STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: December 20, 2021]

EXCHANGE ST. HOTEL LLC,	:	
Plaintiff,	:	
	:	
v.	:	
	:	
TOCCI BUILDING CORPORATION,	:	
Defendant,	:	
	:	
and	:	**C.A. No. PC-2019-10577**
	:	
TOCCI BUILDING CORPORATION,	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
MERIT MECHANICAL CORPORATION,	:	
MANAFORT BROTHERS INCORPORATED	:	
and AIR MASTERS HVAC SERRVICES	:	
OF NEW ENGLAND, INC.,	:	
Third-Party Defendants.	:	

DECISION

STERN, J. Before this Court is Plaintiff Exchange St. Hotel LLC's (Exchange St.) Amended Motion for Sanctions against Defendant Tocci Building Corporation (Tocci), for alleged spoliation of discoverable text messages; failure to adequately prepare its Rule 30(b)(6) designee; and improper withholding of documents under the guise of the attorney-client privilege. Tocci filed a timely objection. Jurisdiction is pursuant to G.L. 1956 § 8-2-14 and Rule 37 of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

Background and Underlying Claims

On or about September 6, 2017, Exchange St. and Tocci entered into a contract (the Contract) for the construction of a 120-room hotel to be located on Exchange Street in Providence, Rhode Island (the Project). (Karam Aff. Ex. A.) The Contract required Tocci to pay its subcontractors for work performed within ten days following Tocci's receipt of payment from Exchange St. (Karam Aff. Ex. A, Doc. A201 at § 9.6.1.) Pursuant to the Contract, however, if a subcontractor placed a mechanic's lien on the Project and Tocci failed to either furnish lien security or record a lien bond satisfactory to Exchange St., Exchange St. was authorized to directly pay that subcontractor's lien. *Id*., Doc. A201 § 9.3.7. Tocci was then required to promptly reimburse Exchange St.'s payments to the subcontractors upon demand (not including those unrelated to Tocci's work or related to Exchange St.'s gross negligence or willful misconduct). *Id*. Over the course of the Project, Tocci's subcontractors recorded seventeen mechanic's liens totaling $2,063,109.26; Tocci refused to settle or bond all but two of these claims. (Gilbert Aff. ¶ 20.) Consequently, Exchange St. settled the remaining liens at a cost of $1,350,817.33 in exchange for agreements from these subcontractors to complete their missing work. *Id*. ¶ 21.

The Contract also required Tocci to achieve "Substantial Completion" of the Project within the allotted "Contract Time." (Karam Aff. Ex. A, Doc. A201, § 8.2.3.) Specifically, Tocci had 487 calendar days to achieve Substantial Completion of the Project and deliver a *permanent* certificate of occupancy to Exchange St. (Karam Aff. Ex. A, Doc. A133, § 2.2.7; Doc. A201 § 1.1.9.11.) The Contract provided some exceptions for a delay caused by Tocci and, if the delay

was deemed justifiable, the "Contract Time" would be extended by "Change Order." [1] *Id*., Doc. A201 §§ 8.2.3, 8.3.1. Notably, the adjustments in the "Contract Time" were only allowed to the degree the delay:

> "(1) is not caused by the Contractor failing to employ proper professional care as provided in Section 1.1.9.8, (2) should not have reasonably been avoided by the Contractor's timely notice to the Owner of the delay or the reasonable likelihood that a delay will occur assuming the Contractor was aware of such an event, or (3) should not have been reasonably anticipated and avoided by Contractor using proper professional care, and (4) the delay adversely impacts the Schedule's 'critical path.'" *Id*.

Beginning in October 2018, Exchange St. was notified that Tocci's predicted permanent occupancy date was beginning to slip further and further outside the allotted 487 day "Contract Time." (Gilbert Aff. ¶¶ 14-15.) Exchange St. had previously rejected Tocci's time extension requests because, in Exchange St.'s opinion, they were unwarranted under the Contract and/or were requested without supporting documentation. *Id*. ¶¶ 16-18. On or about March 15, 2019, Tocci finally obtained a Temporary Certificate of Occupancy from the City of Providence. (Karam Aff. ¶ 13.) On or about July 11, 2019—201 days after the Contract's Substantial Completion date

[1] As to the acceptable delays, the Contract reads, in pertinent part,

> "If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties by abnormal, adverse or unanticipated weather conditions or other causes beyond the Contractor's control; or by delay authorized by the Owner pending mediation and litigation; or by other causes that may justify delay under this Agreement, the Contract Time shall be extended by Change Order, but only to the extent that such delay has prevented or will prevent the Contractor from achieving Substantial Completion within the Contract Time." (Karam Aff. Ex. A, Doc. A201 § 8.3.1.)

of December 22, 2018—Tocci was issued the Permanent Certificate of Occupancy for the Project. *Id*. ¶ 14. Tocci, however, had approximately $722,585 of incomplete Contract and "punch list" work remaining on the Project when the permanent certificate of occupancy was issued.[2] *See* Gilbert Aff. Ex. E. Due to the aforementioned agreements between Exchange St. and the subcontractors with outstanding liens, there were, as of September 2020, approximately forty outstanding Contract and "punch list" work valued at $311,662.[3] (Gilbert Aff. ¶ 25.) Additionally, the Contract required that Tocci pay Exchange St. liquidated damages at the rate of $4,000 per day beginning on the 31st day after the Substantial Completion date. (Karam Aff. Ex. A, Doc. A133 § 2.2.7.)

Due to the extended delay, on August 14, 2019, Exchange St. sent Tocci a "litigation hold" letter, that requested Tocci preserve all electronically stored information and documents related to the Project. *See* First McGlynn Aff. Ex. B. [4] Subsequently, on October 30, 2019, Exchange St. filed a twelve-count Complaint asserting, among other things, that Tocci breached the Contract by failing to pay its subcontractors, furnish lien security or lien bonds in connection with the subcontractor's mechanic's liens, and timely achieve Substantial Completion of the Project. *See* Pl.'s Compl. ¶¶ 111-114. In response, on November 12, 2019, Tocci filed an Answer denying

[2] According to Exchange St., the incomplete Contract and "punch list" work was calculated in accordance with the Contract Doc. A133 § 7.1.9. (Gilbert Aff. ¶ 25.)

[3] Exchange also alleged that Tocci's principals negotiated the agreement with the subcontractors and Exchange St. during a July 2, 2019 meeting and thereafter repudiated the settlements. (Pl.'s Mot. to Compel 2.) This is disputed in Tocci's Objection to the Motion to Compel—Tocci stated that the meeting itself did not result in any settlements and there were no written settlement agreements executed by the parties. (Def.'s Opp'n to Pl.'s Mot. to Compel. 3-4.)

[4] For clarification purposes there are two affidavits filed in this matter by Peter McGlynn, Esquire: the first was filed on February 2, 2021, alongside Exchange St.'s Original Motion for Sanctions, and the other was filed on May 6, 2021, alongside Exchange St.'s Amended Motion for Sanctions. *See* Docket (PC-2019-10577). For the purposes of this decision, "First McGlynn Aff." will refer to the first affidavit filed in February and "Second McGlynn Aff." will refer to the second affidavit filed in May.

these allegations. *See* Def.'s Answer ¶¶ 111-114. That same day, Tocci filed a five-count Counterclaim against Exchange St. arising out of the Contract and Project. *See* Def.'s Countercl. In its Counterclaim, Tocci averred that Exchange St. breached the Contract by failing to pay Tocci for base Contract work and adequately addressing and funding the change order requests (CORs) submitted by Tocci. (Def.'s Countercl. ¶¶ 35-38, 51-52.) Moreover, Tocci argued that, by settling numerous liens with the subcontractors who—according to Tocci—caused the delays on the Project, Exchange St. effectively waived those claims against Tocci. *Id*. ¶¶ 39-52. On December 2, 2019, Exchange St. filed an Answer to Tocci's Counterclaim denying those allegations. (Pl.'s Answer to Def.'s Countercl. ¶¶ 39-52.)

Discovery Production

On December 17, 2019, Exchange St. served Tocci with its First Request for Production of Documents. (First McGlynn Aff. ¶ 18.) On January 28, 2020, Tocci responded to the document request by producing approximately 29,904 documents via SharePoint. *Id*. Ex. C; Veaner Aff. ¶ 3. On February 5, 2020, Exchange St. notified Tocci of Tocci's failure to produce and deliver all requested communications and documents, including emails relevant to the Project, and also did not affix counsel identification numbers to the documents. (First McGlynn Aff. Ex. D.) Consequently, on March 4, 2020, Tocci provided a thumb drive with the production to Exchange St. *Id*. Ex. E.

