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<p>LATONIA SUYDAM,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>SUMMIT HOTELS LLC AND MANISH VYAS,</p> <p style="text-align: right;">Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO. MON-L-4190-14</p> <p style="text-align: center;">Civil Action</p> <p>NOTICE OF PLAINTIFF’S MOTION FOR SANCTIONS RELATING TO DEFENDANTS’ CONCEALMENT AND INTENTIONAL SPOILIATION OF RELEVANT EVIDENCE</p>
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TO: Keith Harris, Esq.
Braff, Harris, Sukoneck & Maloof
570 West Mount Pleasant Avenue
P.O. BOX 657
Livingston, New Jersey 07039
Attorney for Defendants

COUNSELOR:

PLEASE TAKE NOTICE that the undersigned attorneys for Plaintiff Latonia Suydam will apply to the Superior Court of New Jersey, Monmouth County Law Division, on June 12, 2015, at 9:00am or as soon thereafter as counsel may be heard, for an Order sanctioning Defendants for their intentional spoliation of relevant evidence.

PLEASE TAKE FURTHER NOTICE that Plaintiff will rely upon the Certification and Brief of Christian V. McOmber, Esquire filed herewith.

PLEASE TAKE FURTHER NOTICE that Plaintiff hereby requests oral argument with regard to this Motion.

Dated: May 26, 2015

Respectfully submitted,

/s/ Christian V. McOmbler, Esq.

Christian V. McOmbler, Esq.

Matthew A. Lubber, Esq.

Elizabeth A. Matecki, Esq.

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THIS MATTER having been opened to the Court by Christian V. McOmber, Esq. of McOmber & McOmber P.C., attorneys for Plaintiff, Latonia Suydam (“Plaintiff”), on a Motion for Sanctions Relating to Defendants’ Intentional Concealment and Spoliation of Relevant Evidence, and the Court having read and considered the all papers submitted, and good and sufficient cause having been shown,

IT IS on this _____ day of _____, 2015

ORDERED that:

1. Based on the record before the Court, spoliation has occurred and sanctions are warranted as a remedy;
2. Plaintiff shall be awarded all costs and attorneys’ fees incurred as a result of Defendants’ spoliation and concealment, including the costs associated with the instant Motion;

3. The Court will appoint a third-party attorney or expert at Defendants' expense to organize, sort, and issue a report on the spoliated documents and to conduct an examination of whether Defendants have spoliated other documents relevant to this case;
4. To the extent the expert finds that documents have been permanently lost or compromised, Plaintiff is entitled to an adverse inference against Defendants that the destroyed evidence contained evidence favorable to Plaintiff;
5. To the extent the expert finds that documents have been permanently lost or compromised, the Court shall strike Defendants' defenses to the discrimination and retaliations claims alleged in its answer the complaint;
6. To the extent the expert finds that documents have been permanently lost or compromised, Plaintiff shall be entitled to a jury instruction that the spoliated documents is evidence of pretext and that retaliation was the but-for cause of Plaintiff's termination; and
7. Plaintiff is granted leave to amend the Complaint to assert a claim for fraudulent concealment, which is actionable under New Jersey law.

IT IS FURTHER ORDERED that, within ___ days of entry of this Order, the parties shall propose an attorney or expert for the Court to appoint to organize, sort, and issue a report on the spoliated documents and to conduct an examination of whether Defendants have spoliated other documents relevant to this case.

IT IS FURTHER ORDERED that the Court will hold a hearing ___ days after the date of this Order to determine the full scope of the spoliation and sanctions. Thereafter, Plaintiff shall submit within ___ days of the hearing, proof of all bills, costs, and attorney's fees she has incurred in connection Defendants' spoliation.

J.S.C.

___ Opposed

___ Unopposed

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LATONIA SUYDAM,

Plaintiff,

v.

SUMMIT HOTELS LLC AND MANISH
VYAS,

Defendants.

