18	No context (an emoji)

Respectfully submitted,

/s/ Anna Benvenuti Hoffmann
Anna Benvenuti Hoffmann
Counsel for Plaintiff

Cc: all counsel

¹ Plaintiff believes but cannot yet confirm that woman number 1 is Plaintiff’s ex-wife.