On both April 9 and April 21, 2020, Exchange St. sent Tocci letters requesting a Rule 37 conference due to Tocci's failure again to appropriately respond to Exchange St.'s requests for document production and interrogatories related to Tocci's financials, other projects, and a July 2, 2019 meeting between parties. *Id*. Exs. F, G. Tocci rejected Exchange St.'s request for a Rule 37 conference and, thereafter, on May 19, 2020, Exchange St. filed a Motion to Compel seeking the

production of the missing and corrected documents and information. *See* Pl.'s Mot. to Compel. On May 26, 2020, Tocci filed an Opposition to Exchange St.'s Motion to Compel arguing that Tocci correctly responded to the production requests and could not provide information or documents that do not exist or are not relevant to the matter at hand. (Def.'s Opp'n to Pl.'s Mot. to Compel 2-6.) At the hearing on the matter, this Court requested that Exchange St. and Tocci attempt to resolve the discovery issues and report back to the Court. (Pl.'s Mem. Supp. of Mot. for Sanctions 7.)

Furthermore, on June 2, 2020, Exchange St. served a notice on Tocci to take depositions under Rules 30(b)(6) and 30(b)(7) that included fifty-four "Matters for Examination" of Tocci's corporate designee. (First McGlynn Aff. ¶ 20.)[5] Tocci designated Marvin Lahoud (Lahoud), Tocci's general manager who was appointed months after the Project was complete, as its sole Rule 30(b)(6) witness. *Id*. Ex. I, at 12:13-19. According to Exchange St., Lahoud was not properly prepared to provide testimony on twelve of the fifty-four matters because he did not have personal knowledge of the Project, nor did he interview two of the managers on the Project—Joe Cavallaro (Cavallaro) and Taj Goodpaster (Goodpaster). *Id*. Ex. I, at 20:22-24:22, 25:19-26:12, 27:1-7, 399:20-22, 591:22-592:7, 785:1-5. Moreover, Lahoud admitted that Tocci did not conduct any specific searches on its electronic devices/servers, did not search within and extract data from company-owned or employee personal electronic devices (*i.e.*, cell phone, tablets, laptops) for responsive documents (*i.e.*, text messages, emails), did not search its physical papers for responsive documents, and failed to search for documents from third parties involved in the Project. *Id*. Ex. I, at 31:3-11, 33:14-34:12, 35:11-19, 44:1-8, 47:4-7, 48:5-10. Lahoud further

[5] Exchange St. filed an amended notice to take Tocci's deposition pursuant to Rule 30(b)(6) and (7) on or about July 1, 2020. *See* Docket (PC-2019-10577).

admitted that Tocci did not provide its employees with copies of the "litigation hold letter," and did not take any effective measures to ensure that relevant information was preserved. *Id*. Ex. I, at 33:9-12, 38:3-8. In fact, Lahoud himself had not even seen the letter.[6] *Id*. Ex. I, at 56:16-18, 57:21-58:12.

On or about September 1, 2020, Exchange St. filed a Motion for Issuance of Letters Rogatory to depose Cavallaro and Goodpaster for "vital information concerning the Project." (Pl.'s Mot. for Issuance of Letters Rogatory 1-2.) Tocci filed an Opposition to Exchange St.'s Motion arguing that the Scheduling Order limited the parties only to two depositions of Tocci employees.[7] (Def.'s Opp'n to Pl.'s Mot. for Issuance of Letters Rogatory 1-2.) At a hearing held on or about September 11, 2020, the Court denied Exchange St.'s motion due to the Scheduling Order's maximum allowance of two depositions, but advised Exchange St. to refile the motion requesting an amendment to the Scheduling Order—namely, the Court advised Exchange St. to cite Lahoud's failure to prepare for his Rule 30(b)(6) deposition as grounds to amend. (Pl.'s Mem. in Supp. of Mot. for Sanctions 12.)

On or about September 23, 2020, Exchange St. began to depose Tocci's general superintendent Robert Tierney (Tierney), who served as the Project's superintendent from August 2017 to the Project's completion. (First McGlynn Aff. Ex. J, at 17:23-18:4, 37:14-18.) Tierney admitted that he only provided "some emails [he] felt were necessary to turn over," explaining that he was never advised by Tocci or its counsel of what to provide to Exchange St., nor was Tierney instructed to preserve any information on his cell phone or computer, and consequently, he deleted

[6] Exchange St. notes that Lahoud was deposed over four non-consecutive days and that a fifth day was postponed given Tocci's production of documents on November 19, 2020. (Pl.'s Mem. in Supp. of Mot. for Sanctions 12 n.11.)

[7] Both Cavallaro and Goodpaster are no longer employed by Tocci. (Pl.'s Mem. in Supp. of Mot. for Sanctions 12.)

thousands of emails, messages, and other electronically stored information (ESI) from the Project time period. *Id*. Ex. J, at 21:3-22:5, 21:22-22:10, 23:21-24:2, 25:5-31:8. Subsequently, on or around November 5, 2020, Exchange St. requested a second Rule 37 conference regarding the deficiencies in production disclosed during Lahoud and Tierney's depositions. *Id*. Ex. K. On or around November 9, 2020, Tocci agreed to supplement the document production. *Id*. Ex. L. Later, Tocci further advised that this supplemental production would include the previously requested internal emails and documents dated beyond September 1, 2019. *Id*. Ex. M. In addition, Tocci informed Exchange St. that Tocci utilized a system called Mimecast, which archives and sources all of Tocci's emails (sent or received), even those a user believed were deleted. *See* Def.'s Obj. to Pl.'s Mot. for Sanctions 3-4; Def.'s Obj. to Pl.'s Mot. for Sanctions Ex. 9; *see also* Ho Aff. ¶¶ 3-4.

On or about November 19, 2020, Tocci produced 50,000 documents (approximately 76,067 pages) via SharePoint—notably, the day before Lahoud's fourth day of deposition. (Veaner Aff. ¶¶ 4-5.) Exchange St. encountered numerous issues with this production: emails were not produced in their "native" format, email attachments were not searchable, and numerous documents were not numbered. *Id*. After unsuccessfully attempting to batch download this production, Exchange St. requested that the production be re-produced in "native" format. (First McGlynn Aff. Ex. H.) According to Tocci, there were issues with the "link and the duplication of documents" relative to this production, and Tocci informed Exchange St. on November 27, 2020, that Tocci would reproduce the e-mails in a more suitable format. (Def.'s Obj. to Pl.'s Mot. for Sanctions Exs. 12-13.)

As Exchange St. awaited the new document production, an email from Lahoud was discovered in the "non-searchable" batch. (Veaner Aff. ¶ 6.) In this email dated November 16,

2018, Lahoud suggested that Exchange St. consider "the unusually high [number of] rainy days" which impacted Exchange St.'s "critical path" in relation to Tocci's requests for time extensions. (First McGlynn Aff. Ex. P.) Lahoud stated to Tocci employees, including Tierney and Goodpaster, that he was "not recommending you do the fair thing . . . if you can claim for more days, why not[.]" *Id*.

Subsequently, via email dated December 11, 2020, Tocci notified Exchange St. that Tocci had engaged a discovery consultant to assist with Tocci's production difficulties. (Def.'s Obj. to Pl.'s Mot. for Sanctions Ex. 14.) On or around December 21 and 23, 2020, Tocci reproduced and supplemented the prior November 19, 2020 production with 105,862 documents (approximately 206,610 pages). (Veaner Aff. ¶ 7.) Exchange St., however, found this reproduction still plagued by the same flaws—documents were unsearchable, many emails were duplicates of those previously submitted, many emails previously provided were now missing, and there was a failure to include Microsoft Teams communications and documents. *Id.* ¶¶ 8-10. Moreover, internal emails from September 1 through November 30, 2019—which is the period Tocci submitted the CORs to Exchange St.—were still missing despite Tocci's representation that a broader range of dates would be provided. *See* Veaner Aff. ¶¶ 8, 10; First McGlynn Aff. Ex. M.