SUPERIOR COURT OF NEW
JERSEY
LAW DIVISION
MONMOUTH COUNTY
DOCKET NO. MON-L-4190-14

Civil Action

**CERTIFICATION OF
CHRISTIAN V. MCOMBER, ESQ.
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SANCTIONS
RELATING TO DEFENDANTS'
INTENTIONAL CONCEALMENT
AND SPOILIATION OF
RELEVANT EVIDENCE**

CHRISTIAN V. McOMBER, certifies and states as follows:

1. I am an attorney-at-law of the State of New Jersey, attorney for Plaintiff Latonia Suydam, ("Plaintiff"), and I am fully familiar with the matters set forth and am making this Certification in Support of Plaintiff's Motion for Sanctions Relating to Defendants' Intentional Concealment and Spoliation of Relevant Evidence.

2. A Complaint was filed in the above-entitled matter on October 28, 2014 and it was served on November 12, 2014. The Complaint alleges that Plaintiff was subjected to repeated, pervasive, severe and continuing instances of harassment and disparate treatment due to her race and national origin. Plaintiff's Complaint also alleges that she ultimately was

terminated in retaliation for complaining of the harassment and discrimination. A true and correct attached hereto as **Exhibit A**.

3. On October 15, 2014, Plaintiff issued a litigation hold to Defendants regarding the above allegations, a true and correct copy of which is attached hereto as **Exhibit B**.

4. On November 12, 2014, Plaintiff personally served Defendants with the Complaint. A true and correct copy of the Affidavit of Service is attached hereto as **Exhibit C**.

5. On November 20, 2014, Defendant Vyas discarded a trash bag full of critical documents into a dumpster at Defendants' Tinton Falls Comfort Inn.

6. Plaintiff learned of Defendants' concealment and spoliation from Dominique Dumay, who was employed by Defendant Summit Hotels as a front desk supervisor at the time. Ms. Dumay retrieved the documents from the dumpster and turned them over to Plaintiff. A true and correct copy of the Affidavit of Dominique Dumay is attached hereto as **Exhibit D**.

7. Pictures of the discarded documents and a satellite image of the dumpster are attached hereto as **Exhibit E**.

8. A sampling of the spoliated evidence revealed that Defendants discarded critical housekeeping assignments that are the subject of Plaintiff's claims. Sample Spoliated documents are attached hereto as **Exhibit G**.

9. Plaintiff's counsel advised defense counsel of the spoliation and requested to confer regarding the matter. True and correct copies of the emails between Christian V. McOmber, Esq. and Keith Harris, Esq. are attached hereto as **Exhibit F**.

10. Accordingly, Plaintiff requests that the Court grant the Order imposing sanctions and granting Plaintiff's requested relief as a consequence of Defendants' intentional concealment and spoliation of relevant evidence.

11. As a result of Defendants' misconduct, Plaintiff seeks an Order from the Court granting Plaintiff the following relief:

- a) Based on the record before the Court, spoliation has occurred and sanctions are warranted as a remedy;
- b) Plaintiff shall be awarded all costs and attorneys' fees incurred as a result of Defendants' spoliation and concealment, including the costs associated with the instant Motion;
- c) The Court will appoint a third-party attorney or expert at Defendants' expense to organize, sort, and issue a report on the spoliated documents and to conduct an examination of whether Defendants have spoliated other documents relevant to this case;
- d) To the extent the expert finds that documents have been permanently lost or compromised, Plaintiff is entitled to an adverse inference against Defendants that the destroyed evidence contained evidence favorable to Plaintiff;
- e) To the extent the expert finds that documents have been permanently lost or compromised, the Court shall strike Defendants' defenses to the discrimination and retaliations claims alleged in its answer the complaint;
- f) To the extent the expert finds that documents have been permanently lost or compromised, Plaintiff shall be entitled to a jury instruction that the spoliated documents is evidence of pretext and that retaliation was the but-for cause of Plaintiff's termination; and
- g) Plaintiff is granted leave to amend the Complaint to assert a claim for fraudulent concealment, which is actionable under New Jersey law.

12. I certify that the foregoing statements made by me are true and am aware that any of the foregoing statements are willfully false, I am subject to punishment.

Respectfully submitted,

/s/ Christian V. McOmber, Esq.
Christian V. McOmber, Esq.

Dated: May 26, 2015

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**BRIEF IN SUPPORT OF PLAINTIFF’S MOTION FOR SANCTIONS RELATING TO
DEFENDANTS’ INTENTIONAL CONCEALMENT
AND SPOILIATION OF RELEVANT EVIDENCE**

Dated: May 26, 2015

Christian V. McOmber, Esq.
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Plaintiff Latonia Suydam, by and through her undersigned counsel, hereby moves for the entry of an Order imposing sanctions and other relief against Defendant Summit Hotels LLC (“Defendant Summit Hotels”) and Defendant Manish Vyas (“Defendant Vyas”) (collectively “Defendants”) stemming from their intentional spoliation of relevant evidence (“Motion”). In support thereof, Plaintiff states the following:

I. INTRODUCTION

No act serves to undermine the integrity of the judicial system more than spoliation of evidence. It therefore is incumbent upon a party to immediately suspend its routine document retention policy and to issue a litigation hold to ensure the preservation of documents whenever a lawsuit is reasonably anticipated. In this case, however, and with the Complaint in their very hands, Defendants sought not to preserve but to conceal and destroy.

Defendants’ conduct can only be described as surreal. One (1) month after receiving Plaintiff’s document preservation letter, and just eight (8) days after being personally served with the Complaint, Defendant Vyas intentionally disposed critical documents into a trash bag and then tossed that bag into a dumpster located behind Defendant Summit Hotels’ Tinton Falls Comfort Inn. Defendants’ hotel desk clerk at the time learned of the spoliation, retrieved the trash bag from the dumpster, and turned it over to Plaintiff and her counsel. Defendants discarded not just any documents—they dumped documents that go to the heart of this case and which directly relate to Plaintiff’s allegations in the Complaint.

Having been caught red-handed committing the most egregious litigation violation, one would think that the spoliating party would do everything possible to attempt to repair the situation. Not Defendants, they have refused to acknowledge let alone endeavor to cure their misconduct. Further, Defendants have declined invitations from Plaintiff’s counsel to cooperate in good faith

and to address the issue without court intervention. Defendants ostensibly believe they are exempt from preservation obligations or immune from punishment for intentional concealment and destruction of documents. Defendants are mistaken on both accounts. The Court should impose severe sanctions to provide redress to Plaintiff and to deter Defendants and others from engaging in such illicit activity.

In turn, Plaintiff seeks an Order from the Court granting the following relief and imposing the following sanctions:

1. Plaintiff shall be awarded all costs and attorneys' fees incurred as a result of Defendants' spoliation and concealment, including the costs associated with the instant Motion;
2. The Court will appoint a third-party attorney or expert at Defendants' expense to organize, sort, and issue a report on the spoliated documents and to conduct an examination of whether Defendants have spoliated other documents relevant to this case;
3. To the extent the expert finds that documents have been permanently lost or compromised, Plaintiff is entitled to an adverse inference against Defendants that the destroyed evidence contained evidence favorable to Plaintiff;
4. To the extent the expert finds that documents have been permanently lost or compromised, the Court shall strike Defendants' defenses to the discrimination and retaliations claims alleged in its Answer the Complaint;
5. To the extent the expert finds that documents have been permanently lost or compromised, the Plaintiff shall be entitled to a jury instruction that the spoliated documents is evidence of pretext and that retaliation was the but-for cause of Plaintiff's termination; and
6. Plaintiff is granted leave to amend the Complaint to assert a claim for fraudulent concealment, which is actionable under New Jersey law.

II. CASE BACKGROUND

a. Plaintiff's Claims.

From July 2013 through November, 2013, Plaintiff was employed as a housekeeper¹ at Defendant Summit Hotels' Tinton Falls Comfort Inn. See Compl. ¶ 4, attached to the Certif. of Christian V. McOmber, Esq. as **Exhibit A**. In general, Plaintiff alleges she was subjected to repeated, pervasive, severe and continuing instances of harassment and disparate treatment due to her race and national origin. See generally id. (asserting claims of discrimination, retaliation, and intentional infliction of emotion distress). Plaintiff further claims she ultimately was terminated in retaliation for complaining of the harassment and discrimination. Id.

In particular, Plaintiff alleges that (i) Defendant Vyas and another manager, both of Indian national origin, provide employees of Indian national origin preferential treatment and preferential pay; and (ii) Defendants subjected Plaintiff to increased scrutiny, hostile treatment, and discrimination due to her race and national origin. Id. ¶¶ 5-10. For example, Plaintiff alleges that Indian employees were paid "double" for the same number of hotel rooms cleaned by non-Indian employees; that the hours of the black and Hispanic housekeepers have been cut since Defendants' employment of Indian individuals; and that black and Hispanic housekeepers are required to perform certain tasks that Indian employees are not (e.g., hauling garbage to the dumpster). Id. Plaintiff also claims she was terminated *the same day* she complained to management, October 8, 2014, in retaliation for complaining of Defendants' discriminatory conduct. Id.²

¹ Plaintiff was promoted to housekeeping manager in or around November 2013, a position she held through October 8, 2014 or the day she was terminated. At all relevant times during her employment at Defendant Summit Hotels, Plaintiff's supervisor was Defendant Vyas. Id.

² Defendants answered the Complaint, denying almost all of the allegations and asserting a host of affirmative defenses.

b. Defendants Spoliate Critical Documents.

Plaintiff issued a litigation hold to Defendants regarding the above allegations on October 15, 2014, attached to the Certif. of Christian V. McOmber, Esq. as **Exhibit B**. Further, the Complaint was filed on October 28, 2014 and it was personally served on Defendants on November 12, 2014. See Affidavit of Service, Nov. 12, 2014, attached to the Certif. of Christian V. McOmber, Esq. as **Exhibit C**. Yet, on November 20, 2014—just eight (8) days after being personally served with the Complaint—Defendant Vyas discarded a trash bag full of critical documents into a dumpster at Defendants’ Tinton Falls Comfort Inn.

Plaintiff learned of Defendants’ concealment and spoliation from Dominique Dumay (“Ms. Dumay”), who was employed by Defendant Summit Hotels as a front desk supervisor at the time. See Affidavit of Dominique Dumay, March 2, 2015 at ¶¶ 3-4, 7, attached to the Certif. of Christian V. McOmber, Esq. as **Exhibit D** (“Dumay Affidavit”). Ms. Dumay had been employed by Defendant Summit Hotels since 2012 and she was aware that Defendants had been sued by Plaintiff prior to Defendant Vyas’s placement of the documents into the dumpster. Id. In fact, Ms. Dumay was present on November 12, 2014 when Defendant Vyas was personally served with the Summons and Complaint. Id. ¶ 5.

During her shift on November 20, 2014, Ms. Dumay noticed a shredder at the hotel’s front desk; Ms. Dumay immediately became suspicious that Defendant Vyas was attempting to destroy documents. Id. ¶ 6. When Ms. Dumay opened a drawer that ordinarily contained housekeeping records going back several years, she noticed that all of the pre-October 2014 documents were missing. Id. ¶ 7. Ms. Dumay then searched for those documents and eventually checked the dumpster in the fenced-in area behind Defendants’ hotel, where she found a black trash bag “with

stacks of documents in it.” Id. ¶¶ 7-9.³ Ms. Dumay inspected the bag to confirm that it potentially contained relevant documents and placed the bag in to the trunk of her car. Id. ¶¶ 9-10. Ms. Dumay informed Plaintiff that she found the missing documents and subsequently provided them to Plaintiff. Id. ¶ 11.⁴

c. Plaintiff’s Counsel Attempt to Resolve the Spoliation Issue With Defense Counsel.

On January 22, 2015, counsel for Plaintiff took possession of the documents contained in the trash bag—pictures of the discarded documents are below and attached to the Certification of Christian V. McOmer, Esq. as **Exhibit E**:



Plaintiff’s counsel immediately advised defense counsel of the spoliation and requested to confer regarding the matter. See Email between Christian V. McOmer and Keith Harris, Esq., Jan. 23, 2015, attached to the Certif. of Christian V. McOmer, Esq. as **Exhibit F**.⁵ On January 28, 2015, Defense counsel requested permission to inspect the documents at Plaintiff’s counsel

³ For the Court’s reference, **Exhibit E** to the Certification of Christian V. McOmer, Esq. contains all of the pictures referenced herein, including a satellite view of the dumpster.

⁴ Plaintiff likely would not have recovered the documents if not for the attentiveness and decisiveness of Ms. Dumay.

⁵ **Exhibit F** is a single email chain that includes all of the emails referenced herein.

office. Id., Email between Christian V. McOmber and Keith Harris, Esq., Jan. 28, 2015. Plaintiff's counsel agreed, but further explained:

For your information, I have spot-checked a very limited sample of the documents, but maintained their place in the garbage bag that was delivered to me. For the time being, I am making every effort to preserve them in the condition and order that they were delivered to me. However, please understand that they were placed in a garbage bag, so some are crumpled etc. and the papers have been shifted in the bag. While you are certainly welcome to spot check them in place, I would ask that you leave them in the order and condition that they were put in the bag until we determine how to address this and/or there is a judicial determination about how to address it.

The documents that I spot checked appear to be employee room assignments that are highly relevant to the claim.

Your cooperation and assistance are appreciated. Thanks and have a good day.

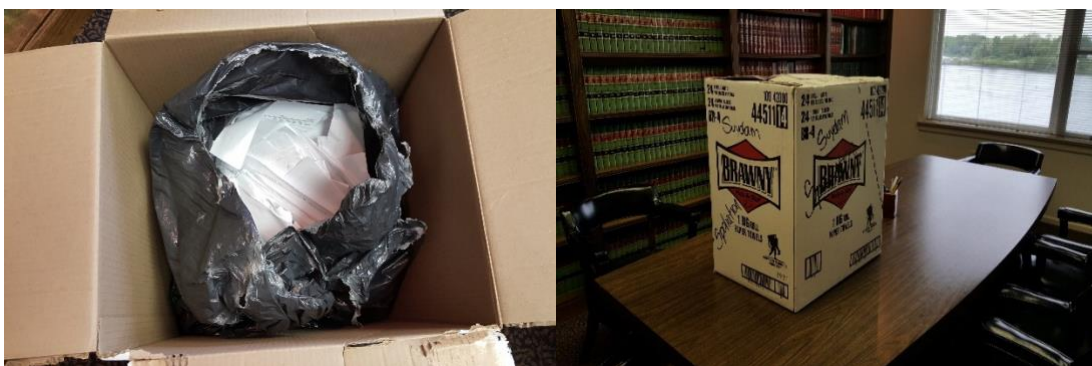
Id.

In fact, a small sampling reveals that Defendants not only spoliated relevant documents, but the room assignment schedules for both *Plaintiff and the Indian housekeepers, which go to the heart of this case and directly relate to Plaintiff's allegations in the Complaint*. Compare Compl. ¶¶ 5-10 with Sample of Spoliated Documents, attached to the Certif. of Christian V. McOmber, Esq. as **Exhibit G** (containing August 20, 2014 and November 22, 2013 Housekeeping Room Assignment for Latonia Suydam and August 16, 2014 Housekeeping Room Assignment for Ila & Raj).

Plaintiff's counsel reiterated that, unless the parties agreed on how to address the spoliation, he intended to file a motion to have "the court to appoint an independent expert to take possession of the documents, organize them, and copy them – at [Defendant's] expense, together with attorney's fees and sanctions." See Email between Christian V. McOmber and Keith Harris,

Esq., Feb. 4, 2015, attached to the Certif. of Christian V. McOmer, Esq. as **Exhibit F**. Defense counsel argued in response that it is a “seemingly strange coincidence that the documents were supposedly placed in a dumpster by an unidentified person and somehow spotted by another unidentified person and then came into possession of the plaintiff.” Id. He also stated “you can obviously make any motion you wish and I will address it [.]” Id.

Plaintiff’s counsel advised that “[t]he individual who dumped the documents and the individual who retrieved the documents are not ‘unidentified,’” that “the facts and circumstances are clearly indicative of intentional spoliation,” and again welcomed Defense counsel to “stop in [his office] and spot inspect [the spoliated documents.]” Id. To date, Defense counsel has not attempted to inspect the spoliated documents and has not endeavored to engage in additional discussions regarding the matter. The spoliated documents remain intact as found in the dumpster and within the custody of Plaintiff’s counsel. They are housed safely within a sealed box at the offices of Plaintiff’s counsel, which is pictured below and attached to the Certification of Christian V. McOmer, Esq. as **Exhibit E**:



Accordingly, Plaintiff brings the instant motion.

III. ARGUMENT

A. The Court Should First Issue a Finding That Spoliation Has Occurred and That Sanctions Are Warranted.

A duty to preserve evidence is a question of law to be determined by the court. Aetna Life & Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 365-66 (App. Div. 1998). That duty, which is independent from an order to preserve evidence, arises when there is: (1) pending or probable litigation; (2) knowledge by the party of the existence or likelihood of litigation; (3) foreseeability of harm to the other party, or in other words, discarding the evidence would be prejudicial; and (4) the evidence is relevant to the litigation. Id.

Furthermore, “[s]poliation of evidence in a prospective civil action occurs when evidence pertinent to the action is destroyed, thereby interfering with the action’s proper administration and disposition.” Id. at 364 (App. Div. 1998) (quoting Hirsch v. General Motors Corp., 266 N.J. Super. 222, 234 (Law Div. 1993)); Rosenblit v. Zimmerman, 166 N.J. 391, 401 (2001); Manorcare Health Servs., Inc. v. Osmose Wood Preserving, Inc., 336 N.J. Super. 218, 226 (App. Div. 2001). “The spoliator’s level of intent, whether negligent or intentional, does not affect the spoliator’s liability. Rather, it is a factor to be considered when determining the appropriate remedy for the spoliation.” Aetna Life & Cas. Co., 309 N.J. Super. at 368 (quoting Hirsch, 266 N.J. Super. at 256); Nerney v. Garden State Hosp., 229 N.J. Super. 37 (App. Div. 1988)).

Here, the Court should hold, as an initial matter and based on the record before it, that spoliation has occurred and sanctions are warranted as a remedy. It cannot be disputed that Defendants failed to appropriately preserve relevant documents to this litigation. Defendants did just the opposite. Defendants deliberately discarded crucial documents almost immediately after receiving notice that Plaintiff actually commenced litigation, let alone after Defendants reasonably anticipated litigation. See supra § II.b.

Further, Ms. Dumay, then Defendants' own employee of twelve (12) years, has attested to the spoliation and Plaintiff has identified specific documents that were concealed and/or destroyed while Defendants were under an obligation to preserve them. Id. Moreover, the spoliation has already caused Plaintiff to incur significant, unnecessary costs and expenses. Further, at this juncture, it is uncertain if the retrieved documents have been permanently compromised. Plaintiff will require additional, unnecessary, and extensive discovery relating to Defendants' document preservation (or lack thereof) and/or destruction of evidence to attempt to reveal the scope of the spoliation, though the full-measure of Defendants' spoliation may never be known. Additionally, if discovery reveals that Defendants permanently compromised or discarded documents, Plaintiff's ability to pursue her claims may be severely and irreparably prejudiced.

Therefore, Plaintiff respectfully requests that the Court find that Defendants spoliated documents and that severe sanctions are warranted as a result. Rosenblit, 166 N.J. at 401-09 (holding trial court erred in preventing plaintiff from apprising the jury of defendant's alteration of the records); Hirsch, 266 N.J. Super. at 256.

B. The Court Should Grant Plaintiff's Requested Relief.

In Plaintiff's view, the only material question for the Court is the scope of redress owed to Plaintiff and the sanctions necessary to punish and deter Defendants. When spoliation is found to have occurred, a judge may fashion a civil remedy to serve the purposes of making the non-spoliating party whole, punishing the wrongdoer, and deterring others from engaging in such activity. Robertet Flavors, Inc. v. Tri-Form Const., Inc., 203 N.J. 252, 273 (2010). In fashioning a remedy for spoliation:

[T]he key considerations in determining [what] sanction is appropriate should be: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994).

“To be sure, if the court concludes that a spoliator has acted intentionally and in bad faith, seeking to ... destroy any evidence that would harm its position, a harsh sanction will be appropriate.” Robertet Flavors, Inc., 203 N.J. at 283. Relief may include: a designation from the Court that certain facts be taken as established, an adverse inference instruction, precluding the spoliator from supporting his or her claims, prohibiting the introduction of designated matters into evidence, dismissal of a complaint or defenses, and an award of attorneys’ fees and costs expended by the aggrieved party. Swick v. The New York Times Co., 357 N.J. Super. 371, 377 (App. Div. 2003), certif. denied, 176 N.J. 428 (2003).

Here, Defendants’ intentional disposing of evidence into a dumpster one month after receiving Plaintiff’s litigation hold letter and eight days after receiving the Complaint indisputably smacks of bad faith and warrants the strictest of sanctions. See Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 122 (2008) (“[T]he time when an act of spoliation is discovered will indeed strongly suggest the appropriate course of action in that case.”)⁶; Robertet Flavors, 203 N.J. at 283. In turn, Plaintiff seeks the following tailored relief:

⁶ New Jersey also recognizes the tort for negligent spoliation of evidence, though it does not recognize the tort for intentional spoliation of evidence. Baxt v. A.Liloia, 155 N.J. 190, 204 (1998) (noting there is “little difference between liability for spoliation of evidence and [the intentional destruction of evidence.]”). To prevail on a claim for intentional destruction of evidence, the plaintiff would have to prove that: (1) there was a legal obligation of the defendant's part; (2) the information was material to plaintiff's case; (3) the plaintiff could not have readily obtained the information without disclosure by the defendants; (4) there was intentional nondisclosure; and (5) the plaintiff was harmed by relying on this nondisclosure. Id. at 205-06.

First, given the extraordinary circumstances presented in this Motion, the Court should appoint a third-party expert or attorney to organize, sort, and issue a report on the spoliated documents in the trash bag and to conduct an examination of whether Defendants have spoliated other documents relevant to this case. The appointment of a capable and neutral expert to do so on Defendants' behalf is essential to ensure that, to the extent possible, all concealed evidence is found and all permanently lost evidence is accounted for. Robertet Flavors, Inc., 203 N.J. at 284 (“[C]ourts faced with spoliation claims should strive to impose a remedy that will serve the ends of justice by creating a level playing field, by ensuring that the consequence of the lost evidence falls on the spoliator rather than on an innocent party, and by using their considerable powers to deter future acts of spoliation.”). Defendants simply cannot be trusted to preserve and produce documents relevant to this case.

Second, Plaintiff and her counsel have expended considerable time, effort, and funds addressing Defendants' spoliation. Defendants have compounded the matter by refusing to cooperate and by refusing to acknowledge their misconduct, necessitating a third-party expert to sort, review, and report on the documents discarded and to investigate Defendants document preservation to date. Plaintiff will also be required to expend significant hours during discovery to fully investigate the spoliation. Defendants, therefore, must compensate Plaintiff for attorneys' fees, expert fees, and other costs expended in connection with Plaintiff's intentional concealment and destruction of evidence, including the costs associated with the presentation of this Motion. N.V.E., Inc. v. Palmeroni, No. CIV.A. 06-5455 ES, 2011 WL 4407428 at *8 (D.N.J. Sept. 21, 2011) (citation omitted) (“In spoliation cases, monetary sanctions are used to compensate a party for ‘the time and effort it was forced to expend in an effort to obtain discovery’ to which it was

otherwise entitled.”); see also R. 4:23-2 (requiring the award of fees unless the delinquent party can show that its discovery violations were “substantially justified.”).⁷

Third, if the Court, or the appointed expert, concludes that Defendants have irreparably destroyed evidence, the sanctions of preclusion of evidence, striking of Defendants’ defenses, and adverse inference should be imposed as well.⁸ These sanctions even the playing field when evidence has been hidden or destroyed and when a party has been permanently prejudiced by intentional acts of spoliation. Tartaglia, 197 N.J. 81⁹; see also Rosenblit, 166 N.J. at 400-06; Manorcare, 336 N.J. Super. at 231-35 (explaining if spoliation of evidence is discovered during the course of litigation, Plaintiff would be entitled to a spoliation of evidence charge at trial instructing the jury that they can presume that the evidence that Defendant destroyed would have been unfavorable to Plaintiff; further, New Jersey courts have “routinely explained that exclusion of testimony and/or evidence is an appropriate sanction to alleviate the prejudice resulting from serious discovery violations.”); Hirsch v. Gen. Motors Corp., 266 N.J. Super. 222, 258 (Ch. Div.

⁷ Rule 4:23-2 applies when a party fails to obey an order to provide discovery. A court may make such orders in regard to the failure as are just including “(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the introduction of designated matters in evidence; (3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party; (4) In lieu of any of the foregoing orders or in addition thereto, an order treating as contempt of court the failure to obey any orders. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.” Id.

⁸ Despite this clear record, should the Court have outstanding questions regarding the appropriate way to address Defendants’ spoliation, the Court could order Defendants to show cause why sanctions for spoliation should not be imposed, and set a hearing.

⁹ New Jersey courts use the terms fraudulent concealment and spoliation interchangeably. In Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81, 116-19 (2008), the New Jersey Supreme Court described in detail the legal evolution of a claim for “fraudulent concealment in the spoliation context.” As such, Plaintiff has asked the Court to permit to Plaintiff to amend her complaint to include a claim for fraudulent concealment.

1993) (“[S]poliation of evidence ... could result in preclusion of evidence at trial” and explaining that since the seventeenth century courts have followed the rule “*omnia praesumuntur contra spoliatorem*”, which means “all things are presumed against the destroyer”); Rosenblit, 166 N.J. at 411 (“Where an adversary has intentionally hidden or destroyed [spoliated] evidence ... and that misdeed is uncovered in time for trial, [the other party] is entitled to a spoliation inference that the missing evidence would be unfavorable to the wrongdoer.”).

Finally, because the spoliation was discovered prior to the trial, Plaintiff is entitled to amend her complaint so that the issue can be resolved in this litigation. Tartaglia, 197 N.J. at 118-19 (“If the spoliation is discovered while the underlying litigation is on-going, the adverse inference may be invoked and the party is permitted to amend the complaint to add a count for fraudulent concealment...”); Rosenblit, 166 N.J. at 407 (“[T]he injured party may amend his or her complaint to add a count for fraudulent concealment.”)

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Honorable Court grant her Motion for Sanctions Relating to Defendants’ Intentional Concealment and Spoliation of Relevant Evidence and impose appropriate sanctions, as described above.

Respectfully submitted,

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<p>LATONIA SUYDAM,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>SUMMIT HOTELS LLC AND MANISH VYAS,</p> <p style="text-align: right;">Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO. MON-L-4190-14</p> <p style="text-align: center;">Civil Action</p> <p style="text-align: center;">CERTIFICATION OF SERVICE</p>
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PLEASE TAKE NOTICE

Christian V. McOmber, Esquire, of full age, hereby certifies:

1. I am an attorney at law in the state of New Jersey and am a partner with the law firm of McOmber & McOmber, P.C., and attorney for Plaintiff Latonia Suydam (“Plaintiff”).
2. On May 26, 2015, I caused a copy of Plaintiff’s Motion for Sanctions Relating to Defendants’ Intentional Concealment and Spoliation of Relevant Evidence, Memorandum of Law, Form Order, and this Certification of Service on:

Keith Harris, Esq.
 Braff, Harris, Sukoneck & Maloof
 570 West Mount Pleasant Avenue
 P.O. BOX 657
 Livingston, New Jersey 07039
Via Federal Express

3. The original and one copy of the above-mentioned documents was sent, via

Federal Express to:

Superior Court of New Jersey
Law Division
Monmouth County
71 Monument Park
Freehold, New Jersey 07728

I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Christian V. McOmber, Esq.

Dated: May 26, 2015