

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION**

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

CITY OF COUNTRY CLUB HILLS, CARL
PYCZ, JOSEPH ELLINGTON, and ROGER
AGPAWA,

Defendants.

No. 2012 L 009916

Honorable Brigid Mary McGrath

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF SANCTIONS FOR
DISCOVERY VIOLATIONS AND SPOLIATION**

Plaintiff Dena Lewis-Bystrzycki, through her undersigned counsel, respectfully submits this Memorandum of Law in Support of Plaintiff’s Motion for Sanctions for Defendants’ discovery violations and spoliation pursuant to Illinois Supreme Court Rule 219. Default judgment, or other comparable sanctions, should be entered against Defendants due to Defendants’ repeated discovery violations and spoliation. In support, Plaintiff states as follows:

INTRODUCTION

Default and sanctions are warranted as Defendants have committed repeated discovery violations and failed to comply with this Court’s numerous orders, which have required Plaintiff to spend an exorbitant amount of time and attorneys’ fees chasing compliance by Defendants. Furthermore, evidence has been permanently lost as Defendants intentionally destroyed evidence despite knowledge that they had a duty to preserve evidence and that the evidence was related to this litigation. Because evidence that would have supported Plaintiff’s claims is permanently lost as a result of Defendants’ actions and inactions, default judgment should be entered against Defendants, and other sanctions, including Plaintiff’s attorneys’ fees and costs in having to file this motion and pursue Defendants’ compliance with the Court’s discovery orders.

BACKGROUND OF DISCOVERY VIOLATIONS

Sanctions are warranted in this case as Defendants have repeatedly violated this Court's discovery orders. This is not the first sanctions motion in this case. Sanctions were first granted back in April 2013 for Defendants' failure to appear and answer Plaintiff's complaint within the time requirements. Defendants have continued this dilatory behavior when it comes to responding to Plaintiff's discovery requests and in failing to comply with this Court's numerous discovery orders. The history of Defendants' discovery violations in this case has resulted in a delay of over two years, the trial in this matter getting moved three times, over 30 court appearances, countless motions trying to obtain compliance from Defendants, including for sanctions and contempt since August 2015. Furthermore, Defendants had notice of their obligations to preserve evidence in this matter and despite this knowledge, intentionally destroyed or altered evidence necessary and relevant to Plaintiff's claims.

Some of the relevant history is as follows:

1. A trial date in this matter was set for October 2015. (Exhibit 1, April order setting trial date.) On June 2, 2015 Plaintiff filed a supplemental complaint. Shortly thereafter, in July 2015, Plaintiff issued a second set of discovery requests. (Exhibit 2, Pl's 2nd Disc. Requests.) These requests sought, among other things, emails relating to specified search terms, investigations into Plaintiff's complaints, and comparator information. (*Id.*)

2. On July 11, 2015, Plaintiff issued an amended notice of inspection. (Exhibit 3, Notice of Inspection). The notice sought to inspect:

- (1) All firehouses in person and by video and/or photographic means;
- (2) The computers for inspection and imaging using Encase Forensic software by Guidance Software or other comparable software, which located in (a) the classroom at Station 1, (b) the middle office across from the bathroom at Station 1, (c) the paramedic writing room computer at Station 2, and (d) the computer in the hallway by the engineers' office at Station 2; and
- (3) The Televisions and cable boxes located in both Stations.

Id. The notice also provided the following WARNING:

This notice of inspection requires Defendants and Defendants’ agents and employees to not alter in any way, shape, or form, any of the areas, documents, data, contents, and information to be inspected.

Id.

3. On August 13, 2015, Plaintiff filed a motion to compel Defendants’ answers to her second set of discovery requests. (Exhibit 4, Motion to Compel). In response to Plaintiff’s motion to compel, Defendants produced documents that had clearly been in Defendants’ possession for years and were responsive to Plaintiff’s first set of discovery requests. On August 24, 2015, Plaintiff filed another motion to compel and for discovery sanctions based on Defendants’ failure to timely supplement their production to Plaintiff’s first discovery requests and also based on deposition testimony from Defendants that they never searched emails for responsive documents. (Exhibit 5, 8/24/15 Motion to Compel and for Disc. Sanctions). Plaintiff’s motions to compel were granted, but sanctions were denied at that point. (Exhibit 6, 8/27/15 Orders).

4. On September 1, 2015, Plaintiff filed a Second Amended Complaint. On September 4, 2015, Defendants filed a motion to continue the trial date claiming “ongoing investigation” of Plaintiff’s allegations. Plaintiff objected to Defendants’ motion to continue the trial date citing Defendants’ delay throughout this case. (Exhibit 7, 9/14/15 Pl’s Response to Def’s Motion to Move Trial). By agreement of the parties, and to avoid prejudice to Plaintiff, the trial date was continued to April 11, 2016. (Exhibit 8, 9/16/15 Orders).

5. On November 2, 2015, this Court ordered that Defendants search and produce electronic documents and emails by December 1, 2015. (Exhibit 9, 11/2/15 Order).

6. On February 17, 2016, Defendants ran CCleaner on computer “6RW2GZ36,” which was the subject of Plaintiff’s notice of inspection. (*See* Exhibit 10, Expert Report (without exhibits).)

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7. On April 6, 2016, Plaintiff filed a second motion to compel and for discovery sanctions due to Defendants' failure to provide email search terms and Defendants' failure to comply with various outstanding discovery requests. (Exhibit 11, 4/6/16 Motion to Compel.)

8. On April 22, 2016, the Court entered an Order stating in part:

(1) Defendants will comply within 14 days, by May 6, 2016, with ¶¶ 4, 5, 9, 11, 12, 13, 15, 17, 28 (produce all documents re: investigation of pornography), 33, and to the extent documents do not exist provide declaration(s), as stated on the record (*see* transcript); (2) Plaintiff's Motion as to computer inspection of emails/documents is entered and continued; Defendants' counsel, IT, Plaintiff's counsel, and Forensic expert will conference call in next 7 days, by April 29, 2016 and Parties will discuss search terms; (3) As to 206 Depositions, the parties will confer by April 29, 2016 and Parties will confer by April 29, 2016; (4) As to Plaintiff's request for forensic inspection of computers re: pornography, Defendants to respond to motion by April 29, 2016, Plaintiff's reply by May 6, 2016, courtesy copies by May 9, 2016 at 9:45 am; (5) Hearing on the remaining items in motion on May 20, 2016; (6) Defendants' oral motion to compel Plaintiff's deposition, granted, limited to 2 hours; (7) Defendants' motion to quash FOIA granted without prejudice as Defendants to produce per motion to compel ¶ 4.

(Exhibit 12, 4/22/16 Order.)

9. On May 11, 2016, Defendants again ran CCleaner on computer "6RW2GZ36," despite the fact that it was the subject of Plaintiff's notice of inspection and at issue in this litigation.

(*See* Exhibit 10.)

10. On or about June 14, 2016, Country Club Hills upgraded the computers that were the subject of this litigation and Plaintiff's notice of inspection. (*See* Exhibit 10.)

11. On June 24, 2016, the Court entered the following Order:

(1) Plaintiff's 2nd Motion to Compel and Sanctions entered and continued for hearing on July 29, 2016 at 9:45 am on all issues and inspection of computers for pornography; (2) Defendants to answer questions from Forensic Examiner within 14 days, by July 8, 2016; (3) Defendants to produce courtesy copy of Plaintiff's 3rd day of deposition on July 25, 2016 at 9:00 am Clerks Status.

(Exhibit 13, 6/24/16 Order.)

12. On July 19, 2016, Plaintiff filed a third motion for discovery sanctions. This motion addressed Defendants' failure to comply with the Court's June 24, 2016 Order requiring

Defendants to answer the questions from Plaintiff's forensic expert. (Exhibit 14, 7/19/16 Motion for Sanctions.)

13. On July 25, 2016, Defendants ran Disk Defragmenter on computer "6RW2GZ36," which was the subject to Plaintiff's notice of inspection and at issue in this litigation. (*See* Exhibit 10.)

14. On July 27, 2016, Deputy Chief Robert Kopec sent an email to CCH employees advising them that two computers were going to be replaced and to copy any data before they are taken out of service identified as computer "WCATR1278977" and "WCATR1278977." (*See* Exhibit 10.) That day Wayne Werosh removed the two computers from service from the "training room" (the "room across from the bathroom") described by the plaintiff in the notice of inspection, and as being some of the computers used to surf pornography. (*See* Exhibit 10.)

15. On August 1, 4, 11, and 14, 2016 Disk Defragmenter was run on computer "WCATR1278977," which was the subject of Plaintiff's notice of inspection and at issue in this litigation. (*See* Exhibit 10.)

16. On August 8, 2016 Disk Defragmenter was run on computer "6RW2GZ36," which was the subject of Plaintiff's notice of inspection and at issue in this litigation. (*See* Exhibit 10.)

17. On August 12, 2016, Defendants finally answered Plaintiff's computer forensic expert's questions regarding Defendants' email and computer servers pursuant to the Court's 6/24/16 Order (Exhibit 13). The questions were based off of Defendant's designee's representations as to Defendants' email and computer system and servers. Defendants failed to identify the Network Attached Storage system that was later discovered by Plaintiff (*see* ¶ 19 below).

18. On this very same day, August 12, 2016, Defendants ran Disk Cleanup on computer "WCATR1278977," which was the subject of Plaintiff's notice of inspection and at issue in this litigation. (*See* Exhibit 10.)

19. On August 21, 2016, Wayne Werosh, IT Consultant for Country Club Hills, wiped the drives on the Network Attached Storage system, which holds backups and fire station files and is used as a fileserver for electronically stored information (ESI) for the Fire Department, containing electronic documents that were the subject of this litigation. Defendants wiped the fileserver of all of its data. (See Exhibit 10.) Plaintiff did not learn of this spoliation until Werosh's deposition on March 14, 2017.

20. On August 31, 2016 the Court granted Plaintiff's Second Motion to Compel as to the imaging of the four computers identified in the notice of inspection. The Court denied Plaintiff's 3rd Motion for Sanctions without prejudice at that time. (Exhibit 15, 8/31/16 Order.) During the hearing, the Court stated:

After reviewing everything, I am granting the second motion to compel regarding plaintiff's request for a forensic examination regarding those computers in the classroom at station one, the middle office across from the bathroom at station one, the paramedic writing room computer at station two and the computer in the hallway by the engineer's office at station two. After reading the depositions, I have concluded this isn't a fishing expedition. The plaintiff was not wholly unable to come up with (inaudible) that she witnessed fellow employees watching porn. The problem is according to her the porn watching was pervasive. So, for example, every time she would worked with Larry, I don't know how to pronounce it, Giseppe --Giseppe? he was watching porn. And that applied to Mr. Marcus 65 percent of the time and Mr. Boyd 50 percent of the time. Again that is according to her testimony. When I couple that testimony with the defendants' witnesses' testimony that they admit witnessing firefighters watching porn or watching porn themselves, I conclude that the forensic examination requested may lead to discoverable evidence and does not constitute a fishing expedition.

(Exhibit 16, Transcript 14:14-15:15.)

21. On January 16, 2017, Defendants refused Plaintiff's Expert access to forensically image computers at Fire Stations, despite the Court's order.

22. As a result, Plaintiff filed a motion for sanctions. (Exhibit 17, Motion for Sanctions.)

23. On January 23, 2017, the Court entered the following Order:

This Matter coming to be heard on Plaintiff's motion for sanctions for violations of the Court's Order regarding inspection of computer for pornographic material, it is hereby ordered: (1) Plaintiff's motion is granted; (2) Inspection/imaging will proceed on January

26, 2017 at 10:00 am by agreement; (3)Plaintiff's request for reimbursement of experts time and expenses is granted. Plaintiff to provide detailed invoice of time and hourly rate by January 30, 2017; (4) Defendants objections to protocol are waived because not raised in a timely manner; (5) Status set for February 6, 2017 at 9:45 am.

(Exhibit 18, 1/23/17 Order.)

24. On January 26, 2017, Plaintiff's forensic Expert imaged the Defendants' computers pursuant to the Court Order. As to 2 of the 4 computers, Defendants, in the presence of their counsel, directed Plaintiff's Expert to the wrong computers to be imaged because Defendants had removed the computers to be serviced and did not advise Plaintiff's expert or Plaintiff's counsel.

25. After Defendants' delay in carrying out the Court's previous Orders, the Court entered the following Order on February 6, 2017:

(1) The ESI/email imaging/retrieval shall occur within 45 days, by March 23, 2017; (2) Defendants represents they filed a motion for protective order – briefing set per separate order; (3) Next status to be held at the hearing on the motion for protective order.

(Exhibit 19, 2/6/17 Order.)

26. On February 16, 2017, Plaintiff filed an emergency motion to preserve ESI and imaging based on evidence of spoliation. This motion addressed Defendants' deliberate conduct in having someone wipe the hard drives and reload the operating system of the very same computers the Court ordered be imaged. (Exhibit 20, 2/16/17 Motion.) It was later discovered on March 14, 2017 during Werosh's deposition that Defendants replaced these computers with two new computers making it look like the hard drives were "wiped."

27. On February 17, 2017, the Court entered the following Order, in part:

It is further ordered: Plaintiff's motion is granted, in part. The imaging of Defendants email servers and google email drive shall occur before 12:00 noon on February 18, 2017 (Sat) with Defendants IT consultant Brent Sachnoff w/ BES Industries present. Brent Sachnoff will monitor the imaging and ensure all details preserved until further Order of the Court.

(Exhibit 21, 2/17/17 Order.)

28. On February 17, 2017, When Plaintiff's expert arrived to conduct the imaging of the emails, Defendants initially refused to allow him to image the email servers.

29. On February 21, 2017, the Court entered the following Order:

This matter coming before the Court on Plaintiff's emergency motion for contempt of the Court's 2/17/17 Order, the motion is denied, however: (1) Plaintiff's forensic expert and Defendants' IT consultant will arrange for Plaintiff's forensic expert to confirm that the list of 44 custodians from 2/6/17 list were preserved by Friday, February 24, 2017; (2) Defendants are ordered to preserve all data on all City computers and email that may be relevant to the case and spoliation and will issue a litigation hold letter to all employees of City; (3) February 27, 2017 court date to stand.

(Exhibit 22, 2/21/17 Order.)

30. On March 14, 2017, During Werosh's deposition it was discovered that two of the four computers subject to Plaintiff's notice of inspection had been set aside by Werosh because they were taken out of service. Werosh testified that he put evidence tags on them and told the Chief, the Deputy Chief, and Rudy Maybell, Defendants' IT director, to preserve the computers because of this litigation. After Werosh's deposition, Plaintiff's counsel emailed Defendants' counsel, advising Defendants' counsel that she would be filing a motion for sanctions seeking default judgment based on Defendants' failure to produce the computers despite Plaintiff's notice of inspection and despite this Court's order requiring the imaging of those computers. Defendants' counsel for the first time in response to this email disclosed that the two computers were in a storage closet, and he would make them available for imaging. Defendants' counsel was present, as well as the Chief, the Deputy Chief, and Maybell when Plaintiff's expert arrived to image the computers. Defendants' counsel, the Chief, the Deputy Chief, and Maybell each took part in directing Plaintiff's expert to two computers that they knew were *not* the computers that the Court ordered to be imaged. All of them failed to direct Plaintiff's expert to the actual computers that were ordered by the Court to be imaged, despite knowing that those computers had been

placed in the storage closet as Defendants put them there. Defendants' only disclosed the existence of these computers after they got caught in their "bait and switch."

31. In addition to the above, even though the computers were taken out of service, Defendants still ran disk clean up and disk wipe on these computers, thus destroying evidence that was relevant to Plaintiff's claims, including internet history containing evidence of pornographic material viewed by male employees. Defendants want to now claim that there is little evidence that male employees were viewing pornographic material while Plaintiff actually worked; however, such evidence would have been destroyed by a disk cleanup and disk wipe programs that were run on these computers.

LEGAL ARGUMENT

I. Sanctions Are Warranted for Defendants' Destruction of Evidence

Defendants have been on notice since April 2012 during the administrative process before the Illinois Department of Human Rights that they were under an obligation to preserve evidence. As shown above, Defendants failed to take reasonable measures to preserve ESI for imaging. Defendants also took affirmative steps to modify, overwrite, or delete data stored on computers. Defendants intentionally engaged in subterfuge to have Plaintiffs analyze the wrong computers. Defendants accomplished the destruction of the data while delaying and violating the Court's numerous orders compelling production of the data. Plaintiff has been attempting to get the imaging of Defendants' server(s) and email accounts pursuant to the Court's order granting Plaintiff's motion to compel since April 2016. Defendants have continually stalled and delayed in the production of their ESI and emails, despite the Court's order compelling the imaging and production. Defendants also failed to disclose the existence of their Network Attached Storage ("NAS") drive. Defendants wiped the NAS drive on August 21, 2016, despite Defendants'

obligation to preserve the information contained on their servers pursuant to their discovery obligations and the Court's orders.

Discovery is intended to be a mechanism for the ascertainment of the truth, for the purpose of promoting either a fair settlement or a fair trial. *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 282, 433 N.E.2d 253 (1982). It is not a tactical game to be used to obstruct or harass the opposing litigant. *Id.* Disclosure requirements are mandatory and subject to strict compliance by the parties. *Sullivan v. Edward Hospital*, 209 Ill.2d 100, 109 (2004). As this Court is well aware, the Illinois Supreme Court has routinely repeated that its rules are not mere suggestions. They are not aspirational. They have the force of law, and should be adhered to as written. *Bright v. Dicke*, 166 Ill.2d 204, 210 (1995).

In Illinois, Supreme Court Rule 201(b) was amended to include the definition of Electronically Stored Information (hereinafter "ESI"). ESI shall include: "any writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations in any medium from which electronically stored information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." Supreme Court Rule 219 is sufficient to cover sanction issues as they relate to electronic discovery. Ill. S. Ct. R. 219, Committee Comment (adopted May 29, 2014).

Discovery sanctions are appropriate when a party unreasonably fails to comply with the rules of discovery and orders regarding pretrial discovery. *See* Ill. S. Ct. R. 219; *see also Garofalo v. General Motors, Corp.*, 103 Ill. App. 2d 389, 395 (1st Dist. 1968) (case was dismissed for unresponsive and evasive answers to interrogatories). Defendants' conduct must be sanctioned because as discussed below, their discovery violations were unreasonable.

II. Defendants' Bad Faith Actions Warrant Default As A Sanction

Sanctions under Rule 219 include awarding reasonable expenses, attorney fees, barring evidence or arguments, permitting adverse inferences, and dismissing claims or entering default judgment. *See* Ill. S. Ct. R. 219(c). The court may further, upon motion or upon its own initiative, impose upon the offending party or his attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fees, and when the misconduct is willful, a monetary penalty. *Id.*

Illinois Supreme Court Rule 219(c) grants the circuit court the discretion to impose a sanction, including default judgment, upon any party who unreasonably refuses to comply with any discovery rule or any order entered pursuant to such rule. *Kambylis v. Ford Motor Co.*, 338 Ill. App. 3d 788, 793 (2003); *see also Shelbyville Mut. Ins. Co. v. Sunbeam Leisure Prod. Co.*, 262 Ill. App. 3d 636, 643 (1994); *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 61–63, 65–67 (1995). The circuit court has inherent authority to dismiss a cause of action with prejudice for failure to comply with court orders where the record shows deliberate and continuing disregard for the court's authority. *Sander*, 166 Ill. 2d at 67. Rule 219 not only allows discretion for those acts in which the party intentionally and purposefully destroyed evidence, but also where evidence was negligently destroyed. *See Farley Metals, Inc. v. Barber Colman Co.*, 269 Ill. App. 3d 104, 109 (1994).

The Illinois Supreme Court has found that a default judgment under Ill. S. Ct. R. 219(c) was appropriate where a party's actions show a deliberate, contumacious or unwarranted disregard of the court's authority. *See Peal v. Lee*, 403 Ill. App. 3d 197, 203 (2010); *see also Graves v. Daley*, 172 Ill. App. 3d 35, 39 (1988) ("This is not a case where the evidence was innocently or negligently destroyed. In the instant case the plaintiffs willingly caused the furnace to be

destroyed with [the insurance carrier's] approval.”). The factors a trial court is to use in determining what sanction to apply are: (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence. *See Peal*, 403 Ill. App. 3d at 203; *see also Vaughn v. Northwest Memorial Hospital*, 210 Ill. App. 3d 253, 259-60 (1991). As will be shown below, Defendants were in a position to comply with the Court's orders, but acted in bad faith when they failed to take reasonable measures to preserve ESI for imaging. Defendants also took affirmative steps to modify, overwrite, or delete data stored on computers. Defendants intentionally engaged in subterfuge to have Plaintiff's expert analyze and image the wrong computers, until they got caught, and only then did they disclose the computers existence. Defendants accomplished the destruction of the data while delaying and violating the Court's numerous orders compelling production.

In this case, there is surprise to Plaintiff that Defendants would engage in such conduct to delay and ignore multiple court orders, require the filing of multiple motions for sanctions in order to achieve compliance, deleting files with data-wiping programs, and deceiving Plaintiff's expert as to the computers that were to be inspected. In *Peal*, the Court found surprise in similar circumstances, stating: “the real surprise is that a litigant would have the audacity to discard his old hard drive and delete tens of thousands of electronic files with sophisticated data-wiping programs and then cry foul that his opponents should not be surprised. This sounds like the story of the children who murdered their parents and then pled for sympathy as orphans.” 403 Ill. App. 3d at 205. Moreover, Plaintiff only found out about the destruction of court ordered evidence through Plaintiff's expert.

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Here, the prejudicial effect of the evidence is evident in that there is ample deposition testimony that pornography was reviewed continuously, by multiple male employees. However, Defendants' actions of deleting, overwriting, and modifying the computer data have caused evidence supporting Plaintiff's claims to be forever lost, not only of the nature, extent, and timeframes of the pornographic material being viewed, but other ESI that was contained on Defendants' NAS drive and other computers that were wiped. Furthermore, Defendants' discovery violations have prejudiced Plaintiff in causing a delay of over two years, the trial in this matter getting moved three times, over 30 court appearances, and countless motions trying to obtain compliance from Defendants, including for sanctions and contempt since August 2015. In addition, Defendants delay, destruction, and failure to comply with this Court's discovery orders has cost Plaintiff hundreds of thousands of dollars in fees and expenses. The nature of the evidence is that the Court has already determined that the discovery of the internet searches and searches of Defendants' ESI in compliance with their discovery obligations is relevant, pursuant to the Court's Orders requiring such searches be conducted, as well as the imaging of Defendants' computers identified in Plaintiff's notice of inspection. Further, Defendants hired an expert to review the computers after the data had been destroyed, thus altering the proofs in this case.

As is evident from the Background of Discovery Violations section, *supra*, Plaintiff has been diligently seeking electronic discovery in this matter. Defendants have been on notice since April 2012 during the administrative process before the Illinois Department of Human Rights that they were under an obligation to preserve evidence. Plaintiffs sent a notice of inspection with the "Warning" requiring them to preserve evidence and not destroy it or alter it in any way. Plaintiff also served discovery on Defendants as early as December 16, 2013, putting Defendants on notice beyond the IDHR and the filing of Plaintiff's complaint of their obligations to preserve

ESI. Plaintiff has filed numerous motions to compel the information that Defendants subsequently destroyed. Defendants were repeatedly ordered by this court to produce the information. Yet, despite the prior notice and orders, Defendants still failed to take reasonable measures to preserve ESI. Defendants also took affirmative steps to modify, overwrite, or delete data stored on computers. Defendants intentionally engaged in subterfuge to have Plaintiffs analyze the wrong computers. Furthermore, Plaintiff raised timely objections to Defendants' destruction of evidence, in that Plaintiff has filed numerous motions for sanctions related to Defendants' failures to produce discovery when Plaintiff learned of Defendants' failure.