Rule 37 Sanctions Motion and Corresponding Litigation

On or about January 26, 2021, Tocci reached out to Exchange St. to confirm the production from December 2020 was adequate. (Def.'s Obj. to Pl.'s Mot. for Sanctions Ex. 16.) The next day, Exchange St. notified Tocci that it would be filing a Motion for Sanctions against Tocci for "discovery abuses." (Def.'s Obj. to Pl.'s Mot. for Sanctions Ex. 17.) The parties held a Rule 37 conference on February 1, 2021. (Def.'s Obj. to Pl.'s Mot. for Sanctions 5.) Tocci asserts that during this conference Exchange St.—for the first time—requested emails for the time period of

September 1, 2019 through November 30, 2019. *Id*. On or about February 2, 2021, Exchange St. filed its original Motion for Sanctions. *See* Pl.'s Mot. for Sanctions.

Exchange St.'s original Motion for Sanctions rested on two major assertions: (1) that Tocci purposefully destroyed and/or purposefully did not produce all e-mails resulting in bad faith spoilation of essential documents and a waste of "considerable time, effort, money, and resources of Exchange St."; and (2) that Tocci failed to comply with Rule 30(b)(6) by not preparing its witness, Lahoud, in a proper manner. (Pl.'s Mem. in Supp. of Mot. for Sanctions 18, 27.) Due to Tocci's alleged bad faith discovery actions, Exchange St. requested that the Court dismiss Tocci's counterclaims and cross-claims against Exchange St. with prejudice, preclude Tocci from introducing at trial any documents other than the ones already produced to Exchange St., draw a negative inference against Tocci for its spoilation of documents, and pay all of Exchange St.'s attorneys' fees and costs with respect to the discovery issues and sanctions motion. *Id*. at 29. On February 19, 2021, Tocci responded by filing an Objection Exchange St.'s Motion for Sanctions arguing that: (1) the allegations of bad faith spoilation are unfounded, namely because Tocci's Mimecast system does in fact preserve emails, but also because Exchange St. cannot provide evidence of spoilation; (2) Tocci's Rule 30(b)(6) witness Lahoud was properly prepared even if he was not entirely familiar with some topics; and (3) despite Tocci's far from perfect document production, Tocci was not on notice to provide the emails from September 1, 2019 through November 30, 2019, as that was past the date of Substantial Completion of the Project. (Def.'s Obj. to Pl.'s Mot. for Sanctions 8-10, 12, 14-15.)

The Court heard oral arguments on Exchange St.'s original Motion for Sanctions on February 23, 2021.[8] (Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 4.) With respect to the period of September through November 2019, the Court ordered Tocci to produce those documents and produce a privilege log.[9] (Def.'s Obj. to Pl.'s Am. Mot. for Sanctions 2.) Tocci produced the documents on March 5, 2021, and later produced two privilege logs on March 12, 2021. *Id*. With respect to the Rule 30(b)(6) witness, the Court noted that, to the extent Tocci's witness was unprepared, Exchange St. could use the testimony for cross-examination at trial.[10] *Id*. Additionally, Exchange St. orally raised the issue of the missing text messages at the hearing. *Id*. The Court further ordered Tocci to produce all text messages,[11] and Tocci produced what it claimed to be "all of the text messages in its possession[]" on March 24, 2021. *See* Second McGlynn Aff. Exs. A, B; Def.'s Suppl. Resp. to Pl.'s First Req. for Prod. Docs.

Subsequently, on March 31, 2021, the Court held another status conference on Exchange St.'s Motion for Sanctions during which Exchange St. raised issues regarding Tocci's privilege log. (Def.'s Obj. to Pl.'s Am. Mot. for Sanctions 3.) The Court ordered Exchange St. to select documents on the privilege log for *in camera* review, which Exchange St. completed via letter on April 2, 2021. *Id*. On April 5, 2021, Tocci produced the requested documents to the Court to await the *in camera* review. *Id*. The Court held another status conference on April 16, 2021, during

[8] The Court reserved ruling on the matter in an attempt to encourage the parties to try to work through the discovery issues first.

[9] Some of Tocci's claims for relief in its Counterclaim relate to the CORs submitted to Exchange St. during the period of September 1, 2019 through November 30, 2019. (Pl.'s Mem. in Supp. of Mot. for Sanctions 21.) The CORs are clearly relevant to both Exchange St.'s and Tocci's claims in this matter.

[10] Lahoud participated in a fourth day of deposition on March 18, 2021. (Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 7-8.)

[11] There was a subsequent conference hearing on March 16, 2021, during which the Court gave Tocci one week to comply with producing the text messages. (Pl.'s Am. Mem. in Supp. of Mot. for Sanctions 4; Def.'s Obj. to Pl.'s Am. Mot. for Sanctions 3.)

which the Court granted Exchange St. permission to file an Amended Motion for Sanctions against Tocci. (Pl.'s Am. Mot. for Sanctions 1 n.2.)

Consequently, on May 6, 2021, Exchange St. filed the instant Amended Motion for Sanctions against Tocci. *See* Pl.'s Am. Mot. for Sanctions. The Amended Motion incorporated Exchange St.'s prior Motion for Sanctions, and further alleged that pursuant to the recent hearings and document production responses, Tocci admitted that it intentionally "wiped" ESI despite having received the "litigation hold" letter placing them on notice. (Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 4-7.) Further, Exchange St. alleged that Tocci did not adequately instruct its employees to preserve text messages and, more specifically, only recently asked them to review all text messages for relevant information pertaining to the Project.[12] (Second McGlynn Aff. Ex. H, at 998:11-18.)

On May 21, 2021, Tocci filed an Objection to Exchange St.'s Amended Motion for Sanctions. *See* Def.'s Obj. to Pl.'s Am. Mot. for Sanctions. Tocci argued that "even if there were destruction of text messages, Rhode Island law does not permit the imposition of sanctions if the failure to provide ESI is the result of the routine, good faith operation or electronic information system." *Id*. at 6 (citing Super. Ct. R. Civ. P. 37(a)(4)(D)). As such, Tocci posited that due to its policy concerning text messages and the Mimecast system which retrieved communications, Tocci did not spoliate any requested information. *Id*. at 5-6. The Court heard oral argument on the

[12] Additionally, Lahoud, in his March 18, 2021 deposition testimony, referred to Tocci's alleged "company policy" that employees do not use text messages to communicate. (Second McGlynn Aff. Ex. H, at 999:10-16, 1000:12-14.) Notably, as of the filing of the Amended Sanctions Motion, Tocci has not produced this "policy." (Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 8.)

Amended Motion for Sanctions on June 18, 2021, and reserved decision on the merits of the Motion.[13] *See* Docket (PC-2019-10577) .

On July 1, 2021, the *in camera* review of the sixty-four requested Tocci documents was completed, and the Court determined that only twelve documents were privileged while the remaining fifty-four were not. *See* Court Order (July 7, 2021). Consequently, Tocci had fourteen days from the date of the Court's Order to produce the requested fifty-four non-privileged documents to Exchange St. *See id*. In Tocci's Amended Supplemental Memorandum Pursuant to This Court's July 7, 2021 Order, it requested the Court to reconsider the Court's *in camera* analysis of documents from Tocci's privilege log as approximately eleven requested documents appeared to be privileged. (Def.'s Suppl. Mem. Pursuant to Ct.'s July 7, 2021 In-Camera Review Order and Def.'s Mot. to Clarify 1-2.) In response, Exchange St. filed a Supplemental Memorandum in Support of its Amended Motion for Sanctions on July 21, 2021, alleging not only the high likelihood that most of the documents listed on Tocci's privilege logs are not actually privileged, but that Tocci is claiming this privilege in bad faith, and further requested that the Court waive Tocci's attorney-client privilege due to the bad faith discovery actions throughout this entire litigation.[14] (Pl.'s Suppl. Mem. in Supp. of Am. Mot. for Sanctions 2-7.)

[13] The production and subsequent *in camera* review of Tocci's documents was connected to Exchange St.'s Motion to Compel document production filed on May 19, 2020. *See* Pl.'s Mot. To Compel. Accordingly, the Court's July 7, 2021 Order is connected to the Motion to Compel, not the Motion for Sanctions. However, it should be noted that the June 18, 2021 hearing included several motions, including both Exchange St.'s and Tocci's Motions to Compel. (Def.'s Suppl. Obj. to Pl.'s Am. Mot. for Sanctions 2.)

[14] Notably, Tocci also filed a Motion to Compel production against Exchange St. on May 24, 2021. *See* Def.'s Mot. to Compel. Thus, throughout Tocci's motions and objections and Exchange St.'s responses, Exchange St.'s discovery production is highlighted and discussed. But, for the purposes of this motion, the Court need not reach these issues as they will be addressed through Tocci's Motion to Compel.

Tocci then provided the Court with the allegedly privileged emails on July 19, 2021. (Def.'s Suppl. Obj. to Pl.'s Am. Mot. for Sanctions 1-2.) The Court held a supplemental *in camera* review hearing on July 20, 2021 and found eight documents were indeed privileged while the other three were not. *See* Court Order (July 22, 2021). Finally, on July 21, 2021, Tocci filed a Supplemental Objection to Exchange St.'s Amended Motion for Sanctions arguing that Tocci's Motion to Clarify regarding the *in camera* review should not be sanctionable conduct—Tocci worked in good faith with Exchange St. and the Court at the *in camera* review and simply requires clarification on the status of the requested documents.[15] *Id.* This Court's decision follows.

II

Standard of Review

A trial justice's decision to grant or deny discovery motions is accorded '"broad discretion[.]"' *Estate of Chen v. Lingting Ye*, 208 A.3d 1168, 1172 (R.I. 2019) (quoting *State v. Lead Industries Association, Inc.*, 64 A.3d 1183, 1191 (R.I. 2013)). Similarly, the imposition of sanctions for discovery violations is reviewed for abuse of discretion. *See Senn v. Surgidev Corp.*, 641 A.2d 1311, 1318 (R.I. 1994).

[15] Tocci filed a Second Supplemental Memorandum on July 29, 2021, alleging discovery violations by Exchange St. despite the denial of its Motion to Compel production. (Def.'s Second Suppl. Mem. in Supp. of Obj. to Pl.'s Am. Mot. for Sanctions 1.) Exchange St. responded by filing a Second Supplemental Memorandum on August 10, 2021, arguing that "Tocci has apparently adopted the questionable litigation stratagem that 'two wrongs do make right' to try and offset its discovery violations with those allegedly committed by Exchange St . . . ." (Pl.'s Second Suppl. Mem. in Supp. of Am. Mot. for Sanctions 2.) However, this back and forth regarding Exchange St.'s discovery actions is irrelevant and outside the scope of this Court's analysis addressing Exchange St.'s Amended Motion for Sanctions.

III

Analysis

Exchange St. asks this Court to impose severe sanctions against Tocci, alleging that Tocci failed to preserve discoverable documents, inadequately prepared its Rule 30(b)(6) designee, and improperly withheld documents under the attorney-client privilege. (Pl.'s Am. Mem. in Supp. of Mot. for Sanctions 8, 18, 20.) Specifically, Exchange St. requests that this Court: (1) dismiss Tocci's counterclaims and cross-claims against Exchange St., with prejudice; (2) preclude Tocci from using at trial any documents not produced by Tocci; (3) invoke a negative inference against Tocci for spoliation that the information would have been not in Tocci's favor; (4) order Tocci to pay Exchange St.'s expenses, including attorneys' fees, in connection with the motion, Exchange St.'s efforts to require Tocci to comply with discovery requests, and the continuation of Lahoud's deposition; and (5) allow Exchange St. to conduct depositions of Cavallaro and Goodpaster and order Tocci to pay for the expenses in connection therewith. *Id*. at 16-18.

Tocci argues that Exchange St.'s instant motion should be denied because: (1) Exchange St. cannot meet its burden of proof, any spoliation was miniscule, and the trial will be a bench trial; (2) Lahoud was properly prepared for his depositions; and (3) Tocci's privilege log is proper. (Def.'s Obj. to Pl.'s Am. Mot. for Sanctions 5-8.) The Court turns first to the allegations of spoliation.

A

Spoliation [16]

Exchange St. asserts that Tocci violated its obligation to preserve and not destroy relevant data when Tocci intentionally wiped Landers's, Cavallaro's, and Tierney's cell phones after Tocci received Exchange St.'s litigation hold letter on August 14, 2019. (Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 9.) Tocci, however, asserts that the Court should deny the instant motion because Tocci had submitted evidence demonstrating that Tocci's company policy is to not use text messaging for project correspondence. (Def.'s Obj. to Pl.'s Am. Mot. for Sanctions 5.) Tocci also contends that Exchange St. must show that Tocci had knowledge of the claim of litigation, the evidence's potential relevance to the claim, and destroyed or did not preserve the potentially relevant evidence. *See id*. Tocci further argues that it would be unreasonable to dismiss its counterclaims for failure to produce any text messages that may have been deleted—pursuant to company policy—because text messages make up less than one percent (1%) of the documents produced by either party during the course of discovery in the case. *Id*. at 6-7. Finally, Tocci contends that Exchange St.'s assertion that "Tocci's alleged destruction of a few dozen text messages requires the same sanction as requested for allegedly destroying 26,000 e-mails" is "absurd." *Id*. at 5.

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." 126 Am. Jur. Proof of Facts 3d 1 *Sanctions for Spoliation of Elec. Evidence* (Dec. 2021 Update); *see also Jimenez-Sanchez v. Caribbean Restaurants, LLC*, 483 F. Supp. 2d 140, 143 (D.P.R. 2007) (finding

[16] As a preliminary matter, Tocci admits that it deleted text messages and "cleaned" the cellular phones of six employees involved with the project at the heart of this dispute. *See* Hr'g Tr. 35:9-36:3.

that spoliation "can be defined as the failure to preserve evidence that is relevant to pending or potential litigation"). The Rhode Island Supreme Court has explained that in Rhode Island, "[t]he doctrine of spoliation provides that 'the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party.'" *Malinou v. Miriam Hospital*, 24 A.3d 497, 511 (R.I. 2011) (quoting *Tancrelle v. Friendly Ice Cream Corp.*, 756 A.2d 744, 748 (R.I. 2000)); *Kurczy v. St. Joseph Veterans Association, Inc.*, 820 A.2d 929, 946 (R.I. 2003). Our Supreme Court has also explained that the "'[d]estruction of potentially relevant evidence obviously occurs along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality.'" *Rhode Island Hospital Trust National Bank v. Eastern General Contractors, Inc.*, 674 A.2d 1227, 1234 (R.I. 1996) (quoting *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988)); *Kurczy*, 820 A.2d at 947.

Although "[a] showing of bad faith on the part of the despoiler is not necessary to permit the spoliation inference," the Rhode Island Supreme Court has found that such a showing "may strengthen the inference." *Farrell v. Connetti Trailer Sales, Inc.*, 727 A.2d 183, 186 (R.I. 1999); *see also Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997) (finding "bad faith is a proper and important consideration in deciding whether and how to sanction conduct resulting in the destruction of evidence" although "bad faith is not essential").

A court properly finds that spoliation of evidence has occurred when the moving party establishes a two-prong "evidentiary foundation." *Booker v. Massachusetts Department of Public Health*, 612 F.3d 34, 46 (1st Cir. 2010); *see also* Francis C. Amendola, J.D. *et al.*, 89 C.J.S. *Trial* § 671 (Nov. 2021 Update). First, the moving party must demonstrate that the opposing party knew of "the claim (that is, the litigation or the potential for litigation)." *Booker*, 612 F.3d at 46. Second,

the moving party must show that the opposing party knew of the evidence's "potential relevance to that claim." *Id*.

1

Knowledge of Claim

As explained above, Exchange St. must first demonstrate that Tocci knew of the claim, the litigation, or the potential for litigation prior to deleting the text messages. *See id*. Our Supreme Court has held that while a party is clearly on notice of a claim once a complaint is filed, the "'obligation to preserve evidence even arises prior to the filing of a complaint *where a party is on notice that litigation is likely*.'" *Tancrelle*, 756 A.2d at 749 (quoting *Conderman v. Rochester Gas & Electric Corp*., 180 Misc. 2d 8, 687 N.Y.S.2d 213, 217 (N.Y. Sup. Ct. 1998)) (emphasis added). Further, in establishing both prongs of the "evidentiary foundation," the moving party need only show that the opposing party had "institutional notice—the aggregate knowledge possessed by a party and its agents, servants, and employees." *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177-78 (1st Cir. 1998).

Here, as stated in Exchange St.'s papers and oral arguments, and as Tocci admitted at oral arguments, Tocci received a litigation hold letter on August 14, 2019 (Litigation Hold Letter). *See* Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 3; Hr'g Tr. 18:12-13, 35:22-36:3. Tocci further admitted that it had wiped three of the six cellular phones in question—those belonging to Frank Landers (Landers), Cavallaro, and Tierney—after Tocci received the Litigation Hold Letter, Exchange St.'s Complaint, and Exchange St.'s First Request for Production of Documents. *See* Hr'g Tr. 18:12-13, 35:22-36:3; Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 3, 5; *see also* Second McGlynn Aff. Ex. A. Thus, Tocci was clearly on notice of the claims against it when it wiped the cellular phones of Landers, Cavallaro, and Tierney. However, determining whether

Tocci knew of the claims against it prior to wiping the remaining cellular phones—those belonging to Brett Flanders (Flanders), Goodpaster, and Andrew DiFraia (DiFraia)—is a more difficult question to answer.

In 2010, The Sedona Conference issued its "Commentary on Legal Holds," offering guidance to courts and litigants on answering the difficult questions of when a litigation might be reasonably anticipated and what might be considered reasonable steps taken in response. *The Sedona Conference, Commentary on Legal Holds: The Trigger & The Process*, 20 Sedona Conf. J. 341 (2019). Two of the guidelines speak directly to the determination of when litigation may be reasonably anticipated: "Guideline 1: A reasonable anticipation of litigation arises when an organization is on notice of a credible threat that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation"; and "Guideline 4: Determining whether litigation is or should be reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances." *Id*. As set forth in The Sedona Conference Guidelines, determining whether litigation was reasonably anticipated is measured by considering the threat's credibility and must be evaluated on a case-by-case basis.

Here, Exchange St. asserts that Tocci was on notice of disputes between the parties prior to the Litigation Hold Letter. *See* Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 9. In fact, in Tocci's objection to the original Motion for Sanctions, Tocci stated that the Litigation Hold Letter was "of no significance." (Def.'s Obj. to Pl.'s Mot. for Sanctions 8.) Tocci further stated that "Tocci . . . did not destroy any documents relating to the Project. Tocci knew, *prior to the receipt of the [Litigation Hold Letter]*, that it was in a dispute with Exchange St. . . . . Tocci did not destroy any documents relating to the Project." *Id*. (emphasis added). While Tocci did not identify the

date on which it was made aware of potential litigation, emails to Tocci demonstrate that Tocci was indeed on notice of potential claims as early as September 18, 2018.

On September 18, 2018, James J. Karam (Karam)—President and CEO of First Bristol Corporation[17]—sent an email to Cavallaro, John Tocci, and Goodpaster stating that: (1) there were certain delays and issues with the construction project; (2) if Tocci did not provide Karam with answers the following day that Exchange St. would "have [its] Atty. send a formal lawyer's letters demanding corrective action[,]"; (3) "I hope you're studying the L[iquidated] D[amages] in this contract and planning on making these non-performing subs reimburse Tocci for this added cost . . . rather than asking the owner to absorb these damages[,]"; and (4) "of course the added cost . . . to this job as a result of delay will be passed on to Tocci." (Second McGlynn Aff. Ex. C (ellipses in original)). Therefore, under the guidance of The Sedona Conference Guidelines, as of September 18, 2018, based on a good-faith and reasonable evaluation of relevant facts and circumstances, there was a credible probability that Tocci would become involved in litigation. *See* Second McGlynn Aff. Ex. C; *The Sedona Conference, Commentary on Legal Holds: The Trigger & The Process*, 20 Sedona Conf. J. 341 (2019).

Thus, this Court is satisfied that Tocci was on notice of claims against it and the potential for litigation as early as September 18, 2018. Notwithstanding that notice, Tocci "wiped" Goodpaster, DiFraia, Landers, Cavallaro, and Tierney's cellular phones, three of which were "wiped" *after* Tocci received the Litigation Hold Letter and Complaint in this matter, as set forth above. Therefore, this Court finds that Exchange St. has successfully demonstrated that Tocci knew of the claims or potential litigation against it and deleted the text messages after becoming aware of the claims.

[17] First Bristol Corporation is the owner of Exchange St.

2

Knowledge of Potential Relevance to Claim

Next, Exchange St. must show that Tocci knew of the evidence's "potential relevance to [Exchange St.'s] claim[s]." *See Booker*, 612 F.3d at 46. The duty to preserve does not extend to "every shred of paper, every e-mail or electronic document, and every backup tape[.]" *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). The duty extends to relevant documents and data only. *See* Fed. R. Civ. P. 37(e) Advisory Comm. Note (2015).

The First Circuit Court of Appeals has consistently recognized that allegedly despoiled evidence is relevant when it "has some tendency, however small, to make the existence of a fact at issue more probable than it would otherwise be." *Nation-Wide Check Corporation, Inc. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 218 (1st Cir. 1982) (citing Fed. R. Evid. 401); *see Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108-09 (2d Cir. 2002) (noting that "relevant" means something more than sufficiently probative to satisfy Fed. R. Evid. 401); *see also* 22 Wright & Miller, *Evidence* § 5178 at 924 (noting same). The First Circuit has also determined that in many spoliation cases "[evidence's] potential relevance to the plaintiff's claims is apparent from the nature of the missing [evidence] itself." *Booker*, 612 F.3d at 47.

The recently revised Sedona Conference Principles explain that the duty to preserve generally requires a party make "reasonable and good faith efforts to identify and preserve the information that is identified as relevant to the claims or defenses in the matter." *The Sedona Principles, Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 94 (3d. 2018). The Sedona Principles also set forth that preservation must be measured against the principles of proportionality found in Rule 26(b). *Id*. In practice, this means that a party need not preserve multiple or duplicative copies of the same ESI,

only unique copies. *Id*. Thus, parties need only preserve documents and data that are within the proper scope of discovery or for which a request in discovery is reasonably foreseeable.

Here, Tocci asserts that its "employees did not communicate with each other on any substantive issues via text messages" and that "[t]he parties did not communicate with each other on any substantive issue via text messages." (Def.'s Obj. to Pl.'s Am. Mot. for Sanctions 5.) Tocci further asserts that it "has submitted evidence that its [company] policy was that employees were not to use text messages for project correspondence in order to ensure that project records are saved in Tocci's servers[,]" *id*., and "[t]he paucity of internal text messages reflect compliance with this policy." *Id*. at 6. Thus, Tocci argues that any text messages it deleted could not have been relevant to the project and "even if there were destruction of text messages, Rhode Island law does not permit the imposition of sanctions if the failure to provide [electronically stored information] is the result of the routine, good faith operation [of an] electronic information system." *Id*. (citing Super. R. Civ. P. 37(a)(4)(D) ("Absent exceptional circumstances, the court may not impose sanctions on a party under these rules for failure to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.")). Tocci's arguments, however, are unpersuasive.

Tocci has admitted that it "wiped" five of the six cellular phones, three of which were wiped *after* Tocci received the Litigation Hold Letter that specifically identified text messages as a category to be preserved. (Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 3; Hr'g Tr. 18:13-14, 35:22-36:3.) Further, as set forth above, this Court has determined that Tocci knew of the claims against it and the potential for litigation as early as September 18, 2018—prior to wiping any of the cellular phones—and, despite that notice, wiped the cellular phones. Tocci has not alleged that the text messages were wiped because Tocci performed its due diligence and concluded that the

text messages were not relevant to the merits of this case. Rather, Tocci asserts that the text messages could not have been relevant because Tocci has a company policy that employees are not to communicate about projects via text messages. (Schneider Aff. Ex. F, at 3, Aug. 10, 2021.) While Tocci's actions may have been routine, they were not a "good faith operation of an electronic information system." *See* Super. R. Civ. P. 37(a)(4)(D). At a minimum, after Tocci received the Litigation Hold Letter, Tocci had a duty both to review the text messages on the three cellular phones it wiped after receiving the letter and to preserve any that may have been relevant. Instead, Tocci did neither. Thus, this Court finds that Tocci did not act in a good faith manner, and Rule 37(a)(4)(D) does not protect Tocci from sanctions.

In Rhode Island, "relevant evidence" is "evidence having *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." R.I. R. Evid. 401. As the First Circuit has explained in many spoliation cases, "[evidence's] potential relevance to the plaintiff's claims is apparent from the nature of the missing [evidence] itself." *Booker*, 612 F.3d at 47; *see, e.g.*, *Testa*, 144 F.3d at 177 (finding notice of potential relevance where the company destroyed purchase order for delivery on date of plaintiff's injury, and company's "defense from the start was anchored on the premise that it had no reason to anticipate any deliveries on the day in question"); *Blinzler v. Marriott International, Inc.*, 81 F.3d 1148, 1158-59 (1st Cir. 1996) (finding notice of potential relevance where hotel destroyed log of outgoing phone calls from day of hotel guest's death, and hotel knew of guest's death and of plaintiff spouse's "persistent attempts" to discover when the hotel placed the call for emergency assistance).

Here, the deleted text messages, or at least a portion thereof, were likely relevant to Exchange St.'s claims. While Tocci claims that the deleted text messages could not have been

relevant to the case because of Tocci's company policy, the fact that Tocci wiped three of the six cellular phones *after* receiving the Litigation Hold Letter leads the Court to believe otherwise. Thus, the Court finds that Tocci knew that, at the very least, some portion of the deleted text messages were relevant to this case and the claims filed against it.

3

Sanctions for Spoliation of the Text Messages

Having determined that Tocci knew of the claims or potential for litigation prior to deleting the text messages and the potential relevance of those text messages to this case, this Court must now determine which sanctions are appropriate. "It is well-settled that once the moving party demonstrates spoliation of evidence has occurred, courts have inherent authority to levy sanctions against the despoiling party to remedy the misconduct." *Berrios v. Jevic Transportation, Inc.*, No. PC-04-2390, 2013 WL 300889, at *14 (R.I. Super. Jan. 18, 2013) (citing 121 A.L.R. 5th 157 § 21; Glenda K. Harnad, J.D. and William Lindsley, J.D., 27 C.J.S. *Discovery* § 117 (Nov. 2021 Update).

In federal courts, the range of sanctions for spoliation of evidence includes "dismissal of the action [or a claim], exclusion of evidence or testimony[,] or instructing the jury on a negative inference to spoliation . . . ." *Jimenez-Sanchez*, 483 F. Supp. 2d at 143 (quoting *Perez v. Hyundai Motor Co.*, 440 F. Supp. 2d 57, 62 (D.P.R. 2006)); *see Gagne v. D.E. Jonsen, Inc.*, 298 F. Supp. 2d 145, 147 (D. Me. 2003). Courts may also impose monetary penalties—including costs and attorneys' fees—for the destruction of evidence. *See Century ML-Cable Corp. v. Carrillo*, 43 F. Supp. 2d 176, 185 n.15 (D.P.R. 1998); *see also E.I. du Pont de Nemours & Co. v. Kolon Industries, Inc.*, 803 F. Supp. 2d 469, 509-10 (E.D. Va. 2011); *Doe v. Norwalk Community College*, 248 F.R.D. 372, 381-82 (D. Conn. 2007).

In Rhode Island, however, courts usually deal with the issue of spoliation through an appropriate instruction to the jury indicating that the jurors are free to draw an adverse inference against the despoiler. *Ferris Ave. Realty, LLC v. Huhtamaki, Inc.*, 110 A.3d 267, 283 (R.I. 2015) (citing *Youngsaye v. Susset*, 972 A.2d 146, 148-150 (R.I. 2009); *Kurczy*, 820 A.2d at 946-47; *Tancrelle*, 756 A.2d at 748-49). The Rhode Island Supreme Court has explained that "'the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party.'" *Kurczy*, 820 A.2d at 946 (quoting *Tancrelle*, 756 A.2d at 748); *see also Testa*, 144 F.3d at 177 (finding that "a trier of fact may (but need not) infer from a party's obliteration of [evidence] relevant to a litigated issue that the contents of the [evidence] were unfavorable to that party."). Once the trial judge gives the adverse inference instruction, "[it is] within the province of the [fact finder] . . . to determine what inference [is] to be drawn from" evidence of spoliation. *Mead v. Papa Razzi*, 899 A.2d 437, 444-45 (R.I. 2006); *see Tancrelle*, 756 A.2d at 749 (quoting *New Hampshire Insurance Co. v. Rouselle*, 732 A.2d 111, 114 (R.I. 1999) in determining that "'the doctrine of spoliation merely permits an inference that the destroyed evidence would have been unfavorable to the despoiler,' and is by no means conclusive").

Importantly, our Supreme Court has noted that

> "[o]ther courts have used five factors in determining an appropriate sanction for the spoliation of relevant evidence: '(1) whether the defendant was prejudiced . . .; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the [despoiler acted] in good faith or bad faith; and (5) the potential for abuse if the evidence is not excluded.'" *Farrell*, 727 A.2d at 187 (quoting *Northern Assurance Co. v. Ware*, 145 F.R.D. 281, 282-83 (D. Me. 1993)).

This Court, therefore, finds application of those same factors appropriate in this matter to determine the proper sanctions to levy against Tocci.

As to the first factor, this Court finds that Tocci's spoliation does in fact prejudice Exchange St. This is because Exchange St. can no longer benefit from knowing what, if anything, Goodpaster, Cavallaro, and Tiernan were thinking and doing from late 2018 through July 2019—a critical time period in this matter. A central issue in this case pertains to the almost $2 million work of change orders that Tocci submitted in 2019, the time period during which Tocci spoliated the text messages. Thus, Exchange St. is unable to examine the communications that may have shown whether Tocci had some ulterior motives in submitting the change orders after the agreed upon Substantial Completion date. While the parties have submitted voluminous records of emails exchanged between and within the parties, the text messages may have presented a clearer picture as to what was happening during that time period because people are likely to communicate with a greater level of candor and in a less guarded manner through text messages. *See Handbook of Federal Civil Discovery & Disclosure: E-Discovery & Records*, § 2:29 (4th ed.) (stating that "[b]ecause text messages are less guarded than e-mail—shorter, quicker, and apt to draw a quick response—they can be important evidence"). Therefore, this Court finds that Exchange St. is prejudiced by Tocci's spoliation, and thus, the first factor is satisfied.

Turning to the second factor, this Court finds that Exchange St.'s prejudice cannot readily be cured in this case. Tocci's deleted text messages are irretrievably deleted, and no backups exist. Moreover, there is no evidence in the record demonstrating that Exchange St. can obtain the missing evidence from any other source. Thus, this Court finds that Exchange St's prejudice cannot be readily cured. *See Ware*, 145 F.R.D. at 283. *Cf. Pitney Bowes Government Solutions, Inc. v. United States*, 94 Fed. Cl. 1, 9 (2010) (holding that spoliation sanctions are inappropriate where the aggrieved party can acquire the missing evidence from another source).

As for the third factor, the despoiled evidence was clearly important in this litigation. The deleted text messages could have provided Exchange St. with an insight as to what the project managers were thinking and doing during the critical time period in this matter. The deleted text messages could have also aided Exchange St. by shedding light on Tocci's concerns about liquidated damages—a critical and highly contested issue in this matter—for late completion of the Project. Exchange St. could have utilized such evidence in the Rule 30(b)(6) depositions.

Next, this Court finds that Tocci acted in bad faith in despoiling the text messages. In determining whether the despoiling party acted in bad faith, "[t]he court should weigh the degree of the spoliator's culpability against the prejudice to the opposing party." *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 946 (11th Cir. 2005). Concerning Tocci's culpability, this Court finds that, at the least, Tocci was negligent in wiping Flanders', Goodpasters', and DiFraia's cellular phones in late 2018 to early 2019, and, at the least, was grossly negligent by wiping Landers', Cavallaro's, and Tierney's cellular phones *after* receiving the Litigation Hold Letter, the Complaint, and Exchange St.'s First Request for Production of Documents. Moreover, this Court has already found that Exchange St. has been prejudiced by Tocci's despoiling of evidence. *See Flury*, 427 F.3d at 945-46; *Ware*, 145 F.R.D. at 283. Weighing those factors against one another, this Court has determined that Tocci acted in bad faith when despoiling evidence. *See Flury*, 427 F.3d at 944-47 (holding that alleged spoliator acted in bad faith based on the totality of the circumstances).

Finally, this Court finds that the potential for abuse if the prejudice is not cured is significant. As stated above, without the despoiled text messages, Exchange St. will not have the opportunity to rebut what Lahoud has stated in his Rule 30(b)(6) deposition through the text messages, utilize the messages with regard to Tocci's submitted CORs or to see what the Project

managers were thinking with regard to liquidated damages. "A fair trial requires that both parties be heard and that both parties be permitted wherever possible to marshal and present evidence relevant to their positions . . . . [However,] the truth-seeking process [is] irreparably subverted, denying opposing parties a full and fair hearing[,]" when spoliation occurs. *Ware*, 145 F.R.D. at 284. Thus, without sanctions to remedy Tocci's misconduct, the potential for abuse of the judicial process is significant. *See id*.; *see also Flury*, 427 F.3d at 946-47.

In conclusion, as is clear from Rhode Island's—and the federal judiciary's—case law, the preeminent sanction for spoliation is an adverse inference instruction. However, because the Court anticipates that the parties will file dispositive motions at the close of discovery, which may affect those claims and counts remaining in the matter, the Court reserves the issuance of an adverse inference until a time when the final claims to be heard at trial are known. Tocci, however, shall be required to pay Exchange St.'s costs and attorneys' fees for the time and resources spent in identifying and responding to Tocci's spoliation of evidence.

B

Preparation of Tocci's Rule 30(b)(6) Designee

Exchange St. alleges that Tocci's Rule 30(b)(6) designee, Lahoud, was not properly prepared for the deposition because Lahoud was unable to speak about twelve of the fifty-four matters set forth in the deposition notice. (First McGlynn Aff. Ex. I, at 20:22-24:22, 25:19-26:12, 27:1-7, 399:20-22, 591:22-592:7, 785:1-5.) Lahoud also, according to Exchange St., did not interview or speak with either Cavallaro or Goodpaster, the two project managers for the Project, in preparation for his deposition. (Pl.'s Mem. in Supp. of Mot. for Sanctions 27; Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 3-4.) Tocci, however, contends that Exchange St. deposed Lahoud for a total of six days—four days prior to the original motion for sanctions and two days

following the original motion hearing—that Lahoud was thoroughly prepared and answered substantially all of Exchange St.'s questions, and that Lahoud was only unfamiliar with nine of the fifty-four topics. (Def.'s Obj. to Pl.'s Mot. for Sanctions 11-13.) Additionally, Tocci asserts that prior to the fifth day of the Lahoud deposition, in an e-mail dated March 16, 2021, Tocci requested that Exchange St. identify the categories of testimony that Exchange St. wished to address with the witness. *See* Def.'s Obj. to Pl.'s Am. Mot. for Sanctions 7; *see also* Def.'s Obj. to Pl.'s Am. Mot. for Sanctions Ex. 2 ("What were the issues you wanted Marvin to study up on for the deposition? I recall the cross-claims in the subcontractor cases being one. Were there any others?"). Exchange St., however, did not respond to the e-mail. *See id.*; Hr'g Tr. 29:20-30:3.

When served with a Rule 30(b)(6) notice, an entity must designate a person to "testify as to matters known or reasonably available to the organization." Super. R. Civ. P. 30(b)(6). "[T]he law is well-established that a [Rule] 30(b)(6) deponent [has] an affirmative obligation to educate himself as to the matters regarding the corporation." *Calzaturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Company Inc.*, 201 F.R.D. 33, 36 (D. Mass. 2001); *see also* Robert B. Kent *et al.*, *Rhode Island Civil and Appellate Procedure* § 30:6 (2020-21 ed.). "If the [person or] persons designated by the [organization] do not possess personal knowledge of the matters set out in the deposition notice, the [organization] is obligated to prepare the designees so that they may give knowledgeable and binding answers for the [organization]." *Calzaturficio*, 201 F.R.D. at 36. The designee must be able to testify about facts within the corporation's knowledge, the corporation's subjective beliefs and opinions, and its interpretations of documents and events. *See United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996).

Here, although Lahoud testified that he did not review all documents or all communications relevant to certain deposition matters, a review of his deposition transcripts provided by Exchange

St. shows that Lahoud indeed answered the majority of questions. Further, Tocci requested that Exchange St. "identify the specific areas of inquiry wherein [Exchange St.] considered preparation to be deficient and Tocci would ensure that [Lahoud] was further prepared" for the final two days of deposition, and sent an additional email seeking clarification on what topics Lahoud's fifth day of deposition would cover. (Def.'s Obj. to Pl.'s Mot. 14.) Exchange St. maintains, however, that because Tocci produced approximately 74% of its production on December 21, 2020, which was after four days of Lahoud deposition and one and one-half days of Tierney deposition, it should be allowed to further depose both Lahoud and Tierney at Tocci's expense. (Pl.'s Mem. in Supp. of Mot. for Sanctions 28; Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 18-20.) Additionally, Exchange St. requests allowance, at Tocci's expense, to depose Cavallaro and Goodpaster, who managed the Project and were not consulted by Lahoud prior to his deposition. (Pl.'s Mem. in Supp. of Mot. for Sanctions 28.)

Tocci's first production of responsive documents was on January 28, 2020 (29,904 documents); its second was on November 19, 2020, the day before Lahoud's continued deposition (50,000 documents); it then reproduced and supplemented its November production on December 21, 2020 (105,862 documents).

Pursuant to Rule 30(d)(2) of the Superior Court Rules of Civil Procedure:

> "By order, the court . . . shall allow additional time consistent with Rule 26(b)(1) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof."

Tocci's delay—whether intentional or unintentional—in providing Exchange St. with a substantial number of documents until after much of Lahoud's deposition testimony was complete

undoubtedly frustrated Exchange St.'s fair examination of the designee. However, the Court finds that Tocci properly prepared Lahoud for his depositions, as he was able to testify to approximately 98 percent of what was asked of him. If Exchange St. determines that it needs further testimony from Lahoud, Exchange St. may conduct an additional day of deposition *at its own expense*. To expedite the process and ensure Lahoud's full preparation, Exchange St. shall provide Tocci with a narrow list of topics and matters Exchange St. seeks testimony on.

C

Claimed Privileges and the Privilege Logs

Exchange St. alleges that Tocci wrongfully withheld documents from its production under the guise of the attorney-client and work-product privileges. *See* Pl.'s Mem. in Supp. of Am. Mot. for Sanctions 20-22. Specifically, Exchange St. alleges that Tocci withheld e-mails to and from Exchange St., CORs, and Tocci's business records. *See id*. at 20-21. Additionally, Exchange St. alleges that Tocci withheld at least 111 internal e-mails where no attorney was listed in the communication, of which eighty-one internal emails were sent during the time period of September 2019 through November 2019—when Tocci created and submitted approximately two million dollars ($2,000,000) worth of CORs to Exchange St. *Id*. at 21. Finally, Exchange St. asserts that Tocci's privilege log provided only minimal descriptions of the subject matter of Tocci's allegedly privileged e-mails and, thus, the Court should sanction Tocci with a waiver of its attorney-client privilege. *Id*. at 20-22.

Tocci, however, asserts that the documents it withheld were identified in the privilege log on a good-faith basis, and that any documents that the Court determined were not privileged during its *in camara* review were appropriately in the privilege log. (Def.'s Suppl. Obj. to Pl.'s Am. Mot.

for Sanctions 2.) Tocci, therefore, argues that it should not suffer sanctions because it acted in good faith. *Id*.

1

Wrongful Withholding and Insufficient Description

In Rhode Island, it is well settled that the "determination of the proper scope of a privilege demands a delicate balancing . . . ." *Pastore v. Samson*, 900 A.2d 1067, 1074 (R.I. 2006). Our Supreme Court has adopted the view of the United States Supreme Court that privileges '"are designed to protect weighty and legitimate competing interests,"' but they are also '"in derogation of the search for truth."' *Id*. at 1074 (quoting *United States v. Nixon*, 418 U.S. 683, 709, 710 (1974)). Accordingly, privileges are not favored in the law and are strictly construed. *Gaumond v. Trinity Repertory Co*., 909 A.2d 512, 516 (R.I. 2006). "When a party who is resisting discovery of so-called confidential or protected information asserts a privilege, '[t]he burden of establishing entitlement to nondisclosure rests on the party resisting discovery.'" *Id*. at 517 (quoting *Moretti v. Lowe*, 592 A.2d 855, 857 (R.I. 1991) (brackets in original)).

In Rhode Island, to successfully invoke the attorney-client privilege, the following elements must be established:

> '"(1) the asserted holder of the privilege is or sought to become a client;
> '"(2) the person to whom the communication was made (a) is [a] member of a bar of a court, or his or her subordinate and (b) in connection with this communication is acting as a lawyer;
> '"(3) the communication relates to a fact of which the attorney was informed (a) by his or her client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
> '"(4) the privilege has been (a) claimed and (b) not waived by the client."' *State v. Von Bulow*, 475 A.2d 995, 1004 (R.I. 1984) (alteration in original) (quoting *United States v. Kelly*, 569 F.2d 928, 938 (5th Cir. 1978)).

The burden of establishing the existence of the attorney-client privilege rests, of course, on the party seeking to prevent disclosure of protected information. *Id*. at 1005.

"A party who withholds discovery materials must provide sufficient information, usually in the form of a privilege log, to enable the other party to evaluate the applicability of protection." *Lead Industries Association*, 64 A.3d at 1197. Rule 26(b)(5) of the Superior Court Rules of Civil Procedure states that:

> "When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

Thus, "[t]he party withholding discovery material must be specific enough in its privilege log to support its claim of protection and to provide a means to assess the claim." *Lead Industries Association*, 64 A.3d at 1197. If a party fails to adequately state the reason for objecting to the production of an allegedly privileged document, the party may be deemed to have waived the privilege. *See* Super. R. Civ. P. 37(d); *see also* 8A Wright and Miller, *Federal Practice and Procedure* §§ 2016.1, 2213 (1994). While courts assessing the adequacy of a privilege log "should avoid hair-trigger findings of waiver, the party relying on the privilege needs to provide significant backup information." 8A Wright and Miller, *Federal Practice and Procedure* §§ 2016.1, 2213 (1994). "Minor procedural violations, good-faith attempts at compliance, and other such mitigating circumstances militate against finding waiver." *Lead Industries Association*, 64 A.3d at 1197.

Here, the Court has conducted two *in camara* reviews of a cross-section of documents found in Tocci's privilege log. *See* Ct. Order July 7, 2021, and Ct. Order July 22, 2021. During

this Court's review of those documents, the Court determined that the claimed privileges did not cover the majority of the documents produced to this Court. *See id*. Many documents Tocci produced to the Court contained communications that were allegedly covered by the attorney-client privilege but did not have an attorney listed in the communication as a sender or receiver of the communication. In a large number of the communications where an attorney was listed as a party to the communication, this Court found that the attorney neither participated in the communication nor was asked for or provided legal advice. Moreover, as this Court has taken the time to review both Tocci's Microsoft Teams messages and general privilege logs, the Court is keenly aware that many of the documents listed in the logs that have been alleged to be covered by attorney-client privilege do not include an attorney in any capacity—*i.e.*, as a sender, as a receiver, or even a carbon-copied receiver. *See* Second McGlynn Aff. Exs. J-K.

As outlined above, the Rhode Island Supreme Court has specifically stated what elements must be present in a communication for the attorney-client privilege to cover that communication. *See Von Bulow*, 475 A.2d at 1004 (quoting *Kelly*, 569 F.2d at 938). The second element of the test provides that "the person to whom the communication was made (a) is [a] member of a bar of a court, or his or her subordinate and (b) in connection with this communication is acting as a lawyer." *Id*. (alternation in original). As even the name of the privilege reveals, despite whether the communication meets all other elements of the test, if an attorney is not a party to the communication, then the communication is not covered under the attorney-client privilege. Thus, as Tocci claimed many documents and communications, which did not include an attorney in any capacity, were privileged under the attorney-client privilege, this Court finds that Tocci acted in bad-faith in claiming privilege to those certain documents and communications.

Additionally, because this Court has reviewed Tocci's privilege logs in their entirety, the Court also finds that Tocci's descriptions of the communications and documents in the general privilege log are far too vague. In Tocci's general privilege log, which contains hundreds of documents across forty-six pages, Tocci describes communications as "attorney/client communication re subcontractor" and "attorney/client communication re owner and mediation." *See* Second McGlynn Aff. Ex. K, at 20, 23. Our Supreme Court has made clear that "[t]he party withholding discovery material must be specific enough in its privilege log to support its claim of protection and to provide a means to assess the claim." *Lead Industries Association*, 64 A.3d at 1197. Those descriptions, even including the dates, type of document (*i.e.*, email), and people and entities involved are far too vague to allow the Court or another party to assess the claim of privilege.

2

Sanctions

As the Court has determined that Tocci acted in bad-faith where it claimed the attorney-client privilege for communications which did not include an attorney, *see* Second McGlynn Aff. Exs. J-K, and Tocci did not adequately describe the documents it alleged were privileged, the Court must now determine the appropriate sanction, if any.

In fashioning a sanction, courts are permitted to use a wide range of alternative possible sanctions for violation of the discovery rules. *Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191, 194 (3rd Cir. 1988). A court, however, should seek to impose the least severe sanction sufficient to effectuate the purpose of the rule. *Id.*; *Young v. City of Providence*, 301 F. Supp. 2d 187, 197 (D.R.I. 2004). While the rule presently directs the Court to limit sanctions to what "is sufficient to deter repetition of such conduct or comparable conduct by

other[s] similarly situated," each judge is free to impose the penalty of his or her choice. *Thomason v. Lehrer, P.C.*, 182 F.R.D. 121, 131 (D.N.J. 1998); *see generally*, 5A Wright & Miller, *Federal Practice and Procedure: Civil* § 1336.3 (4th ed. Apr. 2021). Thus, the trial court is vested with considerable discretion because of the authority given to the Court by Rule 11's use of the word "appropriate." *See Braden v. South Main Bank*, 837 S.W.2d 733, 742-43 (Tex. Ct. App. 1992) (citing *Thomas v. Capital Security Services Inc.*, 836 F.2d 866, 876-78 (5th Cir. 1988)); *see also Lett v. Providence Journal Co.*, 798 A.2d 355, 365 (R.I. 2002) (explaining that "trial courts possess the inherent authority to protect their integrity by sanctioning any fraudulent conduct by litigants that is directed toward the court itself or its processes, as informed by the procedures and sanctions available to the court and to the parties under Rules 11 and 37"); Fed. R. Civ. P. 11 Advisory Comm. Notes to the 1993 Amend. ("The court has significant discretion in determining what sanctions, if any, should be imposed for a violation …").

"The appropriateness of a particular sanction is primarily a function of two variables: the facts presented and the court's purpose in penalizing the errant party." *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir. 1990). "Sanctions, under both Rules 11 and 37, serve dual purposes of deterrence and compensation." *Id.*; *Lett*, 798 A.2d at 368. As such, trial justices must be free to create appropriate remedies to address misconduct that occurs in the court of litigation before them. *See Lett*, 798 A.2d at 368-69. However, this Court may also consider past conduct of the offending party when fashioning an appropriate sanction. *Lockheed Martin Energy Systems, Inc. v. Slavin*, 190 F.R.D. 449, 459 (E.D. Tenn. 1999). Moreover, the Court may consider a party whose behavior reflects a sense of disrespect for the authority of the judicial system and the obligations of the legal profession. *Id.* Accordingly, a court may take into consideration the effect of the offending party's behavior on the public. *See id.*

Considering the history of the case at hand and the parties' behavior throughout, the Court finds that Tocci's actions warrant sanctions. Exchange St. has asked this Court to impose extreme sanctions against Tocci, including dismissal of Tocci's claims against Exchange St.; however, imposing costs and fees, including attorneys' fees related to this motion and Exchange St.'s attempts to obtain the allegedly privileged documents, is an adequate sanction for Tocci's bad-faith claim of privilege.

IV

Conclusion

Based on the foregoing, the Court grants, in part, and denies, in part, Exchange St.'s Motion for Sanctions against Tocci. Counsel shall enter an appropriate order.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Exchange St. Hotel LLC v. Tocci Building Corporation and Tocci Building Corporation v. Merit Mechanical Corporation, et al.**

CASE NO: **PC-2019-10577**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **December 20, 2021**

JUSTICE/MAGISTRATE: **Stern, J.**

ATTORNEYS:

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Interested Party: **Amanda Ashley Garganese, Esq.; Adam Ramos, Esq.; Mark A. Pogue, Esq.**