IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRIEDMAN, et al.	:	**CIVIL ACTION**
	:	
v.	:	
	:	**NO. 14-6071**
	:	
PHILADELPHIA PARKING AUTHORITY, et al.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KEARNEY, J. **March 10, 2016**

Following briefing, oral argument and evaluating credibility of witnesses at our evidentiary hearing on Plaintiffs' Motion arising from alleged spoliation of evidence and analysis of several post-hearing certifications of document production, we find facts and enter conclusions of law supporting the accompanying Order denying Plaintiffs' Motion for an adverse inference spoliation sanction under Fed.R.Civ.P. 37 (e) but ordering Defendants reimburse Plaintiffs under Fed.R.Civ.P. 37 (a) for reasonable fees and costs paid for the filing of their Motion and in preparing and participating in the January 15, 2016 evidentiary hearing:

Findings of Fact

1. The Philadelphia Parking Authority ("Authority") regulates the Philadelphia taxicab business through a sophisticated business model with a board of outside directors who hired Defendant Vincent J. Fenerty, Jr. and entrusted him with the duty of managing several professionals including general counsel Dennis Weldon, Esq., Enforcement Director William Schmid and Information Technology Director Michael Massimiani.

2. Plaintiffs own taxicab medallions and manage a taxicab business they began in Philadelphia in 2011 under the trade name Freedom Taxi. From the outset, Plaintiffs clashed

with the Authority including alleging the Authority and its officials wrongfully retaliated against them for, among other things, publicly criticizing the Authority's management of the taxicab business in Philadelphia.[1]

3. The Authority admits Plaintiffs "have been complaining and generally threatening litigation against [it] almost from the outset of their arrival in the Philadelphia taxicab industry in 2011."[2]

4. On November 5, 2013, Plaintiffs notified the Authority's general counsel : "with respect to the [Authority's] ongoing actions (and inactions) that had deprived, and continued to deprive, Freedom Taxi of its significant property and due process rights...It has become apparent that the [Authority] has responded in retaliatory manner toward Freedom Taxi that is in violation of State and Federal Law."[3]

5. Plaintiffs concluded their November 5, 2013 letter by telling the Authority, unless the Authority addressed their concerns, they would "pursue all available legal remedies without further notice" and "nothing contained [in this letter] waived Plaintiffs' rights and remedies."

6. Inexplicably, the Authority had no document retention policies in place before purchasing an archival system known as Barracuda in mid-2014.

7. Before mid-2014, the Authority's only archive for emails was on each employee's Novell GroupWise email system contained on each desktop. Employees could delete, and permanently delete, emails without guidance.

8. The Authority implemented an email archive system called "Barracuda" which stored any historic emails then on the Authority's servers as of July 1, 2014.[4] The Authority

purchased Barracuda believing it would fully archive all emails through a snapshot of each mailbox every 900 seconds.

9. One of Barracuda's benefits is a user could not "double-delete" or permanently delete an email unless Barracuda had already archived the email. [5]

10. Barracuda could only capture the data available in the mailboxes when it went live. As recently as December 20, 2015, the Authority admitted, "[a]s we have made clear from the outset, we cannot speak to what data went into the Barracuda system, as users had the ability to delete [electronically stored information] before Barracuda became operational." [6]

11. On October 23, 2014, Plaintiffs sued the Authority and two of its officers, Charles Milstein and Vincent J. Fenerty, Jr. for, among other things, retaliatory acts affecting the Plaintiffs' daily business operations sufficient to deter a person of ordinary firmness from exercising constitutional rights.

12. The Authority did not implement a litigation hold or specific preservation efforts at any time before October 28, 2014.[7]

13. On October 31, 2014, the Authority in reliance upon its counsel's advice and the use of the Barracuda email archival system, directed employees to delete emails older than six months from their "live mailboxes."[8]

14. The Authority never checked whether its Barracuda system had captured historic emails before directing its employees to delete emails older than six months.

15. The Authority's Enforcement Director and a central witness, William Schmid, swears he did not delete or destroy any emails after October 30, 2014 and instead printed some, but not all, emails.

16. The Authority did not distribute the litigation hold memorandum until November 19, 2014.[9]

17. We denied Defendants' Motion to Dismiss Plaintiffs' First Amendment Retaliation claim on May 14, 2015.[10]

18. Upon the parties' Joint Motion to Extend Deadlines, we granted one last extension of discovery until January 15, 2016 and scheduled a jury trial for April 4, 2016.[11]

19. Plaintiffs moved three (3) times to compel documents arguing, among other things, Authority employees emailed each other discussing deleting emails during the pendency of this case. In each motion, Plaintiffs raised concerns regarding the Authority's deleting e-mails both before and after they sued the Authority.

20. The parties agreed upon a search term protocol and identified thirty (30) custodians inside the Authority with potentially responsive electronically stored information ("ESI").

The Authority and its Board filed a joint specific certification of full production.

21. On October 16, 2015, following motions and argument, we ordered the Authority and its Board to file a joint certification of full production.

22. On October 26, 2015, counsel for the Authority and separate counsel for the Authority's Board of Directors certified to this Court[12]:

a. Before litigation, Defendants installed a system to ensure the preservation of all electronically stored information ("ESI") either maintained by or in the custody of Defendant at the beginning of litigation, created, received or possessed by them thereafter;

b. The Authority migrated its entire ESI archive to a Barracuda system by June 2014 (emphasis in original);

c. All ESI maintained by or in the custody of the Authority as of the migration in June 2014 is preserved in the Barracuda system and cannot be deleted by any user;

d. "All ESI which is created, received by or came into the possession of [Authority] after the Barracuda system became operational is preserved in the Barracuda system and cannot be deleted by any user";

e. "All ESI in Defendants' possession as of the commencement of this litigation or generated thereafter has been and is preserved."(emphasis in original);

f. Counsel directed the Authority employees, including Christine Kirlin, then a manager of administration, to preserve all administrative files and documents without regard to whether they related directly to Plaintiffs;

g. The Authority instructed Schmid, manager of enforcement, to preserve all enforcement files and papers without regard to whether they relate to Plaintiffs;

h. On October 30, 2014, the Authority had not destroyed any archived historic business records for a substantial time before the litigation and instructed its employees to cease any further purge of historic records;

i. After October 30, 2014, both Kirlin and Schmid told all administrative staff and enforcement staff of the Authority's preservation obligation;

j. All paper documents and ESI relevant not just to Plaintiffs and their claims, but relevant in any way to PPA's regulation of taxicabs in Philadelphia, have been preserved since before this case began; and,

k. Defendants collected a complete ESI archive from the Barracuda system for all agreed custodians and ran all search terms requested by the Plaintiffs against those ESI collections from all agreed custodians.

23. On December 18, 2015, the Authority's General Counsel swore its IT Department told him the Authority "collected complete ESI records from the Barracuda system for relevant custodians." He further swore "[w]e're not holding back anything that's not privileged that was subject to – that there was a hit on these search terms." [13]

24. As shown below, the Authority's October 26, 2015 Certification and General Counsel's December 18, 2015 deposition testimony are deficient as confirmed by Plaintiffs receiving over 125,000 responsive documents after filing the motion for sanctions.

Plaintiffs learn of additional Authority documents previously not produced.

25. In discovery, Plaintiffs obtained records from the Boston Police Department and a private investigative firm relating to the Authority's communications with these third parties regarding Plaintiffs.

26. These third-party responses contained numerous communications between the third-parties and Schmid which the Authority should have produced under the agreed-upon search protocol applied to his emails.

27. On December 19, 2015, Plaintiffs identified numerous documents produced by third parties which the Authority did not produce including documents dated both before the Barracuda archival migration and after.

Responding to Plaintiffs' Motion for Sanctions, the Authority discloses several errors in its document production and certification.

28. Plaintiffs repeatedly complained of the Authority's failure to preserve data before implementing the Barracuda archival program in mid-2014.

29. The Authority offers no reason why it did not preserve data before the Barracuda system other than relying on each employee to preserve information he or she deemed necessary on their personal mailboxes in the GroupWise email system.

30. On December 21, 2015, Plaintiffs moved for spoliation sanctions including reimbursement for its fees and costs incurred in the motion, claiming the Authority destroyed documents which have only been uncovered from third parties.

31. Plaintiffs did not, and have not to date, identified lost information but ask us to speculate as to information which must have been lost by the Authority's paucity of ESI diligence.

32. The Authority appears to have only focused in later December 2015 on the Plaintiffs' repeated claims of deficient production once third parties produced documents which should have been produced under the search term protocol.

33. In late December 2015, the Authority claimed it learned for the first time of at least three (3) defects in its document preservation and discovery compliance. The Authority now admits, only after receiving Plaintiffs' December 21, 2015 Motion for Sanctions, of learning their search terms did not adequately find e-mails sent to or from certain individuals. This level of negligence is somewhat incredible in light of sophisticated electronic storage practices

typically in place in major litigations throughout the United States, particularly those involving First Amendment retaliation claims and with law firms handling these matters.

34. First, the Authority did not properly collect all documents responsive to the search protocol on each of the thirty (30) identified custodians because it, and its lawyers, failed to search for different iterations of the custodians' names. The parties characterize this failure as an "under-inclusive search". The Authority admits "correcting that error, which... no one had any reason to be aware of that issue before this spoliation motion was filed." [14]

35. Second, the Authority did not collect emails from three key witnesses (Schmid, James Ney and General Counsel Weldon) dated after July 9, 2014. At the January 15, 2016 hearing, the Authority conceded "something strange here, it doesn't look like we have any data for Schmid after July 9 of 2014." [15]

36. Third, the Authority's Barracuda system did not archive Schmid's or Christine Kirlin's GroupWise mailboxes after their mailboxes exceeded 20,000 items at certain unknown dates. The parties characterize this failure as a "Barracuda defect".

37. The Authority claims it did not know of these defects before December 2015 or January 2016.

38. We have no evidence of the Authority's purposeful document production failures regarding the "under-inclusive search" or July 9, 2014 end date defect. The Authority presents no excuse other than ignorance. It simply did not check. Rather, it produced tens of thousands of records but neither it, nor its counsel, thought to check on the search protocols or the July 9, 2014 end date on three identified custodians.

39. The Authority's error most directly arises from its October 26, 2015 Certification. Based on its counsel's present admissions, we are surprised with the General Counsel's certainty in the Certification. The Authority and its General Counsel certified facts to this Court regarding complete production when, as they learned a short time later, they could have saved the Court and certainly the Plaintiffs substantial attorney and expert time believing they produced all responsive documents.

40. The Authority does not offer an explanation other than limited ignorance on the Barracuda defect. Their defense on Barracuda assumes the lawyers never spoke to the Authority's IT director regarding electronic data required to be produced in this case or, if they did, the Authority's IT director failed to candidly disclose his knowledge dating from December 2014.

41. On December 16, 2014, in response to Massimiani's questions, Barracuda told the Authority of an "Over folder limit" problem with the CKirlin inbox and WSchmid inbox. [16]

42. Massimiani concedes he does not know what an "over-folder limit" designation means.[17]

43. The Authority apparently ignored this December 16, 2014 red flag as to its touted Barracuda archival system.

44. The Authority knowing of its preservation obligation relating to Schmid and Kirlin emails and, upon receiving written notice of an "Over folder limit" problem in their mailboxes, failed to take steps to investigate or remedy the error:

a. Massimiani did not explain why he did not tell anyone about this default and, after explaining his almost forty (40) years of experience as a technology person, could not adequately explain why he did not follow-up with Barracuda to determine the problem.

b. The Authority presented no witnesses to explain why it did not follow-up on these issues at least as early as December 16, 2014 when Barracuda told Massimiani of the problem.

c. The Authority concedes "nobody even paid attention to it."[18]

45. The Authority also attempts to blame the Barracuda system for its failings. While it appears the Barracuda did not accomplish all the Authority hoped, the Authority is also on notice of these failings and cannot be said to have engaged in any significant due diligence to ensure a full production until after the Plaintiff's December 21, 2015 Motion for Sanctions.

The Authority's efforts to now produce responsive documents.

46. Recognizing the safe harbors in recently revised Fed.R.Civ.P. 37 (e) when facing this Court's scrutiny of an attorney's strident certification, the Authority seemingly went to work to show there is no lost information and it never intentionally deleted emails.

47. At our January 15, 2016 hearing, the Authority claimed a lack of prejudice because the third parties produced documents or it may be able to find documents before the Barracuda system from a back-up tape and other physical servers taken out of service before this case began. The Authority also represented undertaking a more appropriate computer search.

48. The Authority retained document reviewers and completed the task of producing all responsive documents from the Barracuda system including a privilege log. Plaintiffs have not claimed any further document deficiencies from the Barracuda system production.

49. To find documents before the Authority implemented the Barracuda system, the Authority de-duplicated ESI files extracted from two decommissioned servers. The Authority admits inability to fully resolve the de-duplication issues and some documents may be duplicated from the Barracuda production.

50. The Authority applied the search term protocol to the agreed custodians' emails and produced an additional 100,495 non-privileged documents from its Barracuda system by January 25, 2016 and an additional 25,829 non-privileged documents from its servers, including six (6) of the documents produced by third parties but not the Authority.[19]

51. The Authority attempted to catalog its backup tapes and, while largely unsuccessful, did generate catalogs for several key witnesses including Fenerty and Weldon. To date, the Authority has not produced any information from the backup tapes but continue in this process.

52. Plaintiffs have not shown, and we cannot independently discern, any specific information once in the Authority's possession which is lost. For example, Plaintiffs do not adduce evidence of an attachment to an email which, per the email, existed at one time and does not now. At best, we are speculating as to documents which the Authority may have held before the Barracuda migration.

53. Plaintiffs adduce no evidence the Authority intentionally deleted identifiable communications relating to them before implementing the Barracuda archival system on July 1, 2014.

Conclusions of Law

54. Federal Rule of Civil Procedure 37, as well as our inherent power to control discovery and ensure the accuracy of sworn certifications, govern either a potential sanction upon the wrongdoer or a remedy to reimburse the innocent party for fees and costs incurred to recalibrate the balance of full disclosure.

55. The Federal Rules, as amended effective December 1, 2015, provide the parties and district courts with the tools necessary to balance the parties' prejudice.

56. Plaintiffs move under Rule 37 (e) (2) broadly claiming spoliation of evidence because of the Authority's failure to timely preserve information before the lawsuit and its later failure to archive emails.

57. Federal Rule of Civil Procedure 37(e), as amended effective December 1, 2015, governs sanctions by district courts upon motion by a party, due to loss of Electronically Stored Information ("ESI") by an opposing party.

58. Plaintiffs, as the party claiming prejudice from the lost ESI, must establish the facts warranting findings under Rule 37(e) by a preponderance of the evidence. While we recognize some courts have applied the stricter "clear and convincing" standard when the movant seeks a judgment disposing of the case, we decline to do so.[20] Discovery sanctions are a remedy in civil litigation. The non-monetary sanctions do not involve fraud. While we examine, in part, the state of mind of the party allegedly destroying evidence, we do not find this factor requires meeting the burden of proof by clear and convincing evidence. We also do not find a value in the higher standard of proof upon the aggrieved party who is left trying to understand and explain facts of which it could not definitely know absent the spoilating party's admission. The higher onerous standard may, contrary to the purposes of Rule 37, allow the spoliator to

benefit from its conduct. Plaintiffs have not asked for a judgment. They seek an adverse inference.

59. To obtain the adverse inference sanction under Rule 37 (e) , Plaintiffs must show by a preponderance of the evidence: 1) electronically stored information should have been preserved in the anticipation or conduct of litigation; 2) the electronically stored information is lost; 3) because the Authority failed to take reasonable steps to preserve it; and 4) the parties cannot restore or replace the lost information through additional discovery.[21]

60. **The Authority should have preserved information regarding Plaintiffs since at least November 5, 2013.**

61. Federal Rule 37(e) does not identify a standard for preservation. A duty to preserve evidence arises from common law and the test applied is whether litigation is pending or reasonably foreseeable. [22]

62. Litigants have a duty to preserve ESI once a party has notice the evidence is relevant to litigation or when a party knew or should have known the evidence may be relevant to future litigation.[23] Reasonableness is a fact specific determination. Existing law governing a party's duty to preserve evidence is unaltered by newly amended Rule 37(e).

63. "In applying [amended Rule 37(e)], a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant." [24]

64. In evaluating preservation efforts, courts should be sensitive to the parties' sophistication with respect to litigation. Sophisticated parties are expected to have a higher degree of awareness of preservation obligations.[25]

65. The Authority admits knowing of Plaintiffs' litigation threat since at least November 5, 2013. Inexplicably, it ignored Plaintiffs' threats and apparently decided not to take them seriously because of their repeated threats before November 5, 2013. We find ignoring a litigation risk because the party repeatedly writes to you lacks common sense. A reasonable party, particularly a sophisticated multi-million dollar enterprise with an experienced Board including at least one lawyer from a major law firm, should direct its custodians to preserve electronic data and not ignore the threats.

66. **There is no evidence of lost information.**

67. Federal Rule 37(e) applies only to ESI "lost because a party failed to take reasonable steps to preserve it."

68. This is an objective test, "asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." [26]

69. The Authority's conduct, while arguably negligent and at best absent-minded, does not give rise to Rule 37 (e) sanctions because Plaintiffs have not, after three attempts, identified any "lost" information.

70. Plaintiffs cited numerous examples of documents produced by the Boston Police but not by the Authority which would have to be responsive to the agreed search protocols on identified custodians.

71. The Authority initially responded with several answers, none of which address their conduct. It claimed it did not need to search or produce electronic data before the lawsuit. This first answer regarding a duty to preserve fails, as shown above. The Authority's argument challenging the relevance or "clearly benign" non-incriminatory nature of eleven (11) of these

documents produced by the third parties is also unavailing. Those arguments are for trial. The Authority should have preserved and produced the documents. The Authority argues it produced many of these documents in hard copy because Schmid saved paper copies. While possibly true, Schmid's paper copies do not excuse the Authority's obligation to preserve and produce ESI.

72. "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system." [27]

73. Plaintiffs adduce no evidence of ESI which migrated to the Barracuda archival system lost due to an intent to destroy data. The Authority, particularly Massimiani, cannot credibly explain why they did not follow-up on Barracuda's December 16, 2014 email regarding an "over folder limit" defect with Schmid's and Kirlin's mailboxes. In any event, Plaintiffs have not adduced testimony of intent. Massimiani may not have properly done his job but we find no basis he intentionally allowed the Barracuda system to fail for Schmid and Kirlin less than two weeks after implementing Barracuda. The Authority's supervisory officers also failed to correct this defect but Plaintiffs cannot show their misfeasance is intentional. Negligence or gross negligence is insufficient for the requisite Rule 37 (e) finding.[28]

74. The Authority has also shown its post-Motion significant efforts at substantial expense to restore or replace the ESI not captured by its touted Barracuda system. Upon receipt of Plaintiffs' Motion, it produced over 125,000 non-privileged documents from its systems, including decommissioned servers and continuing efforts with back-up tapes.[29] Plaintiffs have not cited any additional "lost" electronically stored information since their December 21, 2015 Motion.

75. Plaintiffs counter they could never prove lost information because they cannot show what they do not know. We appreciate the quandary. But Rule 37 (e) applies only to lost electronically stored information. There are situations, including one we recently reviewed, where the aggrieved party can show Rule 37 (e) lost information through a "lost" attachment to a double deleted email when the parties can recover the email but not the attachment.[30] We could also possibly find "lost" information if a witness testified of writing notes on a document produced by a third party but she fails to produce her copy of the same document with her notes. Absent some indicia of a lost document by a preponderance of the evidence, we cannot morph Rule 37 (e), and its specific adverse inference or dismissal sanction, into a general rule of discovery sanction.

76. Given the Authority's conduct and its counsels' October 26, 2015 certification, our findings under Rule 37 (e) do not end our analysis. Without limitation, litigation misconduct may be otherwise sanctioned by the Court's inherent power. We are vested with broad discretion to fashion an appropriate remedy under our inherent powers to stop litigation abuse.[31]

77. We are also guided by Fed.R.Civ.P. 37 (a)(4),(5) which provides the Court must, after giving an opportunity to be heard, require the Authority and/or its attorneys, to pay the Plaintiffs' reasonable expenses incurred in preparing the motion which, by its filing, resulted in the Authority producing over 125,000 documents which should have been produced months ago.

78. After Plaintiffs attempted to resolve these issues for several months including shortly after December 19, 2015, their motion induced the Authority and its attorneys to fully search the Barracuda systems, servers and back-up tapes and realistically understand their preservation obligation.

79. The Authority's October 26, 2015 Certification is an evasive and incomplete disclosure under Rule 37 (a)(4) as it failed, along with its attorneys, to undertake the necessary investigation begun in earnest in later December 2015 and continuing to date.

80. The Authority's less-than-fulsome discovery compliance resulted in, among other things, Plaintiffs filing the necessary Motion, evaluating ongoing production, this Court holding an extensive evidentiary hearing and now, due to the recently found 125,000 documents, a necessary delay in the trial date resulting in delayed resolution for all parties.

81. Exceptions to the Rule 37 (a) mandatory sanctions include a finding the Plaintiffs moved for sanctions before trying to resolve the issues, the Authority's nondisclosures and responses were substantially justified or other circumstances rendering an award of expenses unjust.

82. No exceptions to the mandatory sanctions exist under Rule 37 (a)(5) (i),(ii) and (iii). While we generally discourage a one-day notice to cure deficiencies shortly before Christmas as failing to meet the standard of civility we expect of experienced counsel in this Court, we cannot find Plaintiffs' need for a prompt response is unjustified given the extended discovery deadlines and the Authority's position, as recently as December 18, 2015 under oath, of producing all material when, as it now admits, it did not. The Authority's incomplete disclosures, particularly when coupled with the October 26, 2015 Certification and December 18, 2015 testimony, cannot be justified. When caught, the Authority undertook the efforts after December 21, 2015 it should have done when served with discovery requests months earlier. As shown, the Authority's nonsensical position on its preservation obligation beginning at least as early as November 5, 2013 only delayed this matter.

83. While we remain concerned with the Authority's counsel's apparent blind eye to these errors, we have no evidence the Authority's outside counsel directed this evasive strategy. The Authority and its counsel's conduct undoubtedly now requires the Authority to spend tens of thousands of dollars in expedited attorney and expert review caused by its own conduct months earlier. We will impose the Rule 37 (a) mandatory sanction only upon the Authority.

84. Under Fed.R.Civ.P. 37 (a), the Authority shall reimburse Plaintiffs for the paid reasonable attorney's fees and expenses, including computer forensic assistance, necessary to prepare and file the December 21, 2015 Motion for Sanctions and present argument and cross-examine witnesses at the January 15, 2016 hearing.

85. We presently decline to exercise our inherent power as Rule 37 (a) provides a more appropriately tailored remedy. Following additional discovery necessitated by the Authority's conduct, the Plaintiffs may move for evidentiary rulings, short of an adverse inference, relating to the Authority's failure to preserve information from November 5, 2013 until Barracuda captured the then-existing mailboxes. To date, the only possible prejudice is speculative: some employee may have deleted some undefined material data at some time before Barracuda became operational. The fact of failing to preserve information since November 5, 2013 may be evidentiary but absent prejudice as yet, we cannot define the scope of this evidence which could be admitted or argued to the jury.

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[1] *Freidman et.al. v. Philadelphia Parking Authority, et.al.*, No. 14-6071, 2015 WL 2337288 (E.D.Pa. May 14, 2015).

[2] Defendants' Verified Statement, ¶ 23 (ECF Doc. No. 66-1).

[3] Nov. 5, 2013 letter (ECF Doc. No. 62-2, Ex. B).

[4] N.T. Hearing, Jan. 15, 2016, p. 128.

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[5] N.T. Hearing, Jan. 15, 2016, p. 124.

[6] (ECF Doc. No. 62-1, ¶ 8).

[7] Defendants' Verified Statement, ¶ 21 (a) (ECF Doc. No. 66-1).

[8] *Id.,* ¶ 21(h).

[9] (ECF Doc. No. 54, ¶ 19).

[10] (ECF Doc. No. 23).

[11] (ECF Doc. No. 47).

[12] (ECF Doc. No. 54).

[13] N.T. Dennis Weldon, pp. 109,111, Dec. 18, 2015 (ECF Doc. No. 73-2, Ex. B).

[14] N.T. Hearing, Jan. 15, 2016, pp 17-18.

[15] N.T. Hearing, Jan. 15, 2016, p. 25.

[16] Dec. 16, 2014 email, introduced during Jan. 15, 2016 hearing.

[17] N.T. Hearing, Jan. 15, 2016, p 122.

[18] N.T. Hearing, Jan. 15, 2016, pp. 36-37.

[19] Defendants' January 25, 2016 Certification, ¶ 1 (ECF Doc. No. 78) and February 16, 2016 Certification, ¶ 12-13 (ECF Doc. No. 89).

[20] *See generally CAT3, LLC v. Black Lineage, Inc.*, No. 14-5511, 2016 WL 154116, at *7-8 (S.D.N.Y. Jan. 12, 2016)(collecting cases).

[21] Fed. R.Civ.P. 37 (e).

[22] *Dunn v. Mercedes Benz of Ft. Washington, Inc.*, No. 10-1662, 2012 WL 424984 at *5 (E.D. Pa. 2012) (citing *Micron Tech.,* 645 F.3d at 1320).

[23] *Id.*

[24] Fed. R.Civ. P. 37(e), Advisory Committee Note.

[25] Fed R.Civ.P. 37(e), Advisory Committee Note.

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[26] *Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011).

[27] Fed.R.Civ.P. 37 (e), Advisory Committee Note.

[28] Fed.R.Civ.P. 37 (e)(2), Advisory Committee Note.

[29] Under the accompanying Order, the Authority shall continue investigating and producing all non-privileged information recoverable from the back-up tapes and file a certification updating the Court on its progress in producing documents from the back-up tapes no later than March 31 and April 15, 2016.

[30] *See DVComm, LLC v. Hotwire Communications, LLC*, No. 14-5543, 2016 U.S.Dist.LEXIS 13661 (E.D.Pa. Feb. 3, 2016)

[31] "It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc.*, 57 F.3d 1215, 1224 (3d Cir. 1995)(quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)). We are careful to exercise this power, especially when the Plaintiffs have not asked, with "restraint and discretion." *Fellheimer, Eichen & Braverman,* 57 F.3d at 1224 (quoting *Chambers*, 501 U.S. at 44)

IN THE UNITED STATES DISTRICT COURT
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	:	
PHILADELPHIA PARKING AUTHORITY, et al.	:	

ORDER

AND NOW, this 10th day of March 2016, upon consideration of Defendants' Motion for sanctions arising from alleged spoliation of electronically stored information (ECF Doc. No. 62), Defendants' response (ECF Doc. No. 66), Defendants' and board members' certification of full discovery (ECF Doc. No. 54), analysis and review of the credibility of witnesses and study of arguments at our January 15, 2016 evidentiary hearing, Defendants' post hearing certifications (ECF Doc. Nos. 78,80,89), Plaintiffs' supplemental memorandum (ECF Doc. No. 90), and for the reasons in the accompanying findings of fact and conclusions of law, it is **ORDERED** Plaintiff's Motion for Sanctions (ECF Doc. No. 62) is **GRANTED in part and DENIED in part**:

1. Plaintiffs' Motion for a Rule 37(e) adverse inference sanction is **DENIED without prejudice,** as Plaintiff is presently unable to adduce evidence of lost information; and,

2. Plaintiffs' Motion for fees and costs under Rule 37 (a)(5) against the Philadelphia Parking Authority is **GRANTED**:

a. **On or before March 21, 2016**, Plaintiffs may file a petition for reimbursement of reasonable attorney's fees and costs with comparator affidavits of reasonable attorney's fees, including reasonable computer forensic costs paid by Defendants in connection with reviewing document production, testimony and electronically stored information necessary to prepare and

file Plaintiffs' December 21, 2015 Motion for Sanctions (ECF Doc. No. 62) and its presentation at the January 15, 2016 hearing; Plaintiffs may file a redacted version with their counsel's attached invoices and evidence of payments to counsel but shall contemporaneously provide the unredacted copy of all invoices and payments demonstrating reasonable fees and costs for *in camera* review. Defendants may object to the amount of Plaintiffs' claim for attorney's fees and costs, including reasonable computer forensic costs, with specific challenges **on or before March 28, 2016**; and,

b. **On or before March 31, 2016,** Defendants shall file a sworn certification describing progress in their ongoing review of their backup tapes with a supplemental sworn certification filed on or before **April 15, 2016**.

KEARNEY, J.