Defendants' conduct in this case is even more egregious than the conduct in *Peal*, where the court found that the party's conduct of wiping computers and destroying external hard drives was the "personification of bad faith." 403 Ill. App. 3d at 206. Similarly, in this case, despite prior notice and multiple Court orders, Defendants failed to take reasonable measures to preserve ESI for imaging. Defendants also took affirmative steps to modify, overwrite, or delete data stored on computers. Defendants intentionally engaged in subterfuge to have Plaintiffs analyze the wrong computers. Defendants accomplished the destruction of the data while delaying and violating the Court's numerous orders compelling production of the data. This too is the personification of bad faith. *Id.*; see also *Graves*, 172 Ill. App. 3d at 39.

An order striking a party's pleadings and for a default judgment is an appropriate sanction where the party's actions show a deliberate, contumacious or unwarranted disregard of the court's authority and the rules. *Sander*, 166 Ill. 2d at 67; see also *Adcock v. Brakegate, Ltd.*, 164 Ill.2d 54, 66 (1994) (holding that because of defendant's discovery abuses, all of plaintiff's allegations of civil conspiracy would be deemed admitted and judgment entered against defendants).

Discovery procedures are meaningless unless violation entails penalty proportionate to the gravity of the violation. *Buehler v. Whalen*, 70 Ill.2d 51, 67 (1977). Pleadings may be stricken for the violation of a discovery order or rule when the stricken pleadings bear some reasonable relationship to the information withheld. *612 North Michigan Avenue Building Corp v. Factsystem, Inc.*, 34 Ill.App.3d 922, 928 (1st Dist. 1975) (court ordered default judgment where information regarding relationships between defendants sought in the discovery orders bore a reasonable relationship to the substantive merits of the defendants' defense).

In this case, Defendants' conduct warrants the entry of judgment against them as Defendants' conduct has forever altered the proofs in this case. In accordance with *Graves, Peal*, *612 N. Michigan, Sander*, and *Adcock, supra*, the sanction against Defendants should be judgment against Defendants because default is the only sanction that is proportionate to the egregious conduct committed by Defendants to actively deceive Plaintiff and this Court in order to destroy highly relevant evidence. Defendants have caused years of delay and required the expenditure of hundreds of thousands of dollars. Moreover, Defendants have defrauded Plaintiff of a fair and impartial trial by their dilatory tactics and destruction of documents. Defendants' conduct should not be tolerated by this Court and should be sanctioned.

CONCLUSION

Plaintiff respectfully requests that this Court enter an Order allowing for a default judgment and sanctions for Defendants destruction of evidence to fully mitigate the prejudice to Plaintiff, along with an award of Plaintiff's attorney's fees and costs, to include but not be limited to, costs related to all of Plaintiff's Electronically Stored Information Motions and efforts to uncover Defendants discovery abuses, and for such other relief that is just and equitable.

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Respectfully Submitted,

DENA LEWIS-BYSTRZYCKI

/s/Dana L. Kurtz

Attorney for Plaintiff

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF SANCTIONS FOR DISCOVERY VIOLATIONS AND SPOILIATION** as served upon the following named individuals by electronic filing on September 6, 2017.

Daniel Boddicker dboddicker@keefe-law.com
John Murphey jmurphey@rmcj.com

/s/Dana L. Kurtz

Dana L. Kurtz

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

CITY OF COUNTRY CLUB HILLS, *et al.*,

Defendants.

No. 2012 L 009916

Honorable Brigid Mary McGrath

Exhibit List

1. 4/15/15 Order
2. Plaintiff's Second Set of Discovery to Defendants
3. Notice of Inspection
4. Plaintiff's Motion to Compel
5. Plaintiff's Motion to Compel and for Discovery Sanctions
6. 8/27/15 Orders
7. Plaintiff's Response to Defendants' Motion to Continue Trial
8. 9/16/15 Order
9. 11/2/15 Order
10. Garrett Report regarding ESI Destruction (without exhibits)
11. Plaintiff's Second Motion to Compel
12. 4/22/16 Order
13. 6/24/16 Order
14. Plaintiff's Third Motion for Sanctions
15. 8/31/16 Order
16. 8/31/16 Hearing Transcript

17. Plaintiff's Motion for Sanctions
18. 1/23/17 Order
19. 2/6/17 Order
20. Plaintiff's Emergency Motion to Preserve ESI
21. 2/17/17 Order
22. 2/27/17 Order

EXHIBIT 1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Dena Lewis-Bystrzycki
v
City of Country Club Hills,
et al
No. 2012 L 009916

TRIAL SCHEDULING

This cause coming on to be heard on April 15, 2015 the Court
being fully advised in the premises,
Motion to extend discovery was denied.
Final Pre-Trial Conference is set for October 2, 2015 at 10:30.

The case is set for Bench/Jury Trial on October 5, 2015
at 10:45 am in Courtroom 2007 of the Richard J. Daley Center.
April 27, 2015 status date is stricken.
Not later than **45 days prior to the trial date**, the parties are directed to meet and
exchange the trial materials as outlined in the standing order,
(<http://www.cookcountycourt.org/JudgesPages/SherlockPatrickJ.aspx>) as well as their
exhibits. The parties are encouraged to agree to motions and exhibits, or state objections
there to.

No later than **30 days before trial**, each party is responsible for delivering to
chambers Trial Materials as outlined in the courts standing order.

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Atty No. 43132
Atty Name: Dana Kurtz
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ENTERED
JUDGE JAMES E. SNYDER-1970
APR 15 2015
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK
Judge Patrick J. Sherlock #1942

Dorothy Brown, Clerk of the Circuit Court of Cook County, Illinois

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EXHIBIT 2

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

No. 2012 L 009916

CITY OF COUNTRY CLUB HILLS, a
municipal corporation, and CARL PYCZ,
JOSEPH ELLINGTON, and ROGER
AGPAWA, in their individual capacity,

Defendants.

**PLAINTIFF'S SECOND REQUEST FOR PRODUCTION OF
DOCUMENTS TO DEFENDANT CITY OF COUNTRY CLUB HILLS**

Plaintiff DENA LEWIS-BYSTRZYCKI, through her attorneys, KURTZ LAW OFFICES, LTD., and pursuant to Supreme Court Rule 214, submits the following requests for the production of documents to Defendant CITY OF COUNTRY CLUB HILLS and requests that within twenty-eight (28) days from service hereof, Defendant produce its written responses. Plaintiff incorporates the instructions and definitions from her first set of discovery requests as though fully set forth herein.

1. The complete personnel, employment, training, evaluation and disciplinary files of (a) all employees with the same supervisor or supervisors as Plaintiff, including employees who currently report to the same supervisor as Plaintiff or previously reported to the same supervisor as Plaintiff, including those in her chain of command all the way up to the Chief of the Fire Department; (b) all employees

subject to the same codes of conduct, rules and regulations Plaintiff was accused of violating; and (c) all employees with the same or similar job duties as Plaintiff.

ANSWER:

2. Produce any and all documents or notes related to the scoring, results, or administration of any and all Country Club Hills Fire Department examination for promotion to Fire Lieutenant, from 2011 to the present and continuing into the future through the pendency of this case, and complete examination results of all examinees that sat for the examination, including but not limited to:

- a) Documents indicating the breakdown of the examination scores, including, but not limited to, the individual scores of all examinees for:
 - i. the written examination;
 - ii. the assessment center;
 - iii. the company training exercise;
 - iv. the tactical exercise; and
 - v. the employee meeting exercise.

- b) Documents relating to the award of any other points, or similar advantages, to all examinees for any reason, and the reasons why such points were given for each candidate;

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- c) Any notes, scorecards, point allocations, or similar documents, related to the creation, administration, or scoring of the exam; and
- d) All rules, regulations, policies, and/or procedures relating to any and all testing, scoring, evaluation, and/or promotional decisions to Lieutenant.

ANSWER:

3. Produce any documents indicating the individuals responsible for scoring, assessing, or creating any portion the Country Club Hills Fire Department examination for promotion to Fire Lieutenant from 2011 to the present and continuing into the future through the pendency of this case, and any documents created or maintained by such individuals, including but not limited to, documents related to or indicating persons responsible for the scoring of the written and assessment center portions of the exam.

ANSWER:

4. Any and all documents relating or referring to any investigation conducted by Defendants about or relating to Plaintiff.

ANSWER:

5. Any and all emails relating or referring to Plaintiff, any Defendant, any of the allegations in this case, including but not limited to those that contain or reference any of the following search terms: Dena, Lewis, Lewis-Bystrzycki, Bystrzycki, any and all individual defendants and any variation of their names, promotion[s], retaliation, harassment, discrimination, discipline, investigation, general orders, policies, procedures, call off, notice, testing, scoring, complaint[s], IDHR, gender, sex, and/or sexual.

ANSWER:

Respectfully Submitted,

DENA LEWIS-BYSTRZYCKI



Attorney for Plaintiff

KURTZ LAW OFFICES, LTD.
32 Blaine Street
Hinsdale, Illinois 60521
Phone: 630.323.9444
Facsimile: 630.604.9444
Firm No. 43132

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFF'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT CITY OF COUNTRY CLUB HILLS** was served upon all parties by email and by placing the same in the United States Postal Depository located at 32 Blaine Street, Hinsdale, Illinois, before 5:00 p.m. on the 2nd day of July 2015, First Class postage prepaid.

Daniel Boddicker
Keefe, Campbell, Biery & Associates, LLC
118 North Clinton Street, Suite 300
Chicago, Illinois 60661
E-mail: dboddicker@keefe-law.com

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A handwritten signature in black ink, appearing to read "Daniel Boddicker", is written over a horizontal line.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

No. 2012 L 009916

CITY OF COUNTRY CLUB HILLS, a
municipal corporation, and CARL PYCZ,
JOSEPH ELLINGTON, and ROGER
AGPAWA, in their individual capacity,

Defendants.

**PLAINTIFF'S SECOND SET OF INTERROGATORIES TO
DEFENDANT CITY OF COUNTRY CLUB HILLS**

Plaintiff DENA LEWIS-BYSTRZYCKI, through her attorneys, KURTZ LAW OFFICES, LTD., and pursuant to Supreme Court Rule 213, submits the following second set of interrogatories to Defendant CITY OF COUNTRY CLUB HILLS, and requests that within twenty-eight (28) days from service hereof, Defendant separately answer each Interrogatory, in writing and under oath. These interrogatories are continuing in nature and Defendant is required and requested to regularly supplement its answers. Plaintiff incorporates the instructions and definitions from her first set of discovery requests as though fully set forth herein.

1. Identify each and every act of misconduct alleged against each employee of the City of Country Club Hills Fire Department for (a) all employees with the same supervisor or supervisors as Plaintiff, including employees who currently report to the same supervisor as Plaintiff or previously reported to the same supervisor as Plaintiff,

including those in her chain of command all the way up to the Chief of the Fire Department; (b) all employees subject to the same codes of conduct, rules and regulations Plaintiff was accused of violating; and (c) all employees with the same or similar job duties as Plaintiff, and include for each the following:

- a. The name of the employee;
- b. The rank and/or position of the employee;
- c. The nature of the alleged misconduct;
- d. Whether or not the employee was investigated, and if so, produce all of the documents relating or referring to the investigation;
- e. Whether or not the employee was disciplined and if so, what disciplined was issued, and what disciplined was actually served;
- f. Whether you claim that anyone else engaged in the same or similar alleged misconduct and is so, what and whom; and
- g. Produce any and all documents relating or referring to the above.

ANSWER:

2. Identify each and every point that was given to any candidate for promotion to Lieutenant from 2011 to the present and continuing into the future through the pendency of this case, and the reason for each point or set of points for each candidate, including but not limited to the reason for each point given to each candidate by the Chief, as well as any other points or point given to each candidate, and how many points they were given, as

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well as a detailed explanation for each point given and by whom.

ANSWER:

Respectfully submitted,

DENA LEWIS-BYSTRZYCKI



Attorney for Plaintiff

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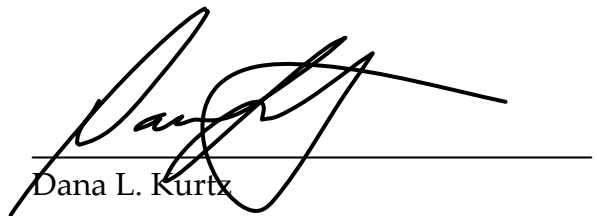
Dana L. Kurtz
KURTZ LAW OFFICES, LTD.
32 Blaine Street
Hinsdale, Illinois 60521
Phone: 630.323.9444
Facsimile: 630.604.9444
Email: dkurtz@kurtzlaw.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFF'S SECOND SET OF INTERROGATORIES TO DEFENDANT CITY OF COUNTRY CLUB HILLS** was served upon all parties by email and by placing the same in the United States Postal Depository located at 32 Blaine Street, Hinsdale, Illinois, before 5:00 p.m. on the 2nd day of July 2015, First Class postage prepaid.

Daniel Boddicker
Keefe, Campbell, Biery & Associates, LLC
118 North Clinton Street, Suite 300
Chicago, Illinois 60661
E-mail: dboddicker@keefe-law.com

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Dana L. Kurtz

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EXHIBIT 3

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

CITY OF COUNTRY CLUB HILLS, a
municipal corporation, and CARL PYCZ,
JOSEPH ELLINGTON, and ROGER
AGPAWA, in their individual capacity,

Defendants.

No. 2012 L 009916

Honorable Brigid Mary McGrath

AMENDED NOTICE OF INSPECTION

PLEASE TAKE NOTICE that Plaintiff, through her undersigned counsel, and pursuant to Supreme Court Rule 214(a), shall conduct an inspection of the following on August 3, 2015 at 10:00 a.m.:

1. All firehouses in person and by video and/or photographic means;
2. The computers for inspection and imaging using Encase Forensic software by Guidance Software or other comparable software, which located in (a) the classroom at Station 1, (b) the middle office across from the bathroom at Station 1, (c) the paramedic writing room computer at Station 2, and (d) the computer in the hallway by the engineers' office at Station 2; and
3. The Televisions and cable boxes located in both Stations.

This notice of inspection requires Defendants and Defendants' agents and employees to not alter in any way, shape, or form, any of the areas, documents, data, contents, and information to be inspected.

Respectfully Submitted,

DENA LEWIS-BYSTRZYCKI



Attorney for Plaintiff

KURTZ LAW OFFICES, LTD.
32 Blaine Street
Hinsdale, Illinois 60521
Phone: 630.323.9444
Facsimile: 630.604.9444
Firm No. 43132

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PROOF OF SERVICE

The undersigned, an attorney, on oath states that I served this notice via email on July 11, 2015.

Daniel Boddicker
Keefe, Campbell, Biery & Associates, LLC
118 North Clinton Street, Suite 300
Chicago, Illinois 60661
dboddicker@keefe-law.com
vpena@keefe-law.com



Dana L. Kurtz

Under penalties as provided by law pursuant to ILL. REV. STAT., CHAP. 100, Sec. 1-109, I certify that the statements set forth herein are true and correct.

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EXHIBIT 4

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

CITY OF COUNTRY CLUB HILLS, CARL
PYCZ, JOSEPH ELLINGTON, and ROGER
AGPAWA,

Defendants.

No. 2012 L 009916

Honorable Brigid Mary McGrath

PLAINTIFF'S MOTION TO COMPEL

Plaintiff DENA LEWIS-BYSTRZYCKI, through her counsel, KURTZ LAW OFFICES, LTD., respectfully moves pursuant to Illinois Supreme Court Rule 219 (eff. July 1, 2002) for an order compelling Defendant CITY OF COUNTRY CLUB HILLS to produce information and documents related to comparative evidence that Plaintiff requested in discovery. In support, Plaintiff states as follows:

1. Plaintiff is a Country Club Hills Fire Fighter and she seeks redress against Defendants for retaliation in violation of the Illinois Whistleblower Protection Act (740 ILCS § 174/15) (Count I); for gender discrimination and for creating a hostile work environment in violation of the Illinois Human Rights Act ("IHRA") (775 ILCS § 5/1-102) (Count II); and for retaliation also in violation of the IHRA (Count III). Among other things, the factual basis of Plaintiff's claims include allegations that Defendants singled out Plaintiff for unwarranted and disproportionate disciplinary action, including suspension, denying Plaintiff training, and treating Plaintiff differently in the

terms of her employment. Plaintiff has been subject to ongoing discrimination, hostile work environment, and retaliation both based on her gender and because of her complaints of illegal and improper conduct. *See generally* Exhibit 1 attached hereto, Supplemental Complaint.

2. On December 16, 2013 Plaintiff served the City with her First Request for Production of Documents (RFPs). *See* Exhibit 2, Pl.'s First RFP COS (only).

3. On March 31, 2015, the City finally served Plaintiff with its answers to Plaintiff's First Request for Production of Documents ("RFP"). *See* Exhibit 3, City's Ans. to Pl.'s First RFP. Request No. 13 calls for:

The complete personnel, employment, training, evaluation and disciplinary files of (a) all employees in the same job classification as Plaintiff; (b) all employees that were accused of the same, similar, or more egregious allegations as Plaintiff; (c) who were involved in the decision, in whole or part, to investigate and/or discipline Plaintiff; (d) each individual Defendant; (e) any and all supervisors of Plaintiff, including those in the chain of command; and (f) anyone that has complained of discrimination, harassment, and/or retaliation.

Defendant's response was only objections and no answer and no production of documents:

ANSWER: Defendant objects to this request in that it is compound; vague, ambiguous, requires Defendant to speculate as to the meaning of "accused of the same, similar, or more egregious allegations as Plaintiff", is overly broad, not limited in scope or time, and unduly burdensome; it requests information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; to the extent it requires a legal conclusion by Defendant, and to the extent it calls for attorney work product privilege.

Exhibit 3, City's Ans. to Pl.'s First RFP.

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4. Defendant's contention with respect to Plaintiff's First RFP No. 13 is that only those with the title Engineer are relevant to this case. Despite this contention, Defendants produced to the Illinois Department of Human Rights limited documents relating to male firefighters (not engineers) in an attempt to establish that some male employees were disciplined for certain things. Moreover, all fire fighters (regardless of rank or position) are in the same job classification according to the Chief of the Fire Department. Exhibit 4, Def. Ellington Dep. at 77:23-78:12 (excerpt only attached).

5. On July 2, 2015, to make sure the request was clear for all employees' personnel files of the Fire Department and since all are subject to the same disciplinary standards and the same supervisors -- the Chief of the Fire Department makes the ultimate decision on disciplinary action against all employees, Plaintiff served the City with her Second Request for Production of Documents and Second Set of Interrogatory Requests. *See* Exhibit 5, Plaintiff's 2nd RFP to the City. Plaintiff's second requests call for the following:

The complete personnel, employment, training, evaluation and disciplinary files of (a) all employees with the same supervisor or supervisors as Plaintiff, including employees who currently report to the same supervisor as Plaintiff or previously reported to the same supervisor as Plaintiff, including those in her chain of command all the way up to the Chief of the Fire Department; (b) all employees subject to the same codes of conduct, rules and regulations Plaintiff was accused of violating; and (c) all employees with the same or similar job duties as Plaintiff.

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Exhibit 5, Plaintiff's 2nd RFP to the City. Plaintiff also served a second set of interrogatory requests, requesting similar and additional information. Exhibit 6, Plaintiff's 2nd Interrog. Req. to the City.

6. As of the date of this filing, Defendant City of Country Club Hills has not responded to Plaintiff's second set of discovery requests. This is not the first time Defendants have delayed the prosecution of this case. Plaintiff had to file a motion for default against the City, which the Court granted, in addition to granting Plaintiff her attorneys' fees for having to prosecute that motion to a point of filing a motion for prove up of her damages.

7. Plaintiff has made several attempts through personal consultation with opposing counsel, Daniel J. Boddicker, pursuant to Rule 201(k), to resolve the discovery dispute addressed in the this motion. However, no responses have been received and Defendant City has failed and refused to produce the comparative personnel files of other Fire Department employees. Plaintiff has requested that these files be made available for immediate inspection.

8. Under the Illinois Supreme Court Rules, "a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action." Ill. S. Ct. R. 201(b)(1). It is well established that discovery is to be "a mechanism for the ascertainment of truth, for the purpose of promoting either a fair settlement or a fair trial." *Pemberton v. Tieman*, 117 Ill. App. 3d 502, 504 (1983) (citing *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 282, (1982)). To this end, the object

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of all discovery procedures is disclosure, and the right of any party to a discovery deposition is “basic and fundamental.” *Pemberton*, 117 Ill. App. 3d at 504. “[G]reat latitude is allowed in the scope of discovery, and the concept of relevance is broader for discovery purposes than for purposes of the admission of evidence at trial, since it includes not only what is admissible at trial but also that which leads to what is admissible.” *Id.* at 504-05. “Relevancy is determined by reference to the issues, for generally, something is relevant if it tends to prove or disprove something in issue.” *Id.*

9. Plaintiff’s requests for production of documents and information relating to disciplinary and other records of other employees are relevant to proving Plaintiff’s claims of discrimination, hostile work environment, and retaliation. Such documents have routinely been recognized by courts, as discussed below, as being relevant to employment discrimination, hostile work environment, and retaliation claims because the issue of whether similarly situated employees were subjected to similar discipline as the plaintiff is generally the cornerstone of proving that an employer’s stated reasons for imposing discipline were simply a pretext.

10. For example, the classic *McDonnell Douglas* framework, which is routinely used by federal courts in employment cases, expressly recognizes the importance of this information in proving pretext. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973) (noting that a plaintiff must “be afforded a fair opportunity to show that [the employer’s] stated reason for [the plaintiff’s] rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts

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against petitioner of comparable seriousness to the ‘stall-in’ were nevertheless retained or rehired”); *see also Kasten v. Saint-Gobain Performance Plastics Corp.*, 703 F.3d 966, 972 (2012) (noting that one method of proving retaliation via the indirect method is “evidence that similarly situated employees were treated differently”); *Hoffelt v. Illinois Department of Human Rights*, 367 Ill. App. 3d 628, 633 (2006) (citing *McDonnell Douglas*).

11. In *Coleman v. Donahoe*, 667 F.3d 835, 860 (7th Cir. 2012), the Seventh Circuit extensively discussed the various methods of proving retaliation using circumstantial evidence. Chief among the types of evidence considered are “evidence, but not necessarily rigorous statistical evidence, that similarly situated employees were treated differently.” *Id.* Similarly situated employees are generally those who are subject to the same supervisor or decision maker. *See id.* at 847-48. A copy of the *Coleman* decision is attached hereto as Exhibit 7.

12. Here, Plaintiff’s discovery requests at issue in this motion are intended to obtain evidence of how similarly situated employees to Plaintiff were treated with respect to discipline, training, and other terms and conditions of employment. Identification of such employees and any disciplinary action and/or investigations that may or may not have been taken against them is directly relevant to Plaintiff’s claims.

13. The interrogatory and document requests that the City has refused to comply with therefore seek information and documents that are relevant to the claims at issue in this case. Consequently, the Court should order the City to produce the documents and information requested.

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WHEREFORE, for the above stated reasons, Plaintiff respectfully moves for entry of an order under Rule 219 compelling:

- A. The City of Country Club Hills to Answer Plaintiff's Second Interrogatory Requests without objections, as objections are now waived, within seven (7) days;
- B. The City of Country Club Hills to produce and make available for inspection within seven (7) days the complete personnel files of all employees of the Fire Department;
- C. Such other relief that is just and equitable.

Respectfully Submitted,

DENA LEWIS-BYSTRZYCKI

s/Dana L. Kurtz

One of Plaintiff's Attorneys

Dana L. Kurtz, Esq. (6256245)
KURTZ LAW OFFICES, LTD.
32 Blaine Street
Hinsdale, Illinois 60521
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFF'S MOTION TO COMPEL** was served upon the parties designated below on August 13, 2015, as follows:

By Electronic Service Only

Daniel Boddicker
Keefe, Campbell, Biery & Associates, LLC
118 North Clinton Street, Suite 300
Chicago, Illinois 60661
Email: dboddicker@keefe-law.com

s/Dana L. Kurtz

Dana L. Kurtz

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EXHIBIT 5

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

CITY OF COUNTRY CLUB HILLS, CARL
PYCZ, JOSEPH ELLINGTON, and ROGER
AGPAWA,

Defendants.

No. 2012 L 009916

Honorable Brigid Mary McGrath

**PLAINTIFF'S MOTION TO COMPEL
AND FOR DISCOVERY SANCTIONS**

Plaintiff DENA LEWIS-BYSTRZYCKI, through her counsel, respectfully moves this Court to enter an order imposing discovery sanctions on the Defendants. In support, Plaintiff states as follows:

1. Under Illinois Supreme Court Rule 214(d), “[a] party has a duty to seasonably supplement any prior response to the extent of documents, objects or tangible things which subsequently come into that party's possession or control or become known to that party.” Ill. S. Ct. R. 214(d) (eff. July 1, 2014).

2. For failure to comply with discovery rules, this Court may impose on the offending party and/or their attorney “an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee” Ill. S. Ct. R. 219(c) (eff. July 1, 2002). Rule 219(c) states in relevant part:

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c) Failure to Comply with Order or Rules. If a party, or any person at the instance of or in collusion with a party, unreasonably fails to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

- (i) That further proceedings be stayed until the order or rule is complied with;
- (ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;
- (iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;
- (iv) That a witness be barred from testifying concerning that issue;
- (v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice;
- (vi) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue; or
- (vii) That in cases where a money judgment is entered against a party subject to sanctions under this subparagraph, order the offending party to pay interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party's conduct.

In lieu of or in addition to the foregoing, the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is wilful, a monetary penalty. When appropriate, the court may, by contempt proceedings, compel obedience by any party or person to any subpoena issued or order entered under

these rules. Notwithstanding the entry of a judgment or an order of dismissal, whether voluntary or involuntary, the trial court shall retain jurisdiction to enforce, on its own motion or on the motion of any party, any order imposing monetary sanctions, including such orders as may be entered on motions which were pending hereunder prior to the filing of a notice or motion seeking a judgment or order of dismissal.

Where a sanction is imposed under this paragraph (c), the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

Ill. S. Ct. R. 219(c).

Failure to Supplement and Belated Production of Documents

3. The depositions of Defendant Carl Pycz and witness Deputy Chief Kopec occurred on July 10, 2015 and July 28, 2015, respectively.

4. On or about August 3, 2015, Defendants produced additional documents responsive to Plaintiff's discovery requests.¹ These documents were in the possession and control of Defendants, most of which the Defendants have possessed for over a year or more, and should have been produced earlier.

5. The recent documents produced by Defendants in an untimely manner include, but are not limited to, the following:

- a) Personnel file of Defendant Ellington;

¹ It must be noted that this is not the first occasion Defendants have supplemented their production in an untimely fashion. On July 20, 2015, the morning of Defendant Ellington's deposition, Defendants' counsel produced approximately 50 pages of documents at Ellington's deposition. Then, on July 28, 2015, the morning of Deputy Chief Kopec's deposition, Defendants' counsel produced 94 pages of documents at the deposition, which were relevant to Kopec's deposition as well as the prior depositions already taken in this case. This belated production delayed the depositions because Plaintiff's counsel had to review the documents before and during the deposition to try to question the witness on these newly produced documents.

- b) Personnel file of Defendant Pycz;
- c) Documents from Plaintiff's personnel file;
- d) An undated, inflammatory memo from Defendant Pycz to the Chief which includes many accusations against Plaintiff, discusses Plaintiff's lawsuit, and Defendant Pycz states that Plaintiff should be put on administrative leave because of her lawsuit;
- e) Defendant Pycz's December 2011 and January 2012 typed journal entries specifically about Plaintiff, including an entry about a disciplinary incident, which Defendants purported to be part of Plaintiff's personnel file, despite it not being included in her personnel file when she made the request in 2012 for her personnel file;
- f) A January 2012 memo from Defendant Pycz to the Chief regarding discipline of Plaintiff, purported to be part of Plaintiff's personnel file;
- g) Several June 2014 memos to Deputy Chief Kopec regarding an incident involving Plaintiff and another firefighter;
- h) An April 2014 memo to Deputy Chief Kopec from a Lieutenant "re: unusual occurrence Engineer Lewis-Bystrzycki and training;"
- i) A February 2014 memo to Deputy Chief Kopec regarding an incident involving Plaintiff and
- j) Defendants' Operational / Policies and Procedures Manual from 2013

6. Plaintiff served discovery requests to Defendants on or about December 16, 2013. (*See* Exhibit 1, First Requests for Production to CCH.) The documents produced on August 3, 2015, are responsive to Plaintiff's Requests, including, but not limited to the following: Nos. 1, 4, 8, 12 and 13. (*See* Exhibit 1.) These documents are also

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responsive to Plaintiff's Interrogatories to CCH Nos. 3, 4, 7, and 10. (See Exhibit 2, First Interrogatories to CCH.)

7. Furthermore, the newly produced documents are directly relevant to several of Plaintiff's claims, and many provide evidence of the retaliation, discrimination, and hostile work environment. For example, documents related to discipline; memorandum written by other firefighters specifically about Plaintiff, some at the behest of supervisors; journal entries by Plaintiff's supervisor about Plaintiff; and personnel files; all of which are relevant to Plaintiff's claims.

8. The documents enumerated above are ones that Plaintiff would have inquired about directly or indirectly at Defendant Pycz and Deputy Chief Kopec's depositions had they been produced in a timely fashion before their depositions, which they should have been. In fact, Plaintiff objected to closing these depositions because Defendants had not yet produced Pycz or the other Defendants' personnel files and the witnesses identified additional responsive documents that had not been produced by Defendants.

9. Plaintiff was prejudiced by the untimely production of these documents because they were relevant to issues that Defendant Carl Pycz and Deputy Chief Kopec had knowledge of and these individuals' depositions had already occurred on July 10, 2015 and July 28, 2015, respectively.

10. Defendants have violated Rule 214(d) because they did not supplement documents in a timely manner, despite the fact that most of these documents were in

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their possession for at least one year or more and they were responsive to Plaintiff's discovery requests. *See* Ill. Sup. Ct. R. 214(d).

11. As a sanction under Rule 219(c) for failing to comply with the Court's discovery rules, Plaintiff should be permitted to re-depose Defendant Carl Pycz and Deputy Chief Kopec at the expense of Defendants, including the cost of attorneys' fees. *See* Ill. Sup. Ct. R. 219(c). Since the trial date in this case is October 5, 2015 (see attached Order, Exhibit 3), Defendants should also be barred from using these documents at trial since they were not timely disclosed. Ill. S. Ct. R. 219(c).

Failure to Produce Emails Responsive to Discovery Requests

12. In addition to the belated production of documents, Defendants have failed to search their emails for responsive documents. Defendant Agpawa testified during his deposition that although he collected documents for production in this case, he failed to search his emails for responsive communications. (See Exhibit 4, Agpawa Dep. at 178:7-9 ("Q. Did you ever search your e-mails for any e-mails to or from Dena or about Dena? A. No.") (excerpts only); Exhibit 5, Kopec Dep. 169:1-7 ("Q. Did anyone ever ask you to search your e-mails for anything in relationship to this case? Dena Lewis? A. No. Q. And I'm going to actually ask that that be done, so -- for everyone including yourself) (excerpts only).)

13. Emails that are sent to or from the Defendants are responsive to Plaintiff's Requests, including, but not limited to the following:

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- a) RFP to CCH No. 8.: “Any and all memorialized communications, whether oral or written . . . made by any person referring or relating to Plaintiff, her employment, her failure to be promoted, any discipline and/or to any issues, claims and/or defenses of this case” (See Exhibit 1, Pl.’s RFP to CCH.); and
- b) Second RFP to CCH No 5: ‘Any and all emails relating or referring to Plaintiff, any Defendant, any of the allegations in this case, including but not limited to those that contain or reference any of the following search terms: Dena, Lewis, Lewis-Bystrzycki, Bystrzycki, any and all individual defendants and any variation of their names, promotion[s], retaliation, harassment, discrimination, discipline, investigation, general orders, policies, procedures, call off, notice, testing, scoring, complaint[s], IDHR, gender, sex, and/or sexual.” (See Exhibit 6, Plaintiff’s Second Requests to CCH, served July 2, 2015.) To date, Defendants have not answered these discovery requests, and therefore, objections are waived.

14. Defendants violated Rule 214(d) because they did not supplement documents in a timely manner when they failed to search and produce responsive emails. *See* Ill. Sup. Ct. R. 214(d).

15. Defendants should be sanctioned for their failure to comply with their discovery obligations in this case, and ordered to allow Plaintiff’s computer forensic expert access to their computers to search their emails for responsive documents within 3 days of the hearing on this motion; otherwise Defendants should ordered to produce the records within 3 days; and Defendants should be barred from being allowed to present any of the documents at trial, but Plaintiff should be allowed to use them. Ill. S. Ct. R. 219(c).

Conclusion

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WHEREFORE, for the above stated reasons, Plaintiff asks this Court to enter an order granting Plaintiff's Motion for Discovery Sanctions and permitting Plaintiff to re-depose Defendant Pycz and Deputy Chief Kopec at Defendants' expense; and enter an order granting Plaintiff's computer forensic access to Defendant's computers and emails to search for responsive documents, and order Defendants to produce the responsive documents, as well as be barred at trial from using the records that were not produced in compliance with Defendants' discovery obligations; and for any other relief that the Court deems just.

Respectfully Submitted,

DENA LEWIS-BYSTRZYCKI

s/Dana L. Kurtz

Attorney for Plaintiff

KURTZ LAW OFFICES, LTD.
32 Blaine Street
Hinsdale, Illinois 60521
Phone: 630.323.9444
Facsimile: 630.604.9444
Firm No. 43132

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PROOF OF SERVICE

The undersigned, an attorney, on oath states that I served this notice by electronic filing and by United States mail to the parties shown below on August 24, 2015.

Daniel Boddicker
Keefe, Campbell, Biery & Associates, LLC
118 North Clinton Street, Suite 300
Chicago, Illinois 60661
Email: dboddicker@keefe-law.com

s/Dana L. Kurtz

Dana L. Kurtz

Under penalties as provided by law pursuant to ILL. REV. STAT., CHAP. 100, Sec. 1-109, I certify that the statements set forth herein are true and correct.

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EXHIBIT 6

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
COMMERCIAL CALENDAR SECTION U - ROOM 1907

Lewis

No. 2012-L-9916

v. City of Country Club Hills

BRIEFING SCHEDULE ORDER

This cause coming to be heard on Plaintiff's Defendant's Motion for to be denied
(CIRCLE APPROPRIATE)

The Court sets the following briefing schedule: Unless the motion is granted to the extent the City shall answer the second interrogatory requests.
Movant shall file a memorandum in support by _____ within _____

Response shall be filed by Defendants have agreed to produce the personnel files for inspection and production, and continued to _____ 7 days, 9/3/15

Reply shall be filed by _____ September 16, 2015 at 11:30

The matter is set for clerk's status on _____, at 9:00 a.m. in room 1907.

MONDAY

include complete deposition transcripts and pleadings, if cited, federal and out-of-state case law with the briefs.

NOTE: Your motion will be stricken by this court for failure to provide courtesy copies at the clerk's status.

Firm: Keefe Kruppel & Co
Attn. for: Defendants
Address: 118 N. Clinton St.
City/Zip: Chicago IL 60661
Telephone: 312 756-1800
Firm No.: 49725

ENTERED ENTER
JUDGE SANJAY TAILOR-1870
AUG 27 2015
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge Brigid Mary McGrath

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
COMMERCIAL CALENDAR SECTION U - ROOM 1907

Lewis

No. 2012-L-9916

v. City of County Club Hills

BRIEFING SCHEDULE ORDER

This cause coming to be heard on Plaintiff's/Defendant's Motion for plumage and
(CIRCLE APPROPRIATE) depositions

The Court sets the following briefing schedule:

Movant shall file a memorandum in support by order. The date shall produce
Carl Byer and Deputy Chief Kopce for further deposition limited

Response shall be filed by _____, in scope

Reply shall be filed by _____, to documents produced

The matter is set for clerk's status on _____, at 9:00 a.m. in room 1907.

MONDAY

Include complete deposition transcripts and pleadings, if cited, federal and out-of-state case law with the briefs.

NOTE: Your motion will be stricken by this court for failure to provide courtesy copies at the clerk's status.

Firm: 49785
Attn. for: Deterohat
Address: 114 W. Clinton St.
City/Zip: Chicago, IL 60661
Telephone: 312 756-1800
Firm No.: 49785

ENTERED ENTER
JUDGE SANJAY TAILOR-1870
AUG 27 2015
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge Brigid Mary McGrath

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EXHIBIT 7

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

CITY OF COUNTRY CLUB HILLS, CARL
PYCZ, JOSEPH ELLINGTON, and ROGER
AGPAWA,

Defendants.

No. 2012 L 009916

Honorable Brigid Mary McGrath

**PLAINTIFF'S RESPONSE AND OBJECTION TO
DEFENDANTS' MOTION TO CONTINUE TRIAL**

Plaintiff DENA LEWIS-BYSTRZYCKI, through her undersigned counsel, respectfully files this response and objection to Defendants' motion to continue the trial for the following reasons: (1) this Court has already advised the parties that it was not going to continue to trial in this matter; (2) Defendants' agreed to the discovery scheduling order that they now seem to object to; (3) continuing the trial would substantially prejudice Plaintiff; and (4) Defendants' history of their own delay in this case is not a basis to continue to trial. In support, Plaintiff states as follows:

1. The trial in this matter was original set for January 12, 2015. (Ex. 1, 7/21/14.) The trial was continued in part because of Defendants' delay in discovery in this case, which is explained in more detail below.¹

¹ As Defendants mention in their motion to continue the trial, Plaintiff's counsel's (Ms. Kurtz) husband suffered a spinal cord injury in July 2014. However, inspite of Ms. Kurtz's need

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2. On October 9, 2014, the Court struck the January 2015 trial date, indicating that it would reset the trial at the January 9, 2015 status hearing. (Ex. 2, 10/9/14 Order.) However, at the January 2015 court status, the court did not set a trial date.

3. On April 15, 2015, the Court entered an order scheduling the trial in this matter to begin October 5, 2015. (See Ex. 3, 4/15/15 Final Case Management Order.)

4. On May 28, 2015, this Court entered an order, based on *the agreement of the Parties*, that all discovery was to be completed by September 4, 2015 and set the case for trial on October 5, 2015. (Ex. 4, 5/28/15 Orders.) At that time, the Court told the Parties' counsel that it was *not* going to continue the trial. (Ex. 5, Kurtz Declaration; see also Ex. 4, 5/28/15 Orders.)

5. Plaintiff and Plaintiff's counsel, Dana L. Kurtz, are ready to proceed to trial in this matter on October 5, 2015 and oppose moving the trial. In fact, Plaintiff has already sent her pre-trial submissions to Defendants, with the limited exception of the exhibit list because Defendants are still producing documents in this case, despite the fact that Plaintiff served her request for documents on December 16, 2013.

6. Plaintiff will be significantly prejudiced if the trial of this case is further delayed for among the following reasons:

- a. First, the retaliation against Plaintiff is ongoing. For example, when she recently complained to Chief Agpawa in writing and asked that he

to provide care for her husband, Ms. Kurtz is prepared to proceed to trial in this matter on October 5, 2015, and objects to the trial being continued for the reasons stated herein.

“truly address these actions of harassment, retaliation, and discrimination, both on your part and the rest of the members of Country Club Hills,” Chief Agpawa disciplined her in response to this memo.

b. Second, also in retaliation for the filing of this lawsuit, Plaintiff was recently put on administrative leave with pay. The City of Country Club Hills’ notice to Plaintiff specifically states “that this paid leave will extend through the date of the trial in your pending suit against the City.” (See Ex. 6, Notice of Administrative Leave and related emails.) Continuing this trial in this matter substantially prejudices Plaintiff because she is not eligible for overtime, training, or promotions while on administrative leave, and she is not able to do the job that she loves (setting aside the unremedied harassment and retaliation);

c. Plaintiff continues to suffer damages both emotionally and economically with no resolution in sight;

d. The continued delay in this case results in witnesses’ memories fading, and thus, damage to Plaintiff being able to prove her claims through other witnesses;

e. Other than the week of October 5, 2015, Plaintiff’s counsel is not available for trial until April 2016 as Ms. Kurtz has trials in other cases scheduled every month from November 2015 through March of 2016;

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therefore, scheduling a new trial date prior to April of next year would be impossible; and

f. Plaintiff's experts have reserved the current trial dates and are available and they have foregone other work to be available the week of October 5, 2015.

7. In Defendants' motion, Defendants erroneously attribute all the delay in this case to Plaintiff's counsel. (*See* Defs.' Motion to Continue the Trial at 5.) However, it is Defendants that have delayed the resolution of this matter. In fact, a default judgment was entered against Defendants because they failed to appear and answer the complaint. (Ex. 7, 11/21/12 Order.) Defendants' failure resulted in the court granting Plaintiff's attorneys' fees and costs; the court found that the "Defendants' failure to appear and respond was *reprehensible under the circumstances*. . . ." (Ex. 8, 4/1/13 Order (emphasis added).) Plaintiff's original complaint was filed on *August 31, 2012*; however, due to Defendants' delay, Defendants did not file their motion to dismiss until May 20, 2013. Defendants' motion to dismiss was denied. Defendants did not file its initial answer until *November 18, 2013*.

8. Defendants have also caused delay in discovery in this case, which includes but is not limited to the following examples: Defendants' answers to Plaintiff's written discovery were due on January 3, 2014; however, Defendants did not answer until late March and early April 2015. Defendants' belatedly produced documents that were in their possession and control for several years. As a result, Plaintiff had to file a

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motion to compel the re-appearance of Defendant Pycz and Deputy Chief Kopec for their depositions, which this Court granted. (Ex. 9, 8/27/15 Order.) These are just a few examples of many more.

9. Defendants also erroneously argue that they will be prejudiced if the trial date and discovery in this case is not extended. (*See* Defs.' Motion to Continue the Trial at 6.) Defendants' arguments supporting this contention appear to be: (1) Plaintiff made 213(f)(3) disclosures; (2) Defendants are not prepared to proceed to trial due to the allegations in the recently amended complaint, some of which are subject to ongoing investigation by Country Club Hills; and (3) Defendants' counsel has been contacted by current and former employees of Country Club Hills with information. (*See* Defs.' Motion to Continue the Trial at 6.)

10. Regarding Plaintiff's expert disclosures, Plaintiff made these disclosures in accordance and in compliance with this Court's scheduling order of May 28, 2015. (Ex. 4, 5/28/15 Order.) Defendants agreed with this schedule. (Ex. 5, Kurtz Affidavit.) In fact, Plaintiff disclosed expert reports even before the September 4, 2015 deadline. Ms. Kurtz also advised Defendants' counsel that Plaintiff would have experts, including a psychological expert, organizational expert, and an economic expert in December 2014, long before the discovery deadline. (Ex. 5, Kurtz Affidavit.) Moreover, Plaintiff has agreed to allow Defendants to take Plaintiff's experts' depositions outside of the September 4, 2015 deadline, despite the fact that discovery, including expert depositions, is closed in this case. In an effort to work with Defendants, Plaintiff has

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confirmed dates that her experts are available on September 18, 2015 and October 1, 2015. Despite numerous emails and a verbal conversation, Defendants have yet to confirm these dates or even respond to Plaintiff's counsel's emails regarding the same. Despite Defendants lack of urgency regarding the depositions of Plaintiff's experts, the experts are holding these dates in their calendar.

11. As to Defendants' erroneous argument that they are not prepared to proceed to trial due to the allegations in the recently amended complaint, when the Court asked Defendants if they had any objections to allowing the Second Amended Complaint, Defendants' only response was that they requested an opportunity to respond and file affirmative defenses. This Court allowed fourteen days for Defendants to answer and file affirmative defenses. (See Ex. 9, 8/27/15 Order Granting Motion to File Amended Complaint.) Defendants have waived any objections not raised at the time of the hearing on the motion for leave. Moreover, the allegations added to the Second Amended complaint were based on facts learned in discovery from Defendants' themselves, or Defendants' own witnesses, and as a result of the ongoing retaliation against Plaintiff.

12. Defendants' contention that "some of the allegations [of the Second Amended Complaint] are the subject of ongoing investigation by the City and/or outside contractor(s)" (Defs.' Motion to Continue the Trial at 6), is in fact further evidence of the prejudice *to Plaintiff*, not Defendants, if the trial were continued.

Defendants' investigations would not be necessary if Defendants were not subjecting Plaintiff to continual and ongoing harassment and retaliation.

13. Finally, though Defendants' counsel contends that they have been contacted by current and former employees of Country Club Hills with information related to the case, Defendants' counsel has had *three years* to interview and obtain information from the current and former employees of their own client, Country Club Hills. (*See* Defs.' Motion to Continue the Trial at 6.) Lack of diligence on the part of Defendants in preparing for the agreed on trial date is not a legitimate reason to continue the trial. Therefore, Defendants request to continue the trial must be denied.

WHEREFORE, for the above stated reasons, Plaintiff respectfully requests this court deny Defendants' motion to continue trial, and grant Plaintiff such other relief that is just and equitable.

Respectfully Submitted,

DENA LEWIS-BYSTRZYCKI

s/Dana L. Kurtz

One of Plaintiff's Attorneys

Dana L. Kurtz, Esq. (6256245)
KURTZ LAW OFFICES, LTD.
32 Blaine Street
Hinsdale, Illinois 60521
Phone: 630.323.9444
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E-mail: dkurtz@kurtzlaw.us

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO CONTINUE TRIAL** was served upon the parties designated below on September 14, 2015, as follows:

By Electronic Service Only

Daniel Boddicker

Keefe, Campbell, Biery & Associates, LLC

118 North Clinton Street, Suite 300

Chicago, Illinois 60661

Email: dboddicker@keefe-law.com

s/Dana L. Kurtz

Dana L. Kurtz

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EXHIBIT 8

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Deu's Bystrzuck,

v.

NO. 2012 L 009916

Country Club Hills, et al

ORDER

This matter coming to be heard on several motions, both parties present, it is hereby ordered:

- (1) On Defs mot. to continue 9/15/15 trial and discovery - that motion is granted by agreement based on court's statements in the 9/15/15 hearing (see transcript), the second amended complaint is to stand; the parties will participate in mediation and make their best efforts to resolve by Oct 30, 2015;
- (2) On Defs mot for Protective Order re video recording of Welch deposition - granted by agreement, ^{as stated in the} agreed protective order to be entered;
- (3) On Defs motion for Protective Order on the notice of inspection the motion is entered and continued to Nov 2, 2015 @ 9:45am
 - (a) The motion is granted as to photo/video inspection of the 2 fire stations
 - (b) Defs will report on status of investigation of computer use ^{of cables} on 11/2/15 and file, produce investigation file to T's counsel
 - (c) T to provide As with pageline of Dep. Swearing emails not searched, and inspection as to electronic documents/emails

(4) T is not to compel personnel files of Defendants

Firm Kurtz ^{represent that}
Attn. for: T ^{production will}
Address: 328 ^{be complete}
City/Zip: Hinsdale IL 60141 ^{9/18/15.}
Telephone: 630-323-9044
Firm No.: 43132

FILE STAMP ONLY

Subject to any objections or privilege assertions

ENTERED:

Judge Brigid Mary McGrath

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EXHIBIT 9

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Lewis - Bystrzycki

v.

NO. 2012 L 009916

Country Club Hills, et al

ORDER

① Defendants' counsel is to ensure and report that ^{electr. docs} emails have been searched by December 1, 2015 and produce any and all emails by December 1, 2015 that have not yet been produced.

② Defendants' counsel will produce investigation of cable & results and related documents by November 11, 2015 subject to any objections or privilege assertions

③ 213(f)(1) Depositions to be taken by January 15, 2016.

④ Status set for January 15, 2016 at 9:45 am.

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Computer use

Firm Kurtz Law Offices
Attn. for: Plaintiff
Address: 32 Blaine St
City/Zip: Hinsdale, IL
Telephone: 630-323-9444
Firm No.: 43132

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ENTERED
JUDGE BRIGID MARY McGRATH-180
NOV 02 2015
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ENTERED:
Judge Brigid Mary McGrath

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EXHIBIT 10



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Report For

Dena Lewis-Bystrzycki

v.

**City of Country Club Hills, Carl Pycz,
Joseph Ellington, and Roger Agpawa**

Case ID - 2012 L 00916

Report on ESI Destruction

Prepared For: Dana Kurtz
Attorney at Law

Prepared By: Andy Garrett
Garrett Discovery Inc
[REDACTED]

Date: July 21, 2017

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1.0 Expert Background

I, Andrew Garrett am employed by Garrett Discovery Inc, an Illinois based computer forensics firm specializing in digital investigations and computer forensics. I was selected to review digital evidence and write an expert report. I have been performing computer forensics for the last ten years and was formerly a contractor and principal responsible for the largest computer forensics and electronic discovery facility at the Department of Defense. I have performed forensic analysis for private corporations, federal and state courts. I have processed more than five hundred cases. I have performed expert work by order for federal and state court cases in Tennessee, Wisconsin, Indiana, Delaware, Iowa, Illinois, Florida and Alabama.

I have received forensic training provided by Guidance Software and AccessData, whom are the leading forensic software companies in the United States. Additionally, I have been deemed an expert in multiple federal and state courts and have held numerous computer certifications. My CV (**Attachment A**) and case history (**Attachment B**) are attached.

2.0 Investigation Narrative

I was asked by counsel and ordered by the court to examine the computers that were in place during the time of employment of the plaintiff to report on the efforts to identify and collect ESI, possible destruction or withholding of ESI.

On May 18, 2017 I issued a 2,164 page report regarding the use of Country Club Hills computers to surf pornography. This report was filed as a separate report and its findings and opinions stand alone and have no weight or bearing on this report.

3.0 Timeline of Events

I have written what I consider the importance of each of these events in **bold** and cited prior discovery materials as reference. Although, this is the best available information to show a timeline of events, the dates of the actual event may be on or about that date.

- | | |
|--------------------------|--|
| February 27, 2012 | Plaintiff files IDHR Charge |
| April 13, 2012 | Defendant files appearance before the IDHR, and had received prior notice of preservation requirements from IDHR

See https://www.illinois.gov/dhr/FilingaCharge/Pages/Investigation.aspx |
| August 31, 2012 | Complaint Filed (See Attachment C) |
| December 2013 | Plaintiff served initial discovery requests on Defendant |
| April 15, 2013 | First Amended Complaint (See Attachment D) |
| July 2, 2015 | Plaintiff served second supplemental discovery requests on defendants |
| July 7 2015 | Plaintiff files Supplemental Complaint (See Attachment E) |

July 11, 2015

Notice of Inspection (See Attachment F)

“The computers for inspection and imaging using Encase Forensic software by Guidance Software or other comparable software, which located in (a) the classroom at Station 1, (b) the middle office across from the bathroom at Station 1, (c) the paramedic writing room computer at Station 2, and (d) the computer in the hallway by the engineers’ office at Station 2; and This notice of inspection requires Defendants and Defendants’ agents and employees to not alter in any way, shape, or form, any of the areas, documents, data, contents, and information to be inspected.”

NOTE: AT THIS TIME THE COMPUTERS HAVE NOT BEEN UPGRADED OR SWAPPED OUT

July 17, 2015

Defendant’s Motion for Protective Order regarding Notice of Inspection

August 18, 2015

Plaintiff’s Corrected Response to Protective Order (Attachment G)

“Defendants erroneously claim that Plaintiff’s Amended Notice of Inspection is overly broad, unduly burdensome, and irrelevant to issues in the case. In fact, all the areas Plaintiff has requested to inspect are relevant to Plaintiff’s claims and the relevancy has been substantiated by testimony in this case.

Second, Plaintiff noticed the “[t]he computers for inspection and imaging” and the “the Televisions and cable boxes” due to evidence acquired during discovery that pornography is viewed at the Country Club Hills firehouses. There has been testimony on the record, during two separate depositions, that pornography is viewed by firefighters at the firehouse(s), including one Lieutenant who admitted

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to watching pornography. (See Exhibit 2, Dep. Draft Transcript of Lt. Dangoy at 191-95 (excerpt only); Exhibit 3, Dep. Transcript of Defendant Pycz at 40 (excerpt only).)”

August 20, 2015

Country Club Hills Public Safety Director William A. Brown sends memorandum to all Department Personnel that an Investigation is underway. (See Attachment H)

“At the request of Fire Chief Roger Agpawa I am directing that an investigation into the use of cable TV in the station and Internet Services at the station using the city’s wifi system be launched immediately. Investigators from the police department and personnel from the IT department will be conducting the investigation”

August 21, 2015

Country Club Hills installs web filters to block pornography websites (See Attachment I)

Wayne Werosh Country Club Hills IT consultant deposition of March 14, 2017 included:

“Research and install DNS Web filtering at Station 1 and Station 2” Page 143 Line 12-13 and when asked what it was for stated “I believe it was both Chief Agpawa and Deputy Chief Kopec to look into installing filters into their computer networks to restrict access to objectional material: pornography, violence, things like that”. (See Attachment I at Page 143 Line 20-24).

When asked if he had installed those filters in 2015 to prevent users from viewing that type of material he responded with “yes” (See Attachment I Page 144 Line 6) and was operational in August of 2015.

September 11, 2015 Rudy Maybell (CCH IT Director) sends letter stating that computers were being monitored, no expectation of privacy and that there was no misuse of the computers and all internet history is being recorded. (See Attachment J)

“The City regularly monitors and /or logs network activity with or without notice, including e-mail and all website communications, and therefore, users should have no reasonable expectation of privacy in the use of these resources.

- a) *City monitors logs network activity and all website communications*
- b) *There is no expectation of privacy for internet usage by employees*

1. *The following information reflects the Fire Department Internet and Software Audit started on 8/28-2015 and completed on 9/10/2015.*
 - a) *The city conducted a software audit*
2. *Review of inventoried equipment disclosed no irregularities or misuse of City equipment and policies based on our Country Club Hills Handbook of personnel, policies and procedures page 88 under {Acceptable Use of Technology Policy}.*
 - a) *No irregularities found*
3. *If deep forensic type hard drive discovery is required, we refer WTM Werosh Technology Management, located in Oak Forest, IL. As a vendor who can perform those services.”*

August 21, 2016 Wayne Werosh IT Consultant for Country Club Hills formats (wiped) drives on Network Attached Storage system. The network attached storage system holds backups and fire station files and is used as a fileserver and was wiped of its data. (See Attachment K)

Wayne Werosh Deposition “*removed the network attached storage device from Station 1, I rebuilt it, and on 3/4/2016 I reinstalled it in the library in the network cabinet*” (See Attachment I Page 115 Line 11-14)

October 7, 2015 Country Club Hills hires an outside Human Resources person, Marion Williams to conduct an investigation of the employees of the Country Club Hills regarding the use of the computers and tv based on allegations of employees watching pornography at work. (See Attachment L)

November 9, 2015 Country Club Hills Fire Chief Agpawa sends letter to Attorney Daniel Boddicker regarding an internal investigation regarding the use of the TV and computers to watch pornography and attached the IT Report and Williams HR Report. (See Attachment M)

When Williams asked the employees: Carl Pycz, Glen McAuliff, Michael Kilburg, Raymond Bernadisius, Michelle Hullinger, Derek Dangoy, Nicholas Jula and Lawrence Gillespie if they had any knowledge of employees watching porn while at the firehouse none of them admitted to surfing or seeing someone surf pornography websites.

My May 18, 2017 2,164 page report at page 12 – 16 clearly shows that Carl Pycz and Lawrence Gillespie were surfing and downloading large amounts of pornography on the computers contrary to their statements to Williams.

February 17, 2016 CCleaner was ran on computer ‘6RW2GZ36’ (See report below for more information)

April 22, 2016 Court Order, granting Plaintiff's Motion to Compel, and entered and continued Plaintiff's motion as to the computer imaging and inspection, and ordering the Parties' counsel, Plaintiff's expert, and Defendant's IT person to meet and confer to discuss search terms on other ESI issues.

April 28, 2016 Meet and confer per the Court's April 22, 2016 Order with Plaintiff's counsel, 4Discovery, Defendant's counsel and Rudy Maybell, regarding the existence and location of ESI, etc. No identification of the NAS server.

March 4, 2016 Wayne Werosh Installs the Rebuilt Network Attached Storage Device

Wayne Werosh installed the Network Attached Storage device taken out of service on January 1, 2016 and testified that "to the best of my-my recollection the server, the training room computer, the computer in the lieutenant's office, and one of the computers in the library" (Attachment I Page 116 Line15-18) were being "imaged onto the NAS" (Attachment I Page 116: Line 10-11)

April 6, 2016 Plaintiff filed Second Motion to Compel and for Sanctions (Attachment N)

May 11, 2016 CCleaner was ran on computer '6RW2GZ36' (See report below for more information)

June 14, 2016 Wayne Werosh IT Consultant for Country Club Hills received a call from Lt. Bernadisius authorizing fire station computers eligible for Windows 10 to be upgraded (Attachment O)

The very computers that were subject of the litigation in the training room were being upgraded by Lt. Bernadisuis and not Wayne Werosh the night prior to Mr. Werosh arriving to upgrade the computers.

The two computers that were subject to this litigation are the two computers “across from the bathroom” and the room was identified to me by Mr. Maybell, Mr. Boddicker and Mr. Sachnoff as the training room and also called the library. “I discussed the process with Lt. Bernadisius, who started the Training room Desktop the evening of 6/15/2016 with the agreement that we would start upgrading all devices in the morning on 6/16/2016.”

June 24, 2016

Court Order on Plaintiff’s Second Motion to Compel and for Sanctions, entering and continuing the motion for hearing on July 29, 2016, and ordering Defendants to answer questions from Forensic expert by July 8, 2016.

July 19, 2016

Plaintiff’s 3rd Motion for Sanctions

*Motion stated “Defendants and their counsel have violated and repeatedly ignored numerous Orders by this Court . . . Most recently on June 24, 2016, this Court entered an order requiring Defendants’ to answer the questions from Plaintiff’s forensic expert on the manner in which their electronic records (ESI) are kept and maintained by **July 8, 2016**. . . . Defendants have failed to comply with this Court’s June 24, 2016 Order, and have not answered the forensic expert’s questions or so much as responded that they needed more time. They have simply ignored this Court’s order (like the many other orders that have been ignored by Defendants and their counsel).”*

July 25, 2016

Disk Defragmenter was ran on computer ‘6RW2GZ36’ (see report below for more information)

July 27, 2016

Robert Kopec sent an email to CCH employees advising them that two computers were going to be replaced and to copy any data before they are taken out of service identified in this report as computer WCATR1278977 AND WCATR1278977(See Attachment P)

July 27, 2016

Wayne Werosh removed the two computers from service from the “training room” (the “room across from the bathroom”) described by the plaintiff in the notice of inspection, and as being some of the computers used to surf pornography. These are the same two computers Werosh notified in two separate conversations Chief Roger Agpawa and Deputy Chief Kopec that they should be retained and left evidence tags on them.

Wayne Werosh made a few assertions during his deposition regarding the removal of the two computers not previously identified by the defendants. At the time of the deposition I had not been told or informed that these computers were replaced with other computers from other areas in the firestation.

Werosh informed the Chief and Deputy Chief in two separate conversations that he took the two desktop computers out of service at Fire Station 1 and *“that they should probably keep them and not do anything with them”* Page 93 Line 6-11 and in another section of testimony commented as to why he had that conversation and responded with *“Because I had had the previous conversation with him about the forensic imaging and thought that it would probably be in his best interest if those were left alone”* (Attachment I Page 99-100 Line 22-24).

Mr. Werosh said both computers “were left in the library on the floor up against the west wall” (**Attachment I Page 99 Line 5-6**) and that “There were only two computers – there were only two desktop computers in the library. And both of them were Windows XP machines that I previously stated I took out of service and left with tags on them”

July 29, 2016 Court Order, entering and continuing Plaintiff’s 3rd Motion for Sanctions, and Plaintiff’s 2nd Motion to Compel and for sanctions to August 31, 2016.

August 1-14, 2016 Disk Defragmenter was run on computer WCATR1278977 on August 1, 4, 11, 14. (See Report Below for more details)

August 8, 2016 Disk Defragmenter was run on computer ‘6RW2GZ36’ (See Report Below for more details)

August 12, 2016 Defendants answered 4Discovery questions that were generated from April 28, 2016 telephone call regarding ESI issues. No identification of the NAS server.

August 12, 2016 Disk Cleanup was run on computer ‘WCATR1278977’ (See Report Below for more details)

August 31, 2016 Court Order granting Plaintiff’s Second Motion to Compel as to the imaging of the four computers identified in the notice of inspection. The Court denied Plaintiff’s 3rd Motion for Sanctions without prejudice for reasons stated in the transcript.

Report of Proceedings memorialized the courts intentions as to a forensic examination of the computers referenced by the Plaintiff. (See Attachment Q)

See transcript “Now, I thank you both for your patience in giving me time to look at everything again. After reviewing everything, I am granting the second motion to compel regarding plaintiff's request for a forensic examination regarding those computers in the classroom at station one, the middle office across from the bathroom at station one, the paramedic writing room computer at station two and the computer in the hallway by the engineer's office at station two.

“After reading the depositions, I have concluded this isn't a fishing expedition. The plaintiff was not wholly unable to come up with (inaudible) that she witnessed fellow employees watching porn. The problem is according to her the porn watching was pervasive. So, for example, every time she would worked with Larry, I don't know how to pronounce it, Giseppe --Giseppe? he was watching porn. And that applied to Mr. Marcus 65 percent of the time and Mr. Boyd 50 percent of the time. Again that is according to her testimony. When I couple that testimony with the defendants' witnesses' testimony that they admit witnessing firefighters watching porn or watching porn themselves, I conclude that the forensic examination requested may lead to discoverable evidence and does not constitute a fishing expedition.”

“[As to Plaintiff's 3rd Motion for Sanctions, I am going to deny it. It is without prejudice. If due to your forensic analysis you discover that there are weighty

documents that should have been produced that weren't, I will reconsider sanctions."

September 23, 2016 Wayne Werosh IT Consultant for Country Club Hills provided a *"Backup/Image Quote"* to Robert Kopec to provide three 2Terabyte USB drives an, image 10 workstation and provide a backup script. (Attachment R)

"Attached is a quote for three 2TB USB Drives, one for you, the Chief and the Assistant Chief, along with a script to replicate all documents, files, etc to the USB drives. Also included in the quote is setting up or verifying that five workstations at Station 2, and five workstations at Station 1 backup system images to the appropriate NAS drive"

November 2016 Daniel Boddicker called Wayne Werosh and asked if he could help with a forensic investigation and was told by Werosh that Werosh could not. (See Attachment I Page 34-35)

Counsel for the Defendants called CCH IT Consultant Wayne Werosh and asked if he *"could help with a forensic investigation"* and *"He contacted me to ask me if I could monitor whomever was doing the disc imaging."* And *"I explained to Mr. Boddicker that I didn't feel like I had the experience in forensic imaging and investigation to be a competent expert witness in court."*

January 16, 2017 Defendant's refused Plaintiffs Expert access to forensically image computers at Fire Stations

Arrived at CCH Fire Station to forensically image computers pursuant to the 'Fourth Amended Notice of Inspection' and courts order of August 31, 2016.

I was directed to the computers in the library (“training room”) by three uniformed unidentified firefighters. Within a few minutes, prior to getting started, I was told that I was not going to be doing the examination by Chief Agpawa.

I asked Chief Agpawa why or who made the decision not to proceed, so that I could report back and was told by that Mr. Boddicker said it was not going to happen today.

I asked to speak with Mr. Boddicker and was put on the phone with him and informed him that I had driven three hours to complete the forensic imaging of the computers and that even if protocols or keywords were still being worked out, that I could create the forensic images to preserve the data and leave it with the Fire Chief. I was told by Mr. Boddicker that it was not going to happen today. I asked when would be good time to return and he said he didn’t know.

January 20, 2017

Plaintiff’s Motion to Show Cause and Sanctions regarding ESI Inspection

“Defendants and Defendants’ counsel has continued to evade the court’s order granting the forensic imaging, including most recently cancelling the inspection the same morning only after the eDiscovery expert appeared at the fire station. In fact, the eDiscovery expert, Andrew Garrett was told to proceed by the staff on site prior to Defendant Chief Agpawa’s and Defendants’ counsel’s subsequent cancellation of the inspection.

January 23, 2017

Court order granting Plaintiff’s motion for sanctions for violations of the Court’s order regarding inspection of computers for pornographic material,

**and ordering the inspection and imaging to proceed on January 26, 2017,
Defendants pay Plaintiff's Expert Fees (See Attachment S)**

January 26, 2017

Court ordered imaging to proceed on this date. Defendants, in the presence of their counsel, directed Plaintiff's Expert to the wrong computers to be imaged because Defendants had removed the computers to be serviced and did not advise Plaintiff's expert or Plaintiff's counsel.

Arrived at the Fire station on 183rd street pursuant to the Emergency Motion and Courts Order and met Rudy Maybell (County Club Hills IT Department Head), Brent Sachnoff (Country Club Hills IT Consultant) and Daniel Boddicker (Counsel for the Defendants).

I asked Mr. Sachnoff to identify the computers used by the defendants that were referenced in the court order. Mr. Sachnoff looked at his mobile phone with Rudy Maybell preset and directed me to the middle office across from the bathroom identified as the training / library room as the first computers to forensically image. I was informed that by Mr. Sachnoff that he was directed to escort me to the computers I was to image and that I was only to image those computers. Mr. Boddicker arrived and oversaw part of the collection of the 'Library Computers'.

When powering down the computers, I noticed that the computers were networked on a domain. It is most typical that computers connected to a corporate network and joined to a domain have 'roaming profiles enabled'.

Roaming Profiles redirect the users data to a centralized server. Therefore, the

users usage data would reside on the workstation and other ESI such as documents stored in the My Documents folder could reside in the server.

I was told by Mr. Sachnoff with Rudy Maybell present that the computers did not have roaming profiles. It was determined two hours later that day that the computers did have roaming profiles and Mr. Sachnoff agreed that there might be data that is relevant on the server. I asked to image the server and Mr. Sachnoff said no that was not going to happen. I asked to speak with Mr. Boddicker about it and Mr. Boddicker stated 'no' as well until I explained the likelihood of ESI being resident on the server due to roaming profiles. Mr. Boddicker agreed to imaging of the only server I was aware of at that time. At no time did the defendants disclose the Network attached storage system or the cloud as a source of ESI.

Mr. Sachnoff and Mr. Maybell both had a discussion with Chief Agpawa in the training room (across from the bathroom) and I could hear Chief Agpawa in a loud voice say "he is not copying the server" and then Mr. Sachnoff and Mr. Maybell returned to say that they think they are both going to be fired if I image the server. I was allowed to image the server pursuant to the agreement of Mr. Boddicker.

A copy of all forensic images were left with Mr. Sachnoff and Mr. Maybell.

Note: At the time of imaging, Defendants did not make me aware of the fact that the two computers from the library had been replaced and that the Network Attached Server contained backups of the workstations. As a result, neither the **original Library Computers (#2(b) to the notice of inspection and**

subject of the court’s order) which were stored in a closet or the Network Attached Storage System Server were NOT imaged on this date. It was not until Wayne Werosh’s Deposition that I was made aware of the existence of the two computers stored in a closet that were in service in the Library (or Training Office/Room) during the employment of the Plaintiff.

Below is a Matrix of the computer hard drives that were imaged.

LOCATION	FIRESTATION	BRAND	HARD DRIVE SN	COMPUER SN
TRAINING OFFICE	2	DELL	MXL4262HVP	Z6E5VF2L
ENGINEERING	2	DELL	MXL2610MMK	WCC2EP518547
TRAINING	1	DELL	1SJLH1	5RW4G1GG
TRAINING	1	HP	MXL2510MM0	WCC2EP70726
TRAINING	1	DELL SERVER	UNKNOWN	UNKNOWN

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February 6, 2017 **Court Order, ordering “the ESI/email imaging/retrieval shall occur [] by March 23, 2017.”**

February 16, 2017 **Plaintiff’s Emergency Motion to Preserve ESI**

“Plaintiff is concerned that Defendants have or will destroy other ESI and emails that are responsive to Plaintiff’s discovery requests in this case, despite their ongoing obligations to preserve ESI.”

February 17, 2017 **Court Order, granting Plaintiff’s Motion to preserve ESI in part, and ordering that the “imaging of Defs’ email servers and google drive shall occur before 12:00 noon on February 18, 2017 with Defs’ IT consultant, Brent Sachnoff [] present, Brent Sachnoff will maintain the imaging and ensure all data is preserved until further order of the court.”**

February 17, 2017

I called IT Consultant for Country Club Hills, Brent Sachnoff, and arranged to meet at City Hall as previously arranged to collect the email pursuant to the courts order to be completed by Saturday February 18, 2017.

When I arrived at City Hall I asked to see Rudy Maybell the IT Director for Country Club Hills and it was 5:02 pm. Five o'clock was the agreed time by Mr Sachnoff to meet as he was out of town and flying back to the area that afternoon. I was told by the Security Guard that Mr. Maybell had just left by direction of the Mayor and was told not to return until Monday.

I called Brent Sachnoff and informed him of the situation. He said he would call the mayor because the Mayor asked that he be directly in the loop on all matters going forward.

I received a call from Mr. Sachnoff with the Mayor on the phone whom proceeded to say "you are going to have to come back another time," and I explained that Mr. Sachnoff and I were ordered by the court to complete the imaging of the email. I asked that Mr. Boddicker be joined to the call for the conversation, and he was then joined in on the call. Upon merging the calls, Mr. Sachnoff's connection dropped from the call. Mr. Boddicker said he did not have his number with him, so I provided the number and he was brought back onto the line. Ms. Kurtz was also joined on this call. Mr. Boddicker said we would have to go back to court because he was not going to allow the imaging of the emails despite the court order. Mr. Kurtz said she would file another emergency motion to enforce the emergency motion and ask that the Mayor

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March 14, 2017

attend. After about 40 minutes of back and forth, I informed the Mayor of what the security guard had said when I arrived. The Mayor then agreed to calling Mr. Maybell back in to comply with the order.

Mr. Maybell provided me with access to the emails and then after about an hour of collecting, terminated my access and said that Brent Sachnoff was going to be collecting the emails. I again got Mr. Boddicker on the phone and let him know that I was there to follow the order, and if not allowed, I would leave. Mr. Boddicker agreed to allow me to continue and Mr. Maybell once again granted me access to the rest of the email boxes.

All emails were left on site on a portable hard drive with Mr. Sachnoff and to date have not been searched despite several attempts through correspondence from Plaintiff's counsel to Defendants' counsel.

Wayne Werosh was deposed pursuant to Plaintiff's subpoena. Werosh testified that the two computers in the room across from the bathroom were swapped out with two other computers from other areas in the fire station, and that he put evidence tags on them, and advised Chief Agpawa, Maybell, and Deputy Chief Kopec to preserve them because of the litigation, among other things. (See Attachment I)

Defendants never identified these computers that had been swapped out and evidence tags placed on them, until after being told that it appeared that the computers that were ordered by the Court to be imaged had been wiped based on the data contained on the computers.

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March 22, 2017

Ms. Kurtz emails Mr Boddicker, stating in part: “I will be filing a motion for sanctions based on Defendants failure to produce the computers that were ordered by the Court for imaging relative to the issue of employees watching pornography in the Fire Stations. I will be seeking default judgment based on the history of non-compliance in this case and based upon the deliberate violations of the Court’s order(s) and failure to produce the computers as ordered by the Court.”

March 22, 2017

Defendants’ counsel, Mr. Boddicker, responded via email regarding the computers, stating that they were located in a storage closet.

April 12, 2017

Plaintiff’s counsel email to Defendants’ counsel – regarding imaging 2 computers in the storage close without waiver.

April 21, 2017

Defendants’ counsel confirmed imaging of the 2 computers in the storage closet for April 24, 2017.

April 24, 2017

Imaged the two computers that were disclosed during the Werosh deposition and referenced in this report as computer hard drive ‘6RW2GZ36’ and ‘WCATR1278977’.

May 18, 2017

Delivered Report to Plaintiff regarding the Country Club Hills employees use of computer to surf pornography
(See Attachment: Subject to Protective Order)

July 21, 2017

Defendants forensic expert firm Sikich delivered a report concurring with Plaintiff’s expert and citing software to wipe data was found and ran.
(See Attachment: Subject to a Protective Order)

5.0 Key Concepts and Terms

5.1 User Profile

In order for Microsoft Windows to separate one users information from another user profiles were created.

When a user establishes an account on a computer for the first time, he or she creates on that computer a registry key with the logged in name and a folder known as the user profile folder used to store data created by the user. At subsequent logons, the system loads the user's profile, and then other system components configure the user's environment according to the information in the profile.

For instance, when examining a computer and navigating to “C:\Users\” you may find multiple folders labeled the same as a users login name. If I had a user profile on the computer I was examining it would contain a folder at “C:\Users\” named ‘agarrett’ corresponding with my login name of ‘agarrett’.

It is the folders that are found in “C:\Users\username” that contain the web history of web sites visited, searches, web chat history, files and other pertinent information to show user actions and based on the name of the user profile it is a good indicator of whom performed the specific actions on the computer.

5.2 Unallocated Space / Free Space

When a computer user saves a file on a computer many things happen, but important to this investigation is the file name and date properties are written to a pseudo spreadsheet called the Master File Table and the data is stored on the physical hard drive.

When a computer user deletes a file by either (Shift+Delete) or drags those files to the recycle bin and subsequently empties the recycle bin the entry in the Master File table is marked as deleted and eventually overwritten by new incoming data.

An easy way to think about data is a phone book. If I was to remove an entry from the phone book it doesn't destroy the house or business that exists. It only hinders me from finding the house or business. The Master File Table is like a phone book and without it a computer user using the operating system cannot locate a file as there is no reference to it.

We could talk about how a user could install specialized data recovery or forensic software and recover the file, but that would not be relevant to this analogy.

When a file is deleted using the methods described above, the data is still resident on the hard drive, but there is not reference to it from the operating system. It is essentially in a landfill of data that we often call 'unallocated space', because it is not allocated to a file name.

When a new file is stored on the computer the operating system finds an area on the drive that is unallocated and allocates it to the new file, therefore overwriting the previous data that existed.

Forensic software can recover files that were previously deleted by chaining back together the clusters on the hard drive that once was referenced only if those files have not been overwritten.

5.3 User Assist Keys

The UserAssist Key artifacts allows users to easily see what application a user has run from their start menu, how many times they have executed that application and when the application was last run from the start menu.

5.4 File Created Date

File created date is the date the file was created on that volume (C:\, D:\ E:\) and not the date the file was originally authored. For instance, when a file is downloaded from the internet and saved onto the computers local C: drive, the file created date would be the date of download. If the file is moved from the C: drive to the D: drive, the file created date of the file on the D drive would be the date the file was moved because it was 'created' on the D drive.

5.5 File Accessed Date

Anytime a user opens a file (whether or not the file is changed is irrelevant), the File Accessed Date changes to the current computer date. Anytime a file Created and Accessed dates are the same, it is interpreted that, after the file was saved to the volume on which it resides, the file has not been opened again.

6.0 Applications used as Anti-Forensic Tools

6.1 Windows Application - Disk Defragmenter

As part of eDiscovery training I have attended with Guidance Software the manufacturers of the most used eDiscovery platform to date, I was required to read the and understand landmark cases for study. One such case Victor Stanley v Creative Pipe (MJG-06-2662) (See Attachment T) in the District of Maryland best described what Disk Defragmenters use as tool of spoliation and I will quote the courts description:

“Disk Defragmenter, Microsoft Window’s disk defragmentation program, is a system utility that “consolidates fragmented files and folders on [a] computer’s hard disk, so that each occupies a single, contiguous space” in the system.

<http://www.microsoft.com/resources/documentation>

[/windows/xp/all/proddocs/en-us/snap_defrag.msp?mfr=true](http://www.microsoft.com/resources/documentation/windows/xp/all/proddocs/en-us/snap_defrag.msp?mfr=true). To consolidate fragmented files, the program moves the file fragments together by “overwriting all those places” where space in the system was occupied by deleted files. As a result, “the ability to recover deleted items virtually . . . disappears” because the same is occupied by other files. (Dec. 1, 2009 Hr’g Tr. 43:1 – 44:18 (Spruill Test.)) Cutting through all the techno-speak, it is foreseeable that the running of a disk defragmentation program, colloquially referred to as “defragging,” can result in the loss of files that were recoverable before the defragmentation occurred.”

The graphic below shows how fragmented data is moved by Disk Defragmenter.



I can offer another explanation of what Disk Defragmenter does as “it moves around files on a hard drive to areas that make it easier for the hard drive to retrieve data. The side effect of this process is that it moves the files to areas that may have occupied a previously deleted file, therefore, overwriting the data that could have been recoverable.

The forensic community has classified the use of Disk Defragmenter as a tool that can be used for anti-forensic measures. SANS institute one of the world’s leading forensic training schools has written papers on the use of Disk Defragmenter as a anti forensic tool.

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6.2 Disk Defragmenter Usage

By examining the User Assist Keys, Prefetch Folder and Prefetch entries, I was able to recover entries that show when disk defragmenter was ran and in some cases who ran it. Some of the entries were recovered from the unallocated space of the computer indicating that the entries had been deleted

and unreferenced prior to my examination. Without the aid of forensic tools the recovery of these entries would not have been possible.

I was able to determine that on multiple occasions disk defragmenter was run on both computers containing hard drives 'WCATR1278977' and 'GRWZGZ36'. Below is a chart of dates that Disk Defragmenter was ran and for most of the entries the user name was not able to be recovered. When the Defragmenter is run a user selecting and running it only the DFRGNTFS.exe entry in Prefetch is updated and the Defrag.exe is not.

Although there are legitimate reasons to run Disk Defragmenter on a computer, there is not when data on the computer is subject to litigation. The software was ran on a computer just prior to taking the computers out of service by direction of Firehouse Management *"Please be advised the two desktop computers at Station 1 in the large office are scheduled to be removed. The replacement units are already in place. Anyone who has been saving documents, photos or other files to the local hard drive should copy or move them to their share folder if they want to keep them. I recommend that this be done prior to the week of August 8th, when the old desktops would be placed in storage."* (See Attachment P)

On August 8, 2016 the computers were to be taken out of service by Wayne Werosh the IT contractor for CCH and according to his deposition he placed them to the side of the room with an evidence tag on it.

Werosh stated that he notified Chief Agpawa and Deputy Chief Kopec that he would highly recommend they retain those computers as they are part of court case.

6.2 Disk Defragmenter Usage on Computer WCATR1278977

Reference: See Attachment U

Disk Defragmenter appears to be run on the computer WCATR1278977. The computer keeps track of the amount of times Disk Defragmenter has been run. I was not able to find any information that would support the consistent use of Disk Defragmenter. I was able to determine that Disk Defragmenter was run just before and many times after the computer was allegedly taken out of service indicating that after Wayne Werosh IT Contractor for CCH's disconnected the computer, that someone reconnected it to power.

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Disk Defragmenter Usage Computer - WCATR1278977					
Report Section	User	Page #	Record #	Run Date	Run Count
Disk Defragmenter Usage	rburke	1	1	8/21/2013	1
Disk Defragmenter Usage	-	2	1	7/16/2016	6
Disk Defragmenter Usage	-	2	2	8/11/2016	2
Disk Defragmenter Usage	-	2	3-4	8/14/2016	3
Disk Defragmenter Usage	-	2	5	8/4/2016	14
Disk Defragmenter Usage	-	3	6	8/1/2016	13
Disk Defragmenter Usage	-	3	7	5/21/2016	5
Disk Defragmenter Usage	-	3	8	7/19/2016	8

6.3 Disk Defragmenter Usage on Computer 6RWZGZ36

Reference: See Attachment V

Disk Defragmenter appears to be set to run on a schedule on the computer 6RWZGZ36. The computer keeps track of the amount of times Disk Defragmenter has been ran and considering it has been run an excess of 2000 times it appears to be ran consistently. I was not able to find any information that would support the suspension of this task created to run Disk Defragmenter.

I was able to recover artifacts that suggest Wayne Werosh on July 25, 2017 used a program named Command Prompt and launched the System Control Panel (controls settings in the computer) and subsequently Disk Defragmenter was ran within 41 minutes of these actions. Additionally, Disk Defragmenter was ran the same day the computers were to be taken out of service according to emails produced.

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Disk Defragmenter Usage Computer - 6RWZGZ36						
Timeline of Events	User	Page #	Record #	Run Date	Time	Run Count
User launches Command Prompt	Unknown	2	1	7/25/2016	9:58 AM	10
User Launched Control Panel	Wayne Werosh	1	2	7/25/2016	10:01 AM	5
Disk Defragmenter Started	Wayne Werosh	2	3	7/25/2016	10:42 AM	2093
Disk Defragmenter Continued Usage	System	2	2, 4	8/8/2016	4:47 PM	2094

6.4 Windows Application – Disk Cleanup

Reference: See Attachment W

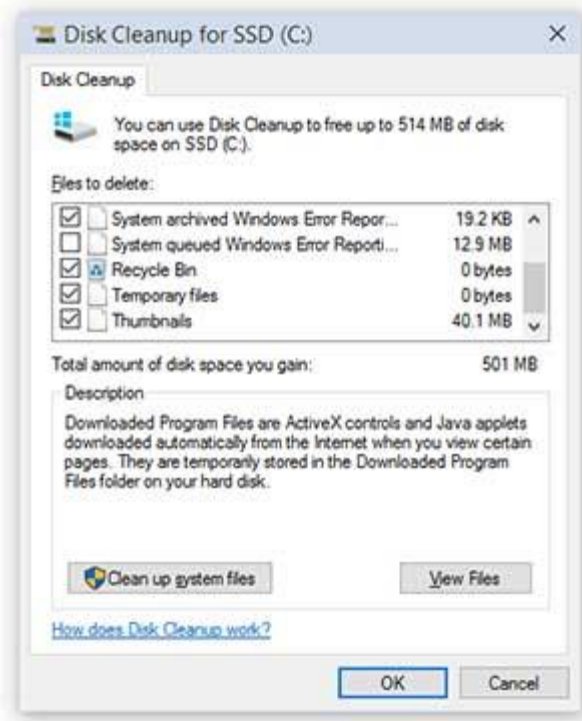
Microsoft Windows operating system contains a Disk Cleanup tool. Microsoft states on its website that the *“The Disk Cleanup tool helps you free up space on your hard disk by searching your disk for files that you can safely delete. You can choose to delete some or all of the files. Use Disk Cleanup to perform any of the following tasks to free up space on your hard disk:*

- Remove temporary Internet files”
- Examiner Note: Temporary Internet Files are files downloaded as part of a webpage (pictures)
- “Remove downloaded program files
- For example, ActiveX controls and Java applets that are downloaded from the Internet
- Empty the Recycle Bin
- Remove Windows temporary files “

Note: This removes system restore points that can be used to examine the computer forensically and recover old data

- “Remove optional Windows components that you are not using
- Remove installed programs that you no longer use”

Disk Cleanup Wizard does not run on a schedule and has to be launched manually \every time the user needs to clean up their disk.



6.5 Disk Cleanup Usage on WCATR1278977

Reference: See Attachment X

Below is a graphic showing the dates and times Disk Cleanup was run on the computer hard drive 'WCATR1278977'.

Disk Cleanup Usage					
Computer - WCATR1278977					
Report Section	User	Page #	Record #	Run Date	Run Count
Disk Cleanup Usage	-	1	1	8/12/2016	Unknown
Disk Cleanup Usage	mperry	2	1	8/12/2016	10
Disk Cleanup Usage	mperry	2	2	8/12/2016	10
Disk Cleanup Usage	rburke	2	3	9/14/2015	3
Disk Cleanup Usage	esawatski	2	4	1/9/2015	1
Disk Cleanup Usage	System	3	1	3/7/2016	-
Disk Cleanup Usage	System	3	2	12/21/2015	-
Disk Cleanup Usage	System	4	3	11/16/2015	-
Disk Cleanup Usage	System	5	4	4/20/2015	-
Disk Cleanup Usage	System	6	5	2/16/2015	-
Disk Cleanup Usage	System	7	6	12/8/2014	-
Disk Cleanup Usage	-	9	1	8/12/2016	1

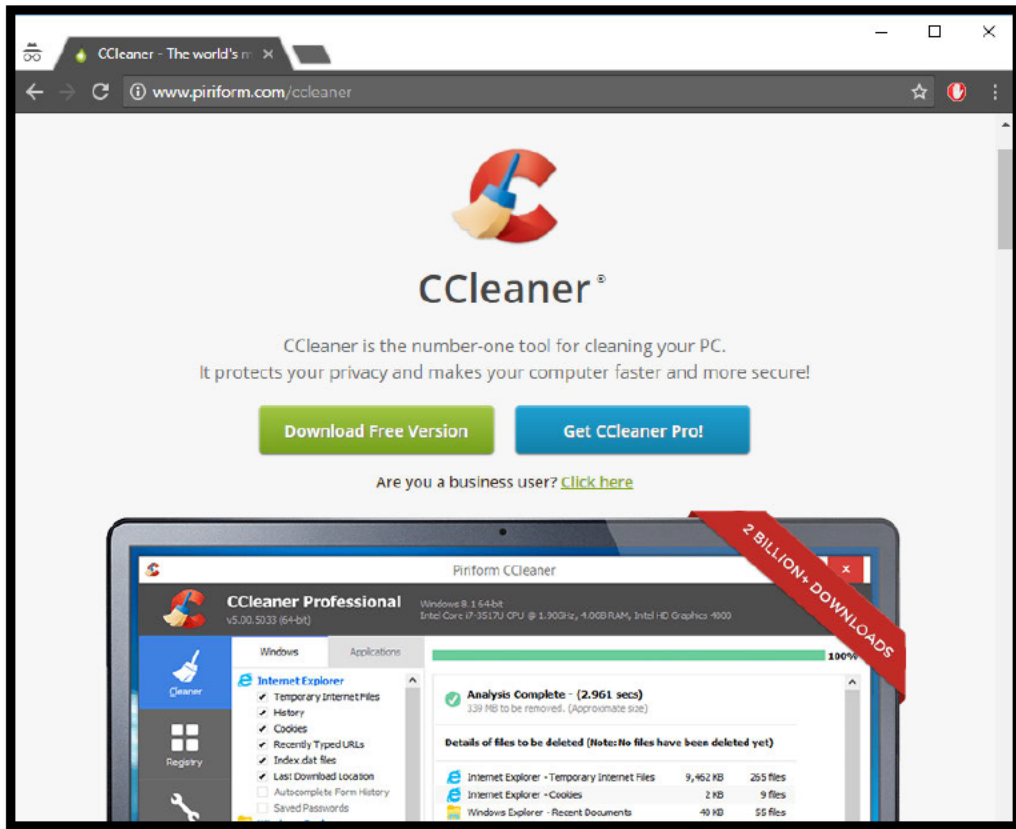
Multiple users have run Disk Cleanup multiple times and the most recent was on August 12, 2016.

6.6 Piriform Application CCleaner

Reference – See Attachment Y

CCleaner is a program that does not come pre-bundled with the Windows Operating system. In order to obtain CCleaner a user would have to navigate to www.piriform.com/ccleaner website and download the application.

A screenshot of the Piriform website showing CCleaner is below



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The reader should notice the 'Download Free Version' and the 'Get CCleaner Pro'. CCleaner advertises that it is a 'cleaning tool' and cleans "traces of your online activities such as your Internet history" and "Additionally it contains a fully featured registry cleaner"





The free version of CCleaner allows a user to perform functions such as those listed on the CCleaner website (see graphic below).

Features

CCleaner is our [system optimization](#), privacy and cleaning tool. It removes unused files from your system - allowing Windows to run faster and freeing up valuable hard disk space. It also cleans traces of your online activities such as your Internet history. Additionally it contains a fully featured registry cleaner. But the best part is that it's fast (normally taking less than a second to run) and contains NO Spyware or Adware!

Cleans the following:

-  **Internet Explorer**
Temporary files, history, cookies, super cookies, Autocomplete form history, index.dat files.
-  **Firefox**
Temporary files, history, cookies, super cookies, download history, form history.
-  **Google Chrome**
Temporary files, history, cookies, super cookies, download history, form history.
-  **Opera**
Temporary files, history, cookies, super cookies, download history.
-  **Safari**
Temporary files, history, cookies, super cookies, form history.

-  **Other Supported Browsers**
K-Meleon, Rockmelt, Flock, Google Chrome Canary, Chromium, SeaMonkey, Chrome Plus, SRWare Iron, Pale Moon, Phoenix, Netscape Navigator, Avant.
-  **Windows**
Recycle Bin, Recent Documents, Temporary files, Log files, Clipboard, DNS Cache, Error Reporting, Memory Dumps, Jump Lists.
-  **Registry Cleaner**
Advanced features to remove unused and old entries, including File Extensions, ActiveX Controls, ClassIDs, ProgIDs, Uninstallers, Shared DLLs, Fonts, Help Files, Application Paths, Icons, Invalid Shortcuts and more...
-  **Third-party applications**
Removes temp files and recent file lists (MRUs) from many apps including Windows Media Player, eMule, Google Toolbar, Microsoft Office, Nero, Adobe Acrobat, WinRAR, WinAce, WinZip and many more...

CCleaner also has a feature that wipes out previously deleted data. This option is called "Wipe Free Space" and overwrites data. You may think that if CCleaner is ran on a computer, that there should be no previously deleted data recovered.

An example of how this can wipe out data is below:

1. User downloads 1000 pictures from the internet over 2 years
2. User moves all of the downloaded pictures into the recycle bin
3. User Empties the Windows Recycle Bin
4. The user can no longer see the files using the operating system, but forensic programs can recover the files from the spaces on the hard drive that are no longer allocated to the operating systems file system. This is called 'unallocated / free space'
5. CCleaner Wipe Free Space option is ran against the hard drive and the file that still existed is overwrites the unallocated / free space with 0's, therefore wiping the data from the computer
6. The files can no longer be recovered

This option may work for pictures that were downloaded, but have no bearing on things such as internet history containing within databases or files that are not deleted. Deleting internet website history is not the same process.

CCleaner touts its ability to wipe out files permanently on its website at <https://www.piriform.com/docs/ccleaner/using-ccleaner/wiping-free-disk-space>.

"When you delete a file, Windows removes the reference to that file, but doesn't delete the actual data that made up the file on your hard drive. Over time, this data will be overwritten as Windows writes new files to that area of the drive.

This means that, given the right software, someone could reconstruct all, or parts of files that you've deleted. For privacy and security reasons, you can set CCleaner to wipe the free areas of your hard disk so that deleted files can never be recovered.”

As far as wiping out internet website history the process is completely different and CCleaner has many flaws. These failures of other parts of the program leave behind many artifacts that can be recovered by forensic software. For instance, there are files that are part of the operating system or part of an internet browser that if deleted the program may not function anymore. In those cases, CCleaner opens the file and attempts to flush out the data within the file. There are many reasons that CCleaner fails when attempting to flush out data within a file, which should not be confused with the process of overwriting a previously deleted file. For instance, if a user has the internet browser open while CCleaner is open, the index.dat file containing the internet history can be locked by the operating system preventing CCleaner from flushing out the data.

CCleaner is listed as one of the top Anti Forensic tools by the forensic community. A presentation was given at the largest computer forensic conference in the world Computer Enterprise Investigations Conference (CEIC) put on by Guidance Software the tool used by over 90% of law enforcement labs. See below slide showing CCleaner.

Determine if a system cleaner has run

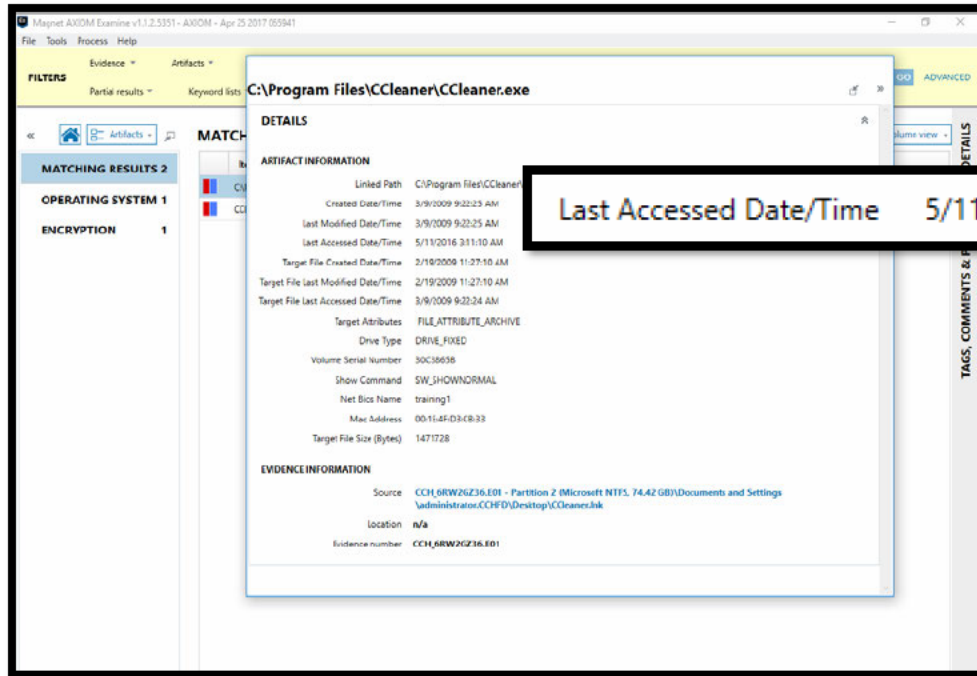
- The one thing system cleaners don't clean, is their own install
- While they may wipe out system settings, registry files, histories, etc... they don't wipe out their own programs and configuration files
- Look for files created around the time of the clean, which will determine how to do on the next slide
- Most have obvious names:
 - Ccleaner
 - Evidence Eliminator
 - System Soap

6.7 Application CCleaner Usage

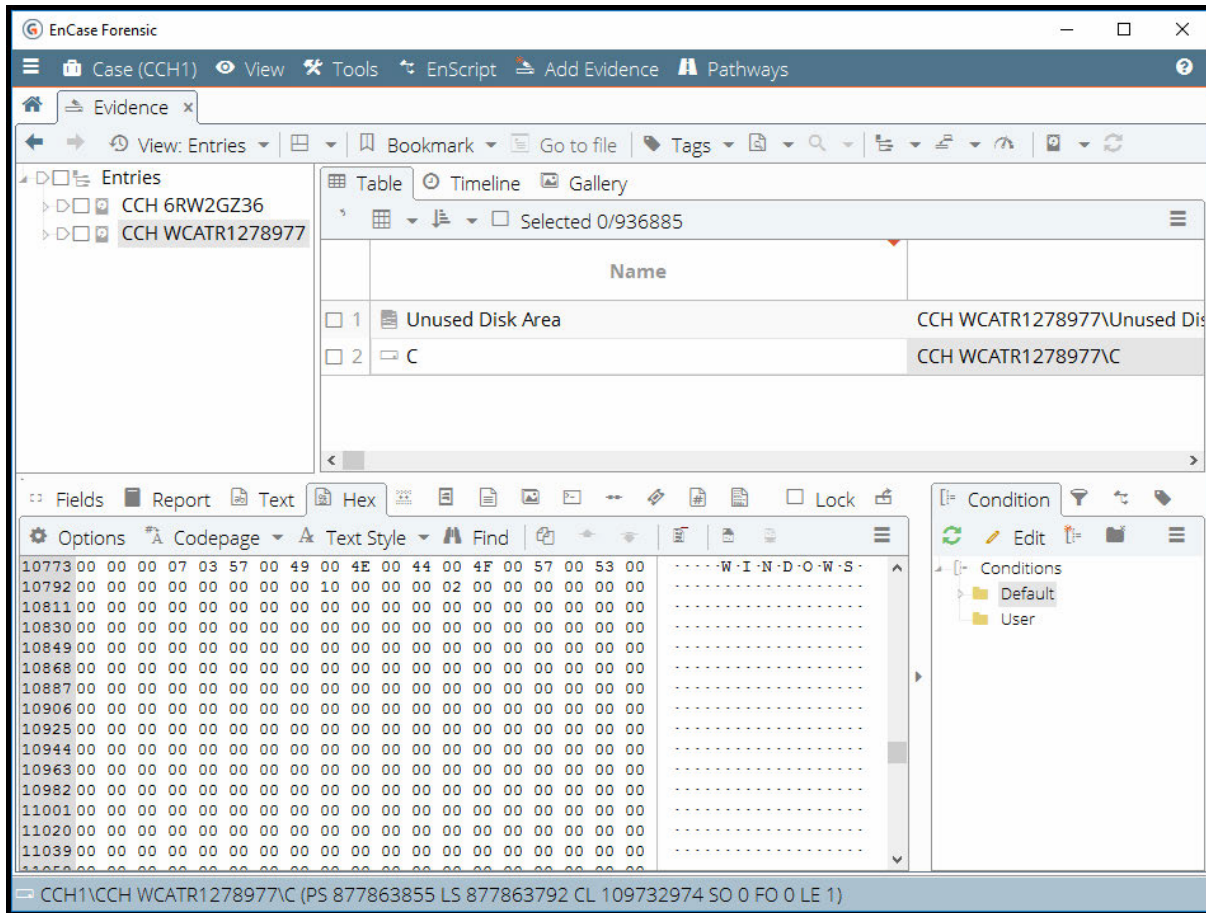
Reference: See Attachment Z

On February 17, 2016 and May 11, 2016, a user logged into the computer '6RW2GZ36' using the administrator account and launched the program CCleaner.

The report generated by the Defense Expert states *"Link files on the image showed that the administrator.CCHFD user account accessed the CCleaner software on February 17, 2016 and May 11, 2016. It is unknown how the administrator.CCHFD user account utilized the CCleaner software or which artifacts (if any) were deleted." (See Report Filed under Seal)*



A screen shot of the forensic tool Encase which is used by the majority of law enforcement forensic labs is below showing that over one third of the hard drive '6RW2GZ36' was partially wiped. By overwriting previously deleted data it prevents forensic applications from recovering items such as downloaded pictures.



When a forensic examiner looks at the surface of the hard drive would show data written and in the middle of the data would see a string of 0's. This is an indication that a wiping utility has been used.

One may make an argument that the drive was simply just not written to yet. That could be true if the drive was a newer drive, but since the drive was manufactured and has been in use for over 6 years it would not be possible and data should exist throughout the drive. In addition, in my experience consumer

grade hard drive manufacturers in the early 2000's did not zero fill their hard drives.

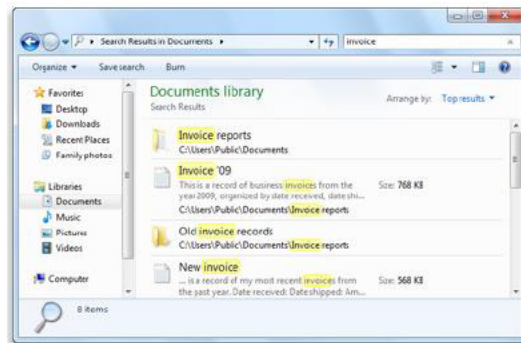
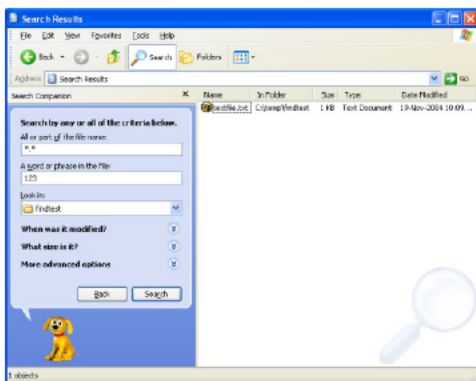
The only way to put the files together without random data between the files is the run disk defragmenter and then additionally run ccleaner or another wiping tool that zero's out sections of the hard drive.

The problem with doing that often tools designed to wipe free space/unallocated/prior deleted files are not perfect and do not destroy all other prior deleted data.

7.0 Defendants Search of Desktop Computers

When a computer user searches within a Windows computer that search is recorded in users NTuser.dat file within the users profile. The search history is recorded in the same file whether or not the operating system is Windows XP (graphic below on the left) and Windows 7 (graphic below on the right). You can see from the graphics below the search pane within Windows is very simple to use.

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I was able to extract what has been search from each of the computers imaged since beginning of 2013. It is apparent that no one has used the Windows Search to conduct a search relevant to this litigation. (See Attachment ZA) for the listing of searches conducted on the computers and corresponding dates.

8.0 Conclusion

Based on the totality of the evidence, defendants took many actions between the initiation of Plaintiff's IDHR charge and litigation hold obligations, including throughout this case, to the time they actually allowed for examination of the computers. Below are some of the actions taken by the defendants after the filing of the suit and well after the time notified to not allow for destruction of data. I will not opine as to whether or not the actions were willful or intentional as those are legal conclusions. I can only offer what is in evidence as facts and based on the facts I think that one could make their own conclusion at to the conduct and actions of the defendants.

1. IT Web Filters were installed to prevent pornography usage
2. An investigation was started
3. Defendants wiped the Network Attached Storage Drive of all data that held computer backups
4. Defendants used anti forensic tool CCleaner on one computer

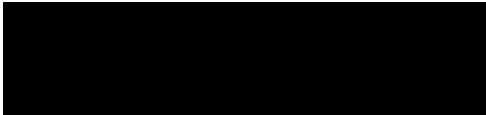
5. Defendants state they had sent a litigation hold letter to employees long after this litigation started
6. Defendants used Disk Cleanup on multiple computers (used to destroy data beyond recovery including web history)
7. Defendants used Disk Defragmenter on a computer (can be used as an Anti Forensic Tool)
8. Defendants swapped out the two computers identified by the Plaintiff
9. HR Firm conducted an investigation stating there was no pornography usage on the computers
10. IT Department conducted an investigation saying there was no pornography usage on the computer
11. Defendants testified in depositions contrary to evidence found by the Plaintiff's and Defendant's experts
12. Defendants were asked and failed to identify the hidden from sight computers until confronted with the deposition of Wayne Werosh IT Consultant for Defendants and possibly the email from Plaintiff's counsel
13. Defendants refused to allow entry despite order for Plaintiff's expert to examine computers and were sanctioned
14. The use of anti-forensic tools on the computers destroyed web history, electronic data and files.
15. Defendants wiped drives on the Network Attached Storage System and then used the Network Attached Storage system to store new files

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16. Defendants did not identify as a source of data the backups created by Wayne Werosh stored on the newly wiped drives of the Network Attached Storage System
17. Defendants did not identify as a source of data the cloud storage system
18. Defendants did not identify as a source of data the network attached storage system in station 1 and 2 that contain the images of 10 computers identified by the plaintiff
19. Plaintiff's and Defendant's expert both filed reports showing that anti forensic tools were launched on a computer after the initiation of the litigation and after Defendants' obligation to preserve such data
20. Plaintiff and Defendants expert both filed reports showing the usage of computers to surf pornography contrary to defendants HR Investigation results, IT Investigation results, and testimony at deposition of the defendants

9.0 Declaration

I declare under penalty and perjury under the laws of the State of Illinois that the information provided is true and correct.



Andy Garrett

July 21, 2017

Date

EXHIBIT 11

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

CITY OF COUNTRY CLUB HILLS, CARL
PYCZ, JOSEPH ELLINGTON, and ROGER
AGPAWA,

Defendants.

No. 2012 L 009916

Honorable Brigid Mary McGrath

PLAINTIFF'S SECOND MOTION TO COMPEL AND FOR SANCTIONS

Plaintiff DENA LEWIS-BYSTRZYCKI, through her undersigned counsel, respectfully moves pursuant to Illinois Supreme Court Rule 219 for a second order compelling Defendants to comply with various outstanding discovery requests previously served upon Defendants. Plaintiff additionally requests sanctions against Defendants for their failure to comply with this Court's previous Orders. In support of this Motion, Plaintiff states as follows:

Background and Procedural History

Defendants have delayed discovery and the prosecution of Plaintiff's claims in this case. For example, a default judgment was entered against Defendants because they failed to appear and answer the complaint. Defendants' failure resulted in the court granting Plaintiff's attorneys' fees and costs; the court found that the "Defendants' failure to appear and respond was *reprehensible under the circumstances. . . .*" (Ex. 1, 4/1/13 Order (emphasis

added.) Plaintiff's original complaint was filed on August 31, 2012; however, due to Defendants' delay, Defendants did not file its initial answer until November 18, 2013.

Defendants have also caused delay in discovery in this case, which includes but is not limited to: Defendants' answers to Plaintiff's written discovery were due on January 3, 2014; however, Defendants did not answer until late March and early April 2015. Defendants' belatedly produced documents that were in their possession and control for several years, and as a result, Plaintiff had to file a motion to compel the re-appearance of Defendant Pycz and Deputy Chief Kopec for their depositions, which this Court granted. These are just a few examples of many more.

This is Plaintiff's second motion to compel, and Plaintiff's second motion for sanctions.

I. Discovery Responses (Interrogatory and Production Request)

A. Plaintiff's First Set of Interrogatory and Production Requests

1. Plaintiff served her First Set of Interrogatories and Production Request on Defendant Country Club Hills ("CCH") on December 16, 2013. (*See* Ex. 2, Pl.'s 1st Interrog. To Def CCH; Ex. 3, Pl's 1st Doc. Req. to CCH.)

2. On March 31, 2015, CCH responded in part to those discovery requests. Besides taking over 15 months to respond, many of CCH's responses were deficient, including the frivolous objection that no time period was sought. (*See* Ex. 4, Def.'s Ans. to Pl.'s 1st Interrog.; Ex. 5, Def.'s Responses to Pl. 1st Prod. Reqs.)

3. Paragraph 16 of the Instructions to Plaintiff's Interrogatories specifically provides a timeframe of 1998 to the present, unless otherwise specified. (*See* Ex. 2, ¶ 16.)

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Paragraph 17 of the Instructions to Plaintiff's First Request for Production specifies a time period of 1998 to the present. (See Ex. 3, ¶ 17.) Plaintiff thus requests this Court compel CCH to answer Plaintiff's discovery with this time period, unless otherwise specified.

4. Defendants' failure to produce other complaints of harassment, discrimination, and retaliation: Plaintiff's requested information relative to all complaints of harassment, discrimination and retaliation. CCH did not answer those requests, specifically Interrogatory numbers 8 and 12, and Production Requests 11, 13, and 16 except to refer to Plaintiff's cause of action. (See Ex. 4, Def.'s Ans. to Pl.'s 1st Interrog.; Ex. 5, Def.'s Responses to Pl. 1st Prod. Reqs.) During the course of discovery, Plaintiff has found evidence of other complaints which CCH did not disclose. Plaintiff thus requests this Court compel CCH to answer those specific requests: Interrogatory Nos. 8, 12, and Production Request Nos. 11, 13, 16.

5. Defendants' failure to produce a privilege log: Plaintiff's First Set of Interrogatories and Production Request directed CCH to provide certain information relating to claims of privilege. (See Ex. 2, Pl.'s 1st Interrog. to Def CCH ¶ 15; Ex. 3, Pl's 1st Doc. Req. to CCH ¶ 16.) Despite Defendant's objections to Plaintiff's discovery requests based upon privilege, Defendant has failed to comply with Plaintiff's requests regarding the privileges claimed and failed to comply with their obligations to produce a privilege log when making objections based on privilege. CCH specifically claimed privilege to Interrogatory Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17. CCH also claimed privilege in its Responses to Production Requests 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 28, 29, and 31.

6. As to Document Request Nos. 21 (exhibits at trial), 22 (documents relied on to support Defendant's denials), 29 (documents relied on to support Defendant's denials), and 31 (documents defendant received in response to any subpoena), Defendant's only objection is based on attorney client and work product privileges. If in fact there really is a legitimate privilege, then Defendant should be required to produce a privilege log.¹

7. Additionally, pursuant to SCR 201(n), when documents or information are withheld from disclosure or discovery on a claim of privilege, such a claim must be made expressly and supported by a description of the nature of the documents, communication or things not produced or disclosed. The exact privilege that is being claimed must be stated, *i.e.*, a privilege log should be created. Plaintiff requests Defendants be ordered to comply with Plaintiff's Instructions 15 and 16 of her discovery requests as well as comply with SCR 201(n) for all claims (as identified above) of privilege.

8. CCH provided no responses over their objections to Production Request Nos. 2 (payroll reports of Plaintiff), 9 (relating to Plaintiff's benefits), 12 (relating to Defendants' decision to discipline Plaintiff), 18 (relating to Defendant's policy on document retention), and 32 (documents requested by Defendant to Plaintiff). These production requests must be answered pursuant to the time frame requested. There is no valid basis for Defendant's objections.

¹ Plaintiff does not agree that there is any legitimate basis for a privilege assertion on these requests. As such, Defendants should be barred from presenting any evidence responsive to these requests, since they did not answer them in substance.

9. CCH must supplement their response to Interrogatory 9, and Production requests: 4, 5, 6, 8, 10, 15, 16, 17, 20, 21, 22, 24, 25, 26, 28, 30, 33, as they are incomplete and have not been supplemented since they were original answered in March 2015.

10. Defendants should also be required to produce an affidavit of completeness, which has not been provided.

B. Plaintiff's Second Request for Production

10. On July 2, 2015, Plaintiff served her Second Production Request. (*See* Ex. 5, Pl.'s Second Req. to Produce.)

11. CCH objected to the requests and a hearing was held on Plaintiff's Motion to Compel. On August 27, 2015, this Court ordered CCH to produce and make available for inspection within seven (7) days the complete personnel files of all employees of the Fire Department. (Ex. 6, 8/27/15 Order.) On September 16, 2015, the Court granted Plaintiff's Motion to Compel and ordered completion of compliance by September 18, 2105. (Ex. 7, 9/16/15 Order.)

12. Defendants have failed to produce personnel files ordered by the Court: Plaintiff has since discovered through depositions, other witnesses, and documents the names of additional employees whose files Defendant did not produced as required by the Court's order. For example, Plaintiff has discovered several other individuals for which no personnel file was produced (despite the Court order requiring such production): Lt. Todd Hamm, Vickie Specht, Darlene Gannon, Connie Youpel, Leonard Christensen, Bill Malesby, Michael Mulvill, Daniel Nester, Adebayo Osunsan, Collen Palermo, and Brian Younker.

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13. Defendants should be required to also produce rosters: Defendant should also be required to produce rosters of all employees of Defendant CCH FD from 1998 to the present so that Plaintiff can compare the files it received to those rosters to determine other files that may be missing. Plaintiff's document request No. 1, 2, and 3 also requested Defendant produce all rosters and schedules from 1998 to the present, which Defendant has not produced. (Ex. 8, Pl.'s Third Req. to Produce.)

14. Defendant should not only be required to produce these missing personnel files and the rosters, but should be sanctioned for violating the Court's August 27, 2015 and September 18, 2015 orders, as discussed in more detail in Section VI below.

C. Plaintiff's Third Request for Production

15. On November 12, 2015, Plaintiff served her Third Request for Production on Defendant CCH. (Ex. 8, Pl.'s Third Req. to Produce.) CCH has not responded to these requests.

16. On January 29, 2016, Plaintiff's counsel sent a 201(k) letter to Defense Counsel requesting compliance with Plaintiff's Third Production Requests. (Ex. 9, 1/29/16 Kurtz Correspondence.) Defendant did not respond to this correspondence.

D. Plaintiff's Fourth Request for Production

17. On February 8, 2016, Plaintiff served her Forth Request for Production on Defendant. (Ex. 10, Pl.'s Fourth Req. to Produce.) Defendant has not responded to that Request.

18. Plaintiff's counsel attempted to resolve Defendant's failure to comply pursuant to Rule 201k, including sending a copy of this motion and emails, and Defendant still has not comply.

II. Computer Inspection / Forensic Imagine

19. Plaintiff's First Request for Production No. 25 requested all electronic data that contain information responsive to [those] requests or Answers to Interrogatories. (*See* Ex. 3, Pl.'s First Req. for Production.) Defendant objected and provided no further response. (*See* Ex. 4, Def.'s Resp. to Pl.'s First Req. for Production.)

20. On July 21, 2015, Plaintiff's counsel, Kurtz requested "emails to and from the Chief and other supervisors regarding the promotion." (Ex. 11, 7/21/15 Kurtz Correspondence.) On August 6, 2015, Plaintiff's counsel requested, "the electronic native formats of all of the documents that were created on the computer. . . ." (Ex. 12, 8/6/15 Kurtz Correspondence.)

21. Plaintiff was forced to file a Motion to Compel Production of emails responsive to discovery requests. After a hearing on the Motion, this Court granted Plaintiff's Motion, stating in part: "Plaintiff to provide defendants with page/line of dep showing emails not searched, and inspection as to electronic documents/emails continued to 11/2/15." (Ex. 7, 9/16/15 Order.)

22. Plaintiff complied with the Court's September 15, 2015 Order, and at the continued hearing on November 2, 2015, this Court entered an Order stating, in part: "Defendant's counsel is to ensure and report that electronic documents/emails have been

searched by December 1, 2015 and produce any and all emails by Dec. 1, 2015 that have not yet been produced.” (Ex. 13, 11/2/15 Order.)

23. On November 12, 2015, Plaintiff’s counsel provided to Defense counsel a list of search terms for emails and electronic records. (Ex. 14, 11/12/15 Email.)

24. On January 26, 2016, Plaintiff’s counsel sent a 201(k) letter to Defense counsel requesting compliance with Plaintiff’s email search terms. (Ex. 9, 1/29/16 Email.) To date, defense counsel has failed to respond to both this Court’s order and Kurtz’s communications.

25. As a consequence of Defendant’s failure to comply with this Court’s orders and Plaintiff’s discovery requests, Defendant should be required to pay for the forensic examination of Defendant’s email server.

III. Documents and Information Regarding Defendant’s “Investigation” Into Improper Use of Television, Computers, and Watching of Pornography

26. The September 16, 2015 Order also provided that “Def’s [to] report on status of investigation of computer and cable use once final and produce investigation to Plaintiff’s counsel on 11/2/15.” (Ex. 7, 9/16/15 Order.)

27. The November 2, 2015 order further provided “Defendants counsel will produce investigation of cable and computer use results and related documents by November 11, 2015 subject to any objections on privilege assertions. (Ex. 13, 11/2/15 Order.)

28. On November 12, 2015, Defendant’s counsel produced limited documents related to Defendant’s investigation of the pornography that occurred in the CCH firehouses. The investigation was conducted by “MJW Consulting.” Defendant eventually

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identified Marion Williams as the investigator. Plaintiff noticed Williams' deposition. Defendant's counsel responded that Williams is not an employee of CCH, and therefore, they would not produce her for deposition. (Ex. 15, 2/16/16 Boddicker Email). Upon speaking with Williams to obtain her address for a subpoena, Williams' advised Karen Moreno, Plaintiff's counsel's paralegal, that she took notes during her investigation from which she prepared her investigative report. Williams advised Moreno that those notes ("written in blue ink") were turned over to CCH. (Ex. 16, Moreno Affidavit.) The investigation report also references the investigator's notes "attached." (See Ex. 17, Document CCH 8400.)

29. Despite the Court's order that Defendant produce the investigation of cable and computer use results *and related documents* by November 11, 2015 (Ex. 13, 11/2/15 Order (emphasis added)), Defendant again did not comply with this Court's order. Thus, its failure to produce these documents is yet another violation of this Court's Order. As such, Defendant should be sanctioned for failure to comply with this Court's orders, and in this instance, Defendant should be barred from presenting any evidence of the alleged investigation of pornography and television usage, which is discussed in more detail below.

IV. Depositions

30. On January 6, 2015, Plaintiff first noticed a Rule 206(a)(1) deposition. (Ex. 18, NOD.) Since that first notice, Plaintiff sent notices for the 206(a)(1) deposition on the following dates: July 1, 7, 2016; August 4, 20, 2016; Sept. 1, 2016; January 29, 2016; and February 8, 2016. Counsel had 201(k) conferences on August 25, 27, September 8, January 29

and February 16, 2016. Defendant has yet to produce a Rule 206 designee responsive to Plaintiff's notice of deposition.

31. Defense counsel's refusal to produce someone in response to the Rule 206(a)(1) notice should result in sanctions in the form of barring their affirmative defenses and other issues that relate to those topics if they do not produce this witness(es) within seven days of the date of this Motion. (*See* Ill. S. Ct. Rule 219, discussed in more detail below.)

32. On September 1, 2015, in addition to the 206(a)(1) deposition, Plaintiff sent an Amended Notice of Deposition for Carl Pycz, pursuant to court order. On January 29, 2016, Plaintiff's counsel sent a 201(k) letter to counsel for CCH requesting follow-up on deposing: Carl Pycz, 206 deposition, and Steve Pycz. (Ex. 19, 1/29/16 Kurtz Email.) To date, no response has been provided.²

V. Other Outstanding Discover Issues

33. On July 21, 2015, Plaintiff's counsel requested documents mentioned on Chief Ellington's deposition. (Ex. 11, 7/21/15 Kurtz Email.) Specifically, counsel requested log book from 11/2011, log book from 1/2012, emails to and from the Chief and other supervisors regarding the promotion and Chief's personal files on employees. To date, Defense counsel has not complied with this request.

² In addition, Defendant's expert Dr. Mosk's deposition was confirmed for April 5, 2016. Defendant's counsel cancelled the deposition the same day (April 5, 2016), stating that Dr. Mosk had a family emergency. Defendant also tried to cancel Sgt. McAuliff's deposition, but then called back to ask if the deposition could still proceed on April 6, 2016 as Sgt. McAuliff preferred for the deposition to go forward. Defendants' counsel has yet to confirm the other depositions that have been noticed in order to comply with the Court's order to complete depositions by April 22, 2016.

VI. Violations of the Court's Orders And Bases for Sanctions

34. Illinois SCR 219(c) provides for sanctions for failure to comply with Orders or Rules. To determine whether noncompliance with discovery is unreasonable, the standard is whether the party's conduct is characterized by a deliberate and pronounced disregard for the discovery rules and the Court. Ill. S. Ct. R. 219(c) (eff. July 1, 2002); *Stringer vs. Packaging Corp. Of America*, 815 N.E.2d 476 (4th Dist. 2004).

35. Rule 219(c) states in relevant part:

c) Failure to Comply with Order or Rules. If a party, or any person at the instance of or in collusion with a party, unreasonably fails to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

(i) That further proceedings be stayed until the order or rule is complied with;

(ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

(iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;

(iv) That a witness be barred from testifying concerning that issue;

(v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice;

(vi) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue; or

(vii) That in cases where a money judgment is entered against a party subject to sanctions under this subparagraph, order the offending party to pay

interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party's conduct.

In lieu of or in addition to the foregoing, the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is wilful, a monetary penalty. When appropriate, the court may, by contempt proceedings, compel obedience by any party or person to any subpoena issued or order entered under these rules. Notwithstanding the entry of a judgment or an order of dismissal, whether voluntary or involuntary, the trial court shall retain jurisdiction to enforce, on its own motion or on the motion of any party, any order imposing monetary sanctions, including such orders as may be entered on motions which were pending hereunder prior to the filing of a notice or motion seeking a judgment or order of dismissal.

Where a sanction is imposed under this paragraph (c), the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

Ill. S. Ct. R. 219(c).

36. As outlined above, Defendant has continuously ignored this Court's numerous Orders, has refused reasonable attempts to resolve discovery disputes, and has provided inadequate discovery responses.

37. Plaintiff's request to bar evidence of Defendant's investigation of pornography is a reasonable sanction considering the numerous discovery violations CCH has committed. See, *In re B.C.*, 740 N.E.2d 41, 45 (1st Dist. 2000) (appellate court upheld trial court's order barring party from presenting any affirmative evidence based on numerous discovery violations); *Nedzveckas v. Fung*, 872 N.E.2d 431, 436 (1st Dist. 2007) ("By violating three separate orders setting the deadlines for disclosing witnesses, and then untimely serving the defendant with an insufficient witness disclosure, the plaintiff demonstrated a

deliberate and unwarranted disregard of the court's authority. Based upon the record before us, we cannot conclude that the circuit court abused its discretion in entering the June 10, 2005, order barring the plaintiff from calling certain witnesses at trial or denying the plaintiff's motion to vacate that order."); *Santorini vs. Cab Corp. v. Banco Popular North America*, 999 N.E.2d 46 (1st Dist. 2013)(trial court acted within its discretion by barring buyer from relying on financial documents that were not timely produced in response to discovery requests to prove its claim for lost profits and by barring buyer's witness from testifying as to contents of documents to establish lost profits, as a sanction for buyer's willful violation of deadlines and discovery rules; buyer refused to produce requested financial documents supporting its lost profits claim for nearly two years despite multiple discovery requests and trial court's issuance of motion to compel production of such information, and if witness had been permitted to testify as to lost profits, it would have enabled buyer to circumvent the discovery sanction order and prejudiced seller's ability to cross examine witness); *Rosen vs. Larkin Center, Inc.*, 982 N.E.2d 944, 951 (2nd Dist. 2012)("the trial court in this case acted within its discretion by barring plaintiff as a witness where he willfully violated deadlines and discovery rules imposed both by the court and by supreme court rules over the course of four years").

38. Plaintiff also requests this Court order Defendant to pay for a forensic computer examination to search their emails. This Court's September 16, 2015 and November 2, 2015 Orders both required CCH to provide emails, which they continue to defy. (See Ex. 7, 9/16/15 Order; Ex. 13, 11/2/15 Order.)

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39. Plaintiff requests this Court order CCH to produce its' Rule 206(a)(1) witness pursuant to Plaintiff's eight (at least) deposition notices, or bar CCH from asserting any affirmative matter in defense to Plaintiff's cause of action on the issues listed in the notice.

40. Finally, Plaintiff requests CCH produce rosters of all employees of CCH FD from 1998 to present in order for Plaintiff to determine all missing employee personnel files that CCH did not produce, despite being required to do so by the Court.

41. The Court should order Defendant to comply with its prior orders to produce the personnel files of current and former employees of the CCH Fire Department within 7 days.

42. In one last attempt to comply with 201(k), Plaintiff's Counsel sent Defendants' counsel a draft of this Motion on March 31, 2016, requesting he confirm within 3 business days (by April 5, 2016) that he will comply within 7 days, to avoid Plaintiff's filing of this Motion. Defendant's counsel contacted Plaintiff's counsel to cancel depositions previously noticed, and in passing advised Plaintiff's counsel that he was reviewing the motion, with no other suggested course of action.

WHEREFORE, for the reasons states above, Plaintiff respectfully requests this Court:

- A. Order Defendant to produce the missing personnel files with in 7 days;
- B. Order Defendant to produce all rosters of employees from 1998 to the present so that Plaintiff can ensure compliance with the Court's prior orders;
- C. Order a forensic examination of Defendants' email server based on Plaintiff's search terms at Defendants' expense;
- D. Order a forensic examination at Defendants' expense to analyze the computers for pornographic material;

- E. Order Defendant to produce all documents and answer Plaintiff's interrogatory requests (without objection) of all other complaints of sexual harassment, discrimination, and/or retaliation;
- F. Order Defendant to produce a privilege log;
- G. Order Defendant to produce an affidavit of completeness and an affidavit that it has complied with the Court's orders upon compliance;
- H. Order Defendant to supplement their discovery answers within 7 days for the time period from 1998 to the present;
- I. Order Defendant to answer without objection (as objections are waived), Plaintiff's Third Request for Production of Documents;
- J. Order Defendant to answer without objection (as objections are waived), Plaintiff's Fourth Request for Production of Documents;
- K. Order Defendant to comply with this Court's 11/2/15 Order to produce the investigation of cable and computer use results *and related documents*, or otherwise bar Defendant's defenses and evidence of any investigation;
- L. Order Defendant to produce a Rule 206 witness within 7 days, or otherwise bar Defendants from presenting any evidence in response to those topics noticed;
- M. Order Defendant to produce the log book from 11/2011, log book from 1/2012, emails to and from the Chief; and
- N. Grant Plaintiff such other relief that is just and equitable.

Respectfully Submitted,

DENA LEWIS-BYSTRZYCKI

s/Dana L. Kurtz

One of Plaintiff's Attorneys

Dana L. Kurtz, Esq. (6256245)
KURTZ LAW OFFICES, LTD.
32 Blaine Street
Hinsdale, Illinois 60521
Phone: 630.323.9444
Facsimile: 630.604.9444
E-mail: dkurtz@kurtzlaw.us

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFF'S MOTION TO COMPEL AND FOR SANCTIONS** was served upon the parties designated below on April 6, 2016, as follows:

By Electronic Service Only

Daniel Boddicker
Keefe, Campbell, Biery & Associates, LLC
118 North Clinton Street, Suite 300
Chicago, Illinois 60661
Email: dboddicker@keefe-law.com

s/Dana L. Kurtz

Dana L. Kurtz

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EXHIBIT 12

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Derafeur's Bystrophy

v.

NO. 2012 L 009116

Country Club Hills, et al

ORDER

This matter coming to be heard by Plaintiff's Motion to Compel and sanctions and other oral motions, it is here by ordered:

within 14 days, by May 12, 2016

(1) Defendants will comply with 99 4, 5, 8, 9, 11, 12, 13, 15, 17, 28 (produce all documents re: investigation of pornography) 33, and to the extent documents do not exist provide declaration(s), as stated on the record (see transcript);

(2) Pl's motion as to computer inspection is entered and continued; As counsel, IT, IT's Counsel, and forensic expert will confer to call next 7 days, by April 29, 2016 and parties will discuss search terms;

(3) as to 2de deposition, the parties will confer by April 29, 2016

(4) as to IT's request for forensic inspection computers re: pornography, Defs to respond to motion by April 29, 2016, Pl's reply by May 12, 2016, courtesy copies by May 9, 2016 @ 9:45am

(5) hearing on the remaining items in motion on May 20, 2016

(6) Defs' oral motion to compel IT's Dep, granted, limited to 2 hours;

(7) Defs' motion to quash joint granted without prejudice as Defs to produce per motion to compel 9/4.

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Firm Kurtz Law Offices
Attn. for: Plaintiff
Address: 325 W. Lake &
City/Zip: Hinsdale IL 60521
Telephone: 630-323-9444
Firm No.: 43132

FILE STAMP ONLY
ENTERED
JUDGE BRIGID MARY McGRATH-1800
APR 22 2016 ↑
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ENTERED:
Judge Brigid Mary McGrath

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EXHIBIT 13

Lewis Bystrzycki

v.

NO. 2012 L 9916

City of Country Club Hills, et al

ORDER

This matter coming to be heard on T's Continued Motion to Compel of Dr. Sanchez, T's motion to strike, and Status, it is hereby ordered:

- (1) T's and Motion to Compel and Sanchez entered and continued for hearing on July 29, 2016 @ 9:45 on all issues and inspection of computers for pornography.
- (2) Defendants to answer questions from forensic examiner within 14 days, but July 8, 2016;
- (3) Defendants to provide court's copy of T's 3rd Day of Dep on July 25, 2016 @ 9:00 am Clerk's Status.
- (4) Valda Washington to appear for her deposition on July 8, 2016 @ 11:00 am at ~~the~~ office of As counsel. or court may initiate proceedings for non-compliance.
- (5) T's motion to Bar As' economic expert is continued for hearing on July 29, 2016 @ 9:45.

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Firm: Kurtz Law Offices
Attn. for: Plaintiff
Address: 3232 Bluff St
City/Zip: Hinsdale, IL 60521
Telephone: 630.323.9444
Firm No.: 43132

FILE STAMP ONLY

ENTERED
JUDGE BRIGID MARY McGRATH-1800

JUN 24 2016

DEBORAH BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ENTERED:
Judge Brigid Mary McGrath

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EXHIBIT 14

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

CITY OF COUNTRY CLUB HILLS, CARL
PYCZ, JOSEPH ELLINGTON, and ROGER
AGPAWA,

Defendants.

No. 2012 L 009916

Honorable Brigid Mary McGrath

**PLAINTIFF'S THIRD MOTION FOR SANCTIONS PURSUANT TO RULE 219
BASED ON DEFENDANTS' REPEATED VIOLATIONS OF THIS COURT'S ORDERS,
MOST RECENTLY THIS COURT'S ORDER OF JUNE 24, 2016**

Plaintiff, through her undersigned counsel, respectfully moves this Court for sanctions pursuant to Illinois Supreme Court Rule 219 against Defendants for their blatant and repeated failure to comply with this Court's orders, and again most recently this Court's June 24, 2016 Order, and and in support states:

1. Illinois SCR 219(c) provides for sanctions for failure to comply with Orders or

Rules. Rule 219(c) states in relevant part:

c) Failure to Comply with Order or Rules. If a party, or any person at the instance of or in collusion with a party, unreasonably fails to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

- (i) That further proceedings be stayed until the order or rule is complied with;
- (ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

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(iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;

(iv) That a witness be barred from testifying concerning that issue;

(v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice;

(vi) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue; or

(vii) That in cases where a money judgment is entered against a party subject to sanctions under this subparagraph, order the offending party to pay interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party's conduct.

In lieu of or in addition to the foregoing, the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is wilful, a monetary penalty. When appropriate, the court may, by contempt proceedings, compel obedience by any party or person to any subpoena issued or order entered under these rules. Notwithstanding the entry of a judgment or an order of dismissal, whether voluntary or involuntary, the trial court shall retain jurisdiction to enforce, on its own motion or on the motion of any party, any order imposing monetary sanctions, including such orders as may be entered on motions which were pending hereunder prior to the filing of a notice or motion seeking a judgment or order of dismissal.

Where a sanction is imposed under this paragraph (c), the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

Ill. S. Ct. R. 219(c).

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2. As this Court is fully aware, Defendants have continuously ignored this Court's numerous Orders, which has substantially prejudiced Plaintiff and increased the cost of this litigation and Plaintiff's attorneys' fees and expenses.

3. Defendants and their counsel have violated and repeatedly ignored numerous Orders by this Court (*e.g.*, Order entering default for Defendants' failure to appear and answer; Order granting Plaintiffs' attorneys' fees and vacating the default; *see also* Plaintiff's motion for sanction and Plaintiff's second motion to compel and for sanctions for the numerous violations of this Court's discovery orders; as well as the orders cited herein).

4. Defendants' failure to comply with this Court's orders has not stopped despite the Court admonishing Defendants repeatedly.

5. Most recently on June 24, 2016, this Court entered an order requiring Defendants' to answer the questions from Plaintiff's forensic expert on the manner in which their electronic records (ESI) are kept and maintained *by July 8, 2016*. (Exhibit 1, 6/24/16 Order; *see also* Exhibit 2, Kurtz Email with questions from forensic expert attached.)

6. As of the date of this filing, Defendants have failed to comply with this Court's June 24, 2016 Order, and have not answered the forensic expert's questions or so much as responded that they needed more time. They have simply ignored this Court's order (like the many other orders that have been ignored by Defendants and their counsel).

7. The answers to the questions of the forensic expert are necessary in order for the expert to establish and complete a forensic protocol for ESI discovery, which this Court ordered in response to Defendants' repeated violations of other discovery orders.

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8. As set forth in Plaintiff's Second Motion to Compel and for Sanctions:
 - a. Plaintiff's First Request for Production No. 25 requested all electronic data that contain information responsive to [those] requests or Answers to Interrogatories. Defendant objected and provided no further response.
 - b. On July 21, 2015, Plaintiff's counsel, Kurtz requested "emails to and from the Chief and other supervisors regarding the promotion."
 - c. On August 6, 2015, Plaintiff's counsel requested, "the electronic native formats of all of the documents that were created on the computer. . . ."
 - d. Plaintiff was forced to file a Motion to Compel Production of emails responsive to discovery requests.
 - e. After a hearing on the Motion, this Court granted Plaintiff's Motion, stating in part: "Plaintiff to provide defendants with page/line of dep showing emails not searched, and inspection as to electronic documents/emails continued to 11/2/15."
 - f. Plaintiff complied with the Court's September 15, 2015 Order, and at the continued hearing on November 2, 2015, this Court entered an Order stating, in part: "Defendant's counsel is to ensure and report that electronic documents/emails have been searched by December 1, 2015 and produce any and all emails by Dec. 1, 2015 that have not yet been produced."
 - g. On November 12, 2015, Plaintiff's counsel provided to Defense counsel a list of search terms for emails and electronic records.

- h. On January 26, 2016, Plaintiff's counsel sent a 201(k) letter to Defense counsel requesting compliance with Plaintiff's email search terms.
- i. As a consequence of Defendant's failure to comply with this Court's orders and Plaintiff's discovery requests, Plaintiff requested that Defendant should be required to pay for the forensic examination of Defendant's email server.

9. On April 22, 2016, this Court granted Plaintiff's Second Motion to Compel and for Sanctions in substantial part and ordered Defendants to confer with their IT person and Plaintiff's counsel and the forensic expert within the next 7 days. Defendants failed to comply, and their IT person was wholly unprepared and could not answer any questions about Defendants' server or how Defendant maintains electronic records or emails.

10. In response, the forensic expert sent a list of questions for Defendant to answer. (*See* Exhibit 2, Kurtz Email and attached questions.)

11. Defendants failed to respond.

12. As a result, Plaintiff again had to address Defendants' non-compliance with this Court's orders with the Court.

13. The Court then ordered Defendants to comply and answer the questions from the Forensic expert by July 8, 2016. (Exhibit 1, 6/24/16 Order; *see also* Exhibit 2, Kurtz Email with questions from forensic expert attached.)

14. Defendants yet again have failed to comply with this Court's orders.

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Sanctions Requested

15. Defendants' repeated failure to comply with this Court's orders shows that it is blatant and that Defendants have no regard for this Court or the orders entered by this Court, that the violations are blatant and intended to increase Plaintiffs' costs and fees in this litigation, and that lesser sanctions will not be sufficient to ensure Defendants' compliance with future orders.

16. Pursuant to Illinois Supreme Court Rule 219, Plaintiff requests that the Court enter sanctions against Defendants for their repeated contempt of this Court's orders, and most recently this Court's order of June 24, 2016, by including but not limited to the following:

- a. Entering a default judgment against Defendants for their countless and repeated violations of this Court's orders, including most recently the order of June 24, 2016 (Ill. S. Ct. Rule 219(v));
- b. Alternatively, barring Defendants from asserting any of their affirmative defenses in this case for their repeated violations (Ill. S. Ct. Rule 219(iii)), as their failure to comply with this Courts orders, and failure to produce and search emails and other ESI has prevented Plaintiff from obtaining evidence that are favorable to her claims;
- c. Giving an adverse inference jury instruction that Defendants repeatedly failed to comply with this Court's orders on ESI discovery, and that the jury should consider this adversely to Defendants' defenses in this case; and

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- d. Award Plaintiff her attorneys' fees and costs in bringing this motion and Plaintiff's other motions to compel and for sanctions (Ill. S. Ct. Rule 219).

This Court is well within its authority to impose the above sanctions pursuant to Illinois Supreme Court Rule 219. *See In re B.C.*, 740 N.E.2d 41, 45 (1st Dist. 2000) (appellate court upheld trial court's order barring party from presenting any affirmative evidence based on numerous discovery violations); *Nedzveckas v. Fung*, 872 N.E.2d 431, 436 (1st Dist. 2007) ("By violating three separate orders setting the deadlines for disclosing witnesses, and then untimely serving the defendant with an insufficient witness disclosure, the plaintiff demonstrated a deliberate and unwarranted disregard of the court's authority. Based upon the record before us, we cannot conclude that the circuit court abused its discretion in entering the June 10, 2005, order barring the plaintiff from calling certain witnesses at trial or denying the plaintiff's motion to vacate that order."); *Santorini vs. Cab Corp. v. Banco Popular North America*, 999 N.E.2d 46 (1st Dist. 2013) (trial court acted within its discretion by barring buyer from relying on financial documents that were not timely produced in response to discovery requests to prove its claim for lost profits and by barring buyer's witness from testifying as to contents of documents to establish lost profits, as a sanction for buyer's willful violation of deadlines and discovery rules; buyer refused to produce requested financial documents supporting its lost profits claim for nearly two years despite multiple discovery requests and trial court's issuance of motion to compel production of such information, and if witness had been permitted to testify as to lost profits, it would have enabled buyer to circumvent the discovery sanction order and prejudiced seller's ability to cross examine witness); *Rosen vs. Larkin Center, Inc.*, 982 N.E.2d 944, 951 (2nd Dist.

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2012) (“the trial court in this case acted within its discretion by barring plaintiff as a witness where he willfully violated deadlines and discovery rules imposed both by the court and by supreme court rules over the course of four years”).

17. Where a sanction is imposed under Rule 219(c), the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

18. The only way that this Court will get Defendants’ attention that the Orders of this Court and the rules of civil procedure must be followed is to issue severe sanctions based on the repeated and blatant violations of this Court’s orders.

19. Plaintiff has been substantially prejudiced by Defendants obfuscation of this Court’s orders, including being prevented from discovery evidence that very well would be favorable to her ability to prove her claims in front of the jury.

WHEREFORE, for the reasons states above, Plaintiff respectfully requests this Court sanction Defendants by entering the following order pursuant to and accordance with Illinois Supreme Court Rule 219:

- A. Entering a default judgment against Defendants for their countless and repeated violations of this Court’s orders, including most recently the order of June 24, 2016 (Ill. S. Ct. Rule 219(v));
- B. Alternatively, barring Defendants from asserting any of their affirmative defenses in this case for their repeated violations (Ill. S. Ct. Rule 219(iii)), as their failure to comply with this Courts orders, and failure to produce and

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search emails and other ESI has prevented Plaintiff from obtaining evidence that are favorable to her claims;

- C. Giving an adverse inference jury instruction that Defendants repeatedly failed to comply with this Court's orders on ESI discovery, and that the jury should consider this adversely to Defendants' defenses in this case; and
- D. Award Plaintiff her attorneys' fees and costs in bringing this motion and Plaintiff's other motions to compel and for sanctions (Ill. S. Ct. Rule 219).
- E. Granting Plaintiff such other relief that is just and equitable.

Respectfully Submitted,

DENA LEWIS-BYSTRZYCKI

s/Dana L. Kurtz

One of Plaintiff's Attorneys

Dana L. Kurtz, Esq. (6256245)
KURTZ LAW OFFICES, LTD.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFF'S THIRD MOTION FOR SANCTIONS PURSUANT TO RULE 219 BASED ON DEFENDANTS REPEATED VIOLATIONS OF THIS COURT'S ORDERS, MOST RECENTLY THIS COURT'S ORDER OF JUNE 24, 2016** was served via the Court's ECF system and via email upon the parties designated below on July 19, 2016:

By Electronic Service Only

Daniel Boddicker
Keefe, Campbell, Biery & Associates, LLC
118 North Clinton Street, Suite 300
Chicago, Illinois 60661
Email: dboddicker@keefe-law.com

s/Dana L. Kurtz

Dana L. Kurtz

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EXHIBIT 1

Lewis Bystrzycki

v.

NO. 2012 L 9916

City of Country Club Hills, et al

ORDER

This matter coming to be heard on T's Continued Motion to Compel Depositions, T's motion to strike, and Status, it is hereby ordered:

- (1) T's and Motion to Compel and Sanctions entered and continued for hearing on July 29, 2016 @ 9:45 on all issues and inspection of computers for penography.
- (2) Defendants to answer questions from forensic examiner within 14 days, but July 8, 2016;
- (3) Defendants to provide court's copy of T's 3rd Day of Dep on July 25, 2016 @ 9:00 am Clerk's Status.
- (4) Valda Washington to appear for her deposition on July 8, 2016 @ 11:00 am at ~~the~~ office of As Counsel. or court may initiate proceedings for non-compliance.
- (5) T's motion to Bar As' economic expert is continued for hearing on July 29, 2016 @ 9:45.

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Firm: Kurtz Law Offices
Attn. for: Plaintiff
Address: 3232 Bluff St
City/Zip: Hinsdale, IL 60521
Telephone: 630.323.9444
Firm No.: 43132

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JUDGE BRIGID MARY McGRATH-1800	
JUN 24 2016	
DORIS FI BROWN CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL DEPUTY CLERK	

ENTERED:
Judge Brigid Mary McGrath

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EXHIBIT 2

Karen L. Moreno

From: Dana Kurtz
Sent: Friday, June 03, 2016 1:47 PM
To: Daniel Boddicker
Cc: Elena Vieyra (evieyra@keefe-law.com); Karen L. Moreno
Subject: FW: Lewis-Bystrzycki v. City of Country Club Hills, et al - questionf for ESI
Attachments: CountryClubHillsFDQuestions.pdf

Importance: High

Tracking:	Recipient	Read
	Daniel Boddicker	
	Elena Vieyra (evieyra@keefe-law.com)	
	Karen L. Moreno	Read: 6/3/2016 1:48 PM

Dan, please see email below. I have not received a response. Please provide a response by no later than Tuesday, June 7, 2016 before close of business. I do not want to have to file a motion.

Thanks.

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L. Kurtz, Esq.



KURTZ LAW OFFICES, LTD

www.kurtzlaw.us
32 Blaine Street, Hinsdale, Illinois 60521
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E-mail: dkurtz@kurtzlaw.us

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From: Dana Kurtz
Sent: Friday, May 20, 2016 8:50 AM
To: 'Daniel Boddicker'
Subject: Lewis-Bystrzycki v. City of Country Club Hills, et al - questionf for ESI

Dan, attached are the questions that we need answered for the ESI/forensic search of emails/documents. Please provide answers within the next 7 days if not before. Thank you.

Dana

Dana L. Kurtz, Esq.



KURTZ LAW OFFICES, LTD

www.kurtzlaw.us

32 Blaine Street, Hinsdale, Illinois 60521

Office: 630.323.9444

Facsimile: 630.604.9444

E-mail: dkurtz@kurtzlaw.us

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It is understood that **Comcast Email** was utilized by CCHFD.

Who managed it?

What is the date range when this was utilized?

Was this a Comcast business or personal account?

What was the domain?

How many accounts existed and what were the names/emails for the users?

Is the data still available?

It is understood that **Gmail** was utilized by CCHFD.

Who managed it?

What is the date range when this was utilized?

Was this personal Gmail or Google Apps with a registered domain?

What was the domain?

How many accounts existed and what were the names/emails for the users?

Is the data still available?

It is understood that **two HP servers** were utilized by CCHFD.

Who managed them?

What is the date range when these were utilized?

What is the make and model of each server?

How many accounts are there?

Is the data still available?

It is understood that a **Compaq File and Print Server** was utilized by CCHFD.

Who managed it?

What is the date range when this was utilized?

What is the make and model?

Is the data still available?

For the **computers/workstations** utilized by CCHFD

Provide a list of these computers and who used them

Are these computers still available?

Do backups exist?

What is the **current email service** CCHFD utilizes?

Who manages it?

Since when has it been utilized?

What is the domain?

When switching between email services, was the email from the previous service migrated or was it a fresh start?

Are there backups of this data anywhere?

What are the make, model, and hard drive size of the workstations being imaged?

What are the make and model of the mobile devices being imaged?

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EXHIBIT 15

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Serajewski, Bystrezycki

v.

Chry
Cortez Club Hills, et al

No. 2012 L 9914

ORDER

This matter coming before the court on several motions, it is hereby ordered:

- (1) Plaintiff's Second Motion to Compel as to the forensic imaging of certain computers is granted as stated on the record (see transcript);
- (2) Plaintiff's Motion to Strike Defs' economic expert is denied;
- (3) Plaintiff's 3rd Motion for Sanctions is denied without prejudice for the reasons stated on the record;
- (4) Plaintiff to provide Defs with protocols for ESI/forensic imaging of laptops and computer ESI documents;
- (5) Status set for September 26, 2016 @ 9:45am

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Atty. No.: 43132
 Name: Kurtz Law Offices
 Atty. for: Plaintiff
 Address: 32 Bluff St
 City/State/zip: Hinsdale IL 60521
 Telephone: 630.323.9444

ENTERED:

Dated:

ENTERED
 JUDGE BRIGID MARY McGRATH - 1800
 AUG 31 2016
 Judge's No. _____
 CLERK OF THE CIRCUIT COURT
 OF COOK COUNTY, IL 1800

EXHIBIT 16

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<p style="text-align: right;">1</p> <p>STATE OF ILLINOIS)) SS: COUNTY OF C O O K)) IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS) COUNTY DEPARTMENT-LAW DIVISION</p> <p>DENA LEWIS-BYSTRZYCKI,)) Plaintiff,)) vs.) No. 2012 L 009916</p> <p>CITY OF COUNTRY CLUB HILLS,) a municipal corporation,) and CARL PYCZ, JOSEPH) ELLINGTON and ROGER AGPAWA,) in their individual capacity,)) Defendants.)</p> <p>REPORT OF PROCEEDINGS had at the hearing in the above-entitled cause before the HONORABLE BRIGID MARY McGRATH, Judge of said court, on Friday, the 31st day of August, A.D., 2016 at the Richard J. Daley Center, Room 1907, 50 West Washington Street, Chicago, Illinois, at approximately 9:30 a.m.</p>	<p style="text-align: right;">3</p> <p>1 THE CLERK: Lewis vs. Country Club Hills. 2 MS. KURTZ: Good morning, your Honor. Dana 3 Kurtz for the Plaintiff. 4 MR. BODDICKER: Good morning, Judge. Daniel 5 Boddicker for the defendants. 6 THE COURT: Thank you both for your patience. 7 Of course, after you left that day I found it. I had it 8 on the chair with stickers on it, but it gave me a chance 9 to look at everything again. 10 MS. KURTZ: And, your Honor, the defendants did 11 file a motion with respect to the deposition of Velda 12 Washington. I don't know if you want to deal with that 13 first. She is in court and she doesn't need to be here 14 for everything else. 15 THE COURT: Let's deal with that. 16 MR. BODDICKER: Judge, it's a petition for rule 17 to show cause. 18 THE COURT: Okay. So you noticed her for 19 deposition and she didn't show up. 20 MR. BODDICKER: Several times, judge. 21 THE COURT: What is going on? These are court 22 orders. 23 MS. WASHINGTON: Yes, ma'am. On July 8th I was 24 subpoenaed to come to court. I got the time confused. I</p>
<p style="text-align: right;">2</p> <p>1 APPEARANCES: 2 KURTZ LAW OFFICES, LTD. 3 BY: MS. DANA L. KURTZ 4 32 Blaine Street 5 Hinsdale, Illinois 60521 6 (630) 323-9444 7 appeared for the Plaintiff; 8 KEEFE, CAMPBELL, BIERY & ASSOCIATES, LLC 9 BY: MR. DANIEL J. BODDICKER 10 118 North Clinton, Suite 300 11 Chicago, Illinois 60661 12 (312) 756-3721 13 appeared for the Defendants. 14 15 16 17 18 19 20 21 22 23 24</p>	<p style="text-align: right;">4</p> <p>1 thought it was for 2:00 as opposed to like 10:00. 2 Mr. Boddicker then called me and said are you coming. I 3 live in Oak Forest. We were coming downtown. He said 4 can you get here in an hour. I said I can't, I just kind 5 of got confused on the time. 6 He rescheduled for July 14th in Miss 7 Kurtz's office. I went there, I sat there for 8 deposition. He insisted on a video dep. I said I did 9 not agree with that and he decided just to cancel it. 10 So I have responded, your Honor. 11 THE COURT: And why are you objecting to a 12 video dep? 13 MS. WASHINGTON: Your Honor, because I was 14 released from the City of Country Club Hills. I was 15 suing the City of Country Club Hills, an EEOC claim for 16 discrimination, a wage claim because they did not pay me 17 monies that they owed me after the case. 18 They ruined my reputation in the City of 19 -- in south suburban Cook County with other black mayors 20 and managers where I can't get employment. I don't want 21 a video dep because it is permanent and I believe that 22 they are trying to damage my reputation. 23 THE COURT: Now, is that case still pending? 24 Has it been settled?</p>

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1 MS. WASHINGTON: Uh, it is still --
2 THE COURT: Still in the courts?
3 MS. WASHINGTON: Yes.
4 MR. BODDICKER: Judge, her case is gone. She
5 filed an EEOC complaint. It was dismissed. She has not
6 refiled. The time has lapsed. She's got no ongoing
7 litigation. We want a video deposition.
8 THE COURT: Do you have case law that states
9 that you are entitled to it even over her objection?
10 MR. BODDICKER: It's in my motion, Judge.
11 MS. KURTZ: And, your Honor, if I can just add
12 for the court for reference in terms of historically. We
13 had subpoenaed the mayor for his deposition and he
14 objected to video. We agreed to a protective order and I
15 believe even in that --
16 THE COURT: What was the nature of the
17 protective order?
18 MS. KURTZ: That we wouldn't use the video and
19 I want to say we ended up not -- It was an associate that
20 handled it so don't quote me on it but I want to say we
21 ended up not using the video or the video was pointed to
22 the ceiling and there was some agreement that we wouldn't
23 use it.
24 No, actually I take that back, your

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1 Honor. For the entire time of the deposition the mayor
2 sat with his hands over his face but we did agree
3 pursuant to the protective order that we would not use
4 the video in any circumstance. So there is sort of
5 precedent in this case, you know. I have attempted to
6 work this out with defense counsel.
7 He did literally sit with his hands over
8 his face the entire time of the deposition.
9 MS. WASHINGTON: It is also said in the
10 transcript, your Honor, where Attorney Kurtz said we
11 could point the camera in a different direction, we can
12 continue, she is here but he did not want to continue.
13 THE COURT: Let me see. I have not had this
14 come up before. Petition for rule to show cause.
15 MS. WASHINGTON: So I have some ex bits if you
16 want to see where we agreed to the 14th. I did come on
17 the 14th.
18 THE COURT: That is fine. It seems like the
19 main issue right now is whether or not I can force a
20 video deposition against the wishes of the deponent.
21 Now, why do you want a video dep?
22 MR. BODDICKER: She is incredibly hostile to
23 the City, Judge. I can let you listen to some of the
24 messages she's left for me right now basically stating

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1 that, how dare you subpoena me for a deposition.
2 THE COURT: What does it matter? I mean why do
3 you want the video?
4 MR. BODDICKER: Because we believe the video is
5 clearly going to show she is not a credible witness, hat
6 she is --
7 THE COURT: This isn't an evidence dep though,
8 right?
9 MS. KURTZ: It's not an evidence dep.
10 MR. BODDICKER: This is not an evidence dep,
11 Judge. This is a discovery deposition because
12 plaintiff's counsel has identified Miss Washington as
13 somebody with knowledge of discrimination. Plaintiff's
14 counsel has refused to give me anymore information than
15 that so right now I have absolutely no idea why Miss
16 Washington was named. Miss Washington was a former Human
17 Resources Director at the City of Country Club Hills.
18 MS. WASHINGTON: No, I was a generalist.
19 MR. BODDICKER: In fact, there are several
20 things that I will probably be objecting to if she tries
21 to state them in the deposition based on attorney client
22 privilege. So it is very important that we take this
23 deposition and that we see her reactions.
24 As I said, she just stated to you how she

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1 believes the City is trying to ruin her reputation. She
2 is incredibly hostile to my client. We want a video
3 deposition to show her.
4 MS. WASHINGTON: Your Honor, can I play a voice
5 mail from Mr. Boddicker please? He has surveillanced my
6 house. He has sent people to subpoena my house when my
7 20-year old daughter was at home alone. As soon as she
8 pulled into the driveway, she had some man banging at our
9 front door. He has since come to our front door. We
10 have to live in our house with our blinds closed because
11 Boddicker and his crew are surveillancing my home. It's
12 just absolutely ludicrous at this point.
13 I know nothing about this case, your
14 Honor, nothing, nothing. I have nothing to contribute to
15 this case at all, nothing. This actual case,
16 Lewis-Bystrzycki, precedes me. I was an employee for six
17 months.
18 THE COURT: Can we do a quick dep, five minute
19 dep, in the jury room with the court reporter?
20 MR. BODDICKER: I am not prepared to take her
21 deposition right now, judge.
22 THE COURT: Well, she doesn't know anything.
23 You're telling me --
24 MR. BODDICKER: Judge, I have asked --

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1 THE COURT: No, no, don't interrupt me.
2 MR. BODDICKER: Sure.
3 THE COURT: Now I have the deponent before me
4 saying I don't know anything about this. So what is the
5 prejudice in you at least establishing that for the
6 record right now, here and now?
7 MR. BODDICKER: As long as I have leave to
8 redepose her.
9 THE COURT: If it turns out that later on down
10 the road that she, in fact, does have information?
11 MR. BODDICKER: Judge, this is what I have to
12 say. Plaintiff's counsel, I have asked Dana Lewis
13 whether or not she would --
14 MS. KURTZ: Dana Lewis?
15 MR. BODDICKER: Excuse me. I asked Miss Kurtz
16 whether or not she will just say I don't want to call
17 Miss Washington as a witness in this case. She has
18 refused to do that.
19 THE COURT: I would ask you, Counsel. What is
20 your understanding?
21 MS. KURTZ: If I can respond, your Honor?
22 THE COURT: Yes.
23 MS. KURTZ: So one is, and I don't know if Miss
24 Washington will remember this, there is an email that

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1 defense counsel produced where they had directed Miss
2 Washington to give notice to the plaintiff that she was
3 on administrative leave. After we filed this case, they
4 put her on administrative leave. She is still on
5 administrative leave, they're not letting her back to
6 work. So that's one --
7 THE COURT: That is the issue that she was
8 placed on administrative leave on a time and date
9 certain?
10 MR. BODDICKER: She was placed on
11 administrative leave.
12 MS. WASHINGTON: I have the email of her being
13 placed on administrative leave. I also have an email
14 here of me saying to the mayor "Mayor, I know nothing
15 about this."
16 THE COURT: Would you stipulate to the
17 authenticity, both sides, if this went to trial; would
18 you stipulate to the foundation of this email without
19 requiring this woman's deposition testimony?
20 MS. KURTZ: We would, judge.
21 THE COURT: Okay.
22 MS. KURTZ: That's fine.
23 There is a separate issue of under the case
24 law with respect to sexual harassment retaliation cases.

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1 One of the ways in which proving motive of discriminatory
2 or retaliatory intent is showing comparatives and how
3 they have treated others.
4 As your Honor recalls, you have ordered
5 defendants to produce the EEOC charges, the complaints
6 and lawsuits filed by other individuals. I still don't
7 have those documents, including Miss Washington's EEOC
8 charge that she filed.
9 THE COURT: Miss Washington is telling me that
10 she worked there after your client.
11 MS. WASHINGTON: Well, it preceded me.
12 Everything in terms of, you know, filing the charge for
13 harassment preceded me. I was never included in that,
14 your Honor.
15 They hired a consultant by the name of
16 Marian Williams who came in and sat with the fire chief
17 and everyone else to investigate the claim. I was not
18 involved. I was simply hired as a generalist and that
19 was to manage benefits and payroll and things like that.
20 I was rarely even invited to the meetings.
21 I do have my EEOC charge here that talks
22 about that I believe the City is just -- They've
23 discriminated against me. Your Honor, they harass me. I
24 have been in HR for 25 years, a director for 15. I am a

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1 credible person. I have a Master's Degree. I am a
2 responsible individual so I am not sure what is going on
3 here.
4 MS. KURTZ: So I mean, your Honor, as much as I
5 obviously don't want to bring other people into the case
6 in terms of witnesses but the case law provides that in
7 terms of proving motive of retaliatory intent or
8 discriminatory intent that we can point to others. She
9 was working there at the time towards the end of the
10 retaliation before they put Miss Lewis-Bystrzycki on
11 administrative leave. Miss Lewis-Bystrzycki does have a
12 retaliation claim for the complaints of gender
13 discrimination as well as a retaliation claim under the
14 Illinois (inaudible) Protection Act.
15 So that's where the comparatives would be
16 relevant in terms of how others were treated. If other
17 people were retaliated against, that's certainly evidence
18 that we can present at trial or, you know, we should at
19 least be entitled to discovery on.
20 THE COURT: So you are going to be stuck giving
21 a deposition. I hate to tell you this but you are going
22 to be stuck giving a deposition.
23 Now, if this were an evidence dep, I
24 would require her to sit and be filmed. It isn't. You

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1 though instead of having a film may have your client
2 there because you're probably wanting to show your client
3 what's going on.
4 MR. BODDICKER: My client knows exactly how she
5 is going to react. She is so hostile to the City and I
6 want that to be shown, judge, how hostile she is to the
7 City and to everybody involved.
8 THE COURT: Yeah, and for a trial if it is an
9 evidence dep go for it; but this is a discovery
10 deposition for purposes of obtaining evidence. If you
11 want your client there, you may have your client there,
12 you have that right anyway. If she does not want a video
13 dep, bring your client instead. Just for the record if
14 this was an evidence dep I would require it.
15 MS. KURTZ: Thank you, your Honor.
16 MS. WASHINGTON: Thank you.
17 THE COURT: So when can we do this?
18 MS. WASHINGTON: Did you say we can do this
19 now, your Honor?
20 THE COURT: No, because it is going to be a
21 while.
22 MS. WASHINGTON: That is fine. We can set up a
23 time. Thank you.
24 THE COURT: So what time?

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1 MR. BODDICKER: How about within the next three
2 weeks sometime?
3 MS. KURTZ: That's fine.
4 THE COURT: Within the next 21 days. So you
5 all will be in touch as to the exact time. We will go
6 from there.
7 MS. WASHINGTON: And once again, your Honor,
8 thank you and I know nothing about this case so he is
9 going to get the same result. Thank you.
10 THE COURT: Okay, thank you.
11 (Miss Washington excused.)
12 Now, I thank you both for your patience
13 in giving me time to look at everything again.
14 After reviewing everything, I am granting
15 the second motion to compel regarding plaintiff's request
16 for a forensic examination regarding those computers in
17 the classroom at station one, the middle office across
18 from the bathroom at station one, the paramedic writing
19 room computer at station two and the computer in the
20 hallway by the engineer's office at station two.
21 After reading the depositions, I have
22 concluded this isn't a fishing expedition. The plaintiff
23 was not wholly unable to come up with (inaudible) that
24 she witnessed fellow employees watching porn. The

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1 problem is according to her the porn watching was
2 pervasive. So, for example, every time she would worked
3 with Larry, I don't know how to pronounce it, Giseppe --
4 Giseppe?
5 MR. BODDICKER: Gillespie.
6 THE COURT: (Continuing) -- he was watching
7 porn. And that applied to Mr. Marcus 65 percent of the
8 time and Mr. Boyd 50 percent of the time. Again that is
9 according to her testimony.
10 When I couple that testimony with the
11 defendants' witnesses' testimony that they admit
12 witnessing firefighters watching porn or watching porn
13 themselves, I conclude that the forensic examination
14 requested may lead to discoverable evidence and does not
15 constitute a fishing expedition.
16 MS. KURTZ: Thank you, your Honor.
17 THE COURT: Okay. Anything else?
18 MS. KURTZ: Yes. There are two other motions
19 up for today and I didn't want to burden the court with
20 filing another motion but there are other issues in the
21 second motion to compel that defendants have not complied
22 with so I will address that separately.
23 And, your Honor, you know, I don't
24 typically file motion for sanction after motion for

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1 sanction. And I don't think it is Mr. Boddicker, I
2 actually think it is his client but he has an obligation
3 to make sure that his client is complying with the
4 court's orders.
5 We had filed a motion to bar the --
6 motion to strike the defendants' expert. I don't know if
7 you have that motion. We did give courtesy copies.
8 THE COURT: No, but go ahead.
9 MS. KURTZ: And I can certainly give the court
10 my copy, essentially -- And I can do that, your Honor.
11 Just ignore my scribble on it.
12 THE COURT: Just give me the gist of it.
13 MS. KURTZ: Yes, exactly.
14 So you entered an order requiring
15 disclosures back in 2015. The defendants did not
16 disclose any experts at that time or file a motion for an
17 extension. They have never filed a motion to extend the
18 expert discovery disclosure. We did disclose experts
19 within that time frame. This motion, the motion of our
20 defense expert, has been pending since June of 2016.
21 Defendant has never filed a response nor moved for leave
22 to disclose an economic expert.
23 They belatedly requested a psychological
24 evaluation under the guise of that they needed that for

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1 purposes of the mediation. If you recall, the parties
2 agreed to a private mediation. I agreed to that
3 psychological evaluation even though it was beyond the
4 expert disclosure because under the assumption that we
5 were proceeding in good faith to legitimately talk about
6 settlements. It was not in good faith. Despite that I
7 am not seeking to bar the defendants' psychological
8 expert.

9 There has been -- Even prior to
10 defendants disclosing, belatedly disclosing an economic
11 expert they filed two motions, at least two motions to
12 move the trial date.

13 Your order of May 25th, 2015 indicates
14 the expert disclosures by September 4th, 2015.
15 Defendants did not comply with that order. They have not
16 complied with numerous orders of this court.

17 They produced a report May 12, 2016
18 without leave of court, without seeking to extend the
19 time frame and, judge, it's just -- it's too late. We
20 are almost done with the wrapping up of the fact
21 discovery on these issues that have been subject to our
22 motions to compel, now which is the second and third
23 motions. We're done with expert discovery and then
24 defendants belatedly produce.

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1 THE COURT: Counsel, what is the problem?
2 MR. BODDICKER: There is no problem, judge.
3 What counsel I think basically misrepresented to the
4 court is that we never disclosed our expert. There is an
5 expert disclosure on February 16th of 2013 where we
6 disclosed James McGovern. That's the expert at issue.
7 MS. KURTZ: Can I see what you produced to the
8 court?
9 MR. BODDICKER: And that's not a complete copy,
10 judge, because it is 126 pages long; but if you will look
11 at that disclosure on February 16th of 2013 --
12 MS. KURTZ: No, it's 2016.
13 MR. BODDICKER: Excuse me. Yes, the 16th,
14 February 26th. (Sic) And when counsel says oh, yes, we
15 filed motions to continue, this case originally had a
16 trial date in October of 2015. She's referring way back
17 to then. At that point in time when that trial got
18 continued we had a big discussion about all the expert
19 discovery that still needed to be done and that we were
20 disclosing experts and you said we could do that.
21 THE COURT: So this is your expert,
22 Mr. McGovern?
23 MR. BODDICKER: Mr. McGovern is the expert at
24 issue. I disclosed him in February of this year. The

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1 depositions, you know, the schedule had been continued to
2 be extended. I offered, I've got emails where I offered
3 his deposition and counsel said oh, no, it's too late, we
4 can't do that.

5 The bottom line is our economic expert,
6 Mr. McGovern, if you look at his disclosure, I mean the
7 difference in what he says compared to their economic
8 expert is over a million dollars difference. It would be
9 highly prejudicial to keep us from having Mr. McGovern
10 who was timely disclosed and who was timely offered for a
11 deposition, just the fact that counsel didn't want to
12 take it, you know, and now is trying to say no it's too
13 late, it's just wrong.

14 MS. KURTZ: Your Honor, if I can just briefly
15 respond to that.

16 So this is what he gave me in February of
17 2016. No report. There's no opinions in here. It
18 doesn't even comply with 213. The report he actually
19 produced was May 12th, 2016 so several months after. And
20 again without filing a motion to extend, without leave of
21 court, not in compliance with this court's orders and
22 it's just further delaying this case.

23 And, your Honor, the prejudice to my
24 client, they have put her on administrative leave.

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1 She's not -- With pay but she is not getting overtime.
2 She doesn't get training. That is essentially --
3 THE COURT: But we aren't even done with
4 discovery. You still are looking at computers. We are
5 nowhere near done with discovery. So this doesn't make
6 any difference to the trial. He disclosed it in
7 February. I am going to deny the motion to strike.
8 MS. KURTZ: Thank you.
9 THE COURT: Okay. So next?
10 MS. KURTZ: So next is our third motion for
11 sanctions pursuant to Rule 219 based on defendants'
12 repeated violations of the court's orders and most
13 recently the June 24, 2016 order. Do you have a copy of
14 that?
15 THE COURT: I have it.
16 MS. KURTZ: Excellent. Thank you, your Honor.
17 And mainly, if you look at page four of
18 the motion, it sort of sets out the history with respect
19 to that particular order of June 24, 2016.
20 We initially requested electronic
21 documents, ESI in our request for production. On July
22 21st, 2015, I had requested emails to and from the chief
23 and other supervisors. There are also other requests
24 regarding electronic discovery.

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1 On August 6th, 2015 I requested the
2 electronic nada (phonetic) forms of all the documents
3 because there are emails -- as you know, there are emails
4 that have not been produced or attachments that have not
5 been produced. We were forced to file a motion to compel
6 production of the emails responsive to the discovery
7 request. After the hearing on the motion, the court
8 granted the motion in part saying we were to provide the
9 page line. We complied with that order.

10 And then the hearing was continued to
11 November 2nd where the court ordered defendants' counsel
12 to ensure and report that electronic documents and emails
13 have been searched. That was not done.

14 November 12th I provided to defense
15 counsel a list of search terms and emails. There has
16 been no response to that.

17 On January 26, 2016 I sent a 201(k)
18 letter requesting compliance with plaintiff's email
19 search terms. As a consequence of defendants' failure to
20 comply, I requested that defendants should be required to
21 pay for the forensic examination. That's all part of the
22 second motion to compel and for sanctions.

23 On April 22nd, 2016 you granted the
24 second motion to compel and for sanctions in substantial

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1 part and ordered, with respect to this issue, defendants
2 to confer with their IT person and plaintiff's counsel
3 and forensic expert within seven days. It was a bit
4 after seven days but we did have a telephone call with a
5 forensic expert and their IT person could not answer any
6 of the forensic expert's questions. We then sent a list
7 of questions in writing asking them to answer it because
8 the person that they had on the phone could not answer
9 those questions. They failed to respond to that list of
10 questions.

11 We again had to address it with the court
12 and then on -- The court ordered the defendants to
13 comply and answer the questions by July 8th. That's the
14 June 24th, 2016 order and again defendants failed to
15 comply. The last time we were in you asked him to
16 actually answer them. We did finally get answers.

17 But this has cost my client and my firm
18 money. Having the forensic expert sit on the phone, not
19 getting any answers, having to -- So there is prejudice.

20 THE COURT: Is there anything outstanding at
21 this point regarding what I had ordered in that order as
22 far as -- Is there anything that they haven't done up to
23 this point?
24 MS. KURTZ: They did answer the -- As to this

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1 issue of answering those questions, he did finally send
2 me answers and I have forwarded that to our forensic
3 expert.

4 There is one question on, the reference
5 to a dummy computer which this is the first time we are
6 hearing of it so I did get a response on that.

7 I mean what I would -- If the court is
8 not going to -- I mean really what we are asking for,
9 your Honor, this is what I set forth in the sanctions
10 requested, you know, if the court is going to -- if we
11 are going to proceed with the forensic expert, I would
12 request that my fees in terms of having to file these
13 motions be granted and we can proceed and try to get
14 discovery answers and get discovery finalized so that we
15 can get this case to trial. That would be my request at
16 this point.

17 THE COURT: Counsel.

18 MR. BODDICKER: And, judge, we would absolutely
19 object to her fees for anything related to what we have
20 disclosed to her that the -- All the emails had been
21 disclosed. It's right in Chief Agpawa's deposition which
22 she took in 2015. He affirmatively said, no, I have
23 disclosed everything that's been requested of me and I
24 have told counsel that. For her to sit here and say, oh,

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1 we didn't respond to that? Not true.

2 With respect to her wanting to seek
3 additional forensic evidence, why should we be -- We
4 should not have to pay for that. We have disclosed
5 thousand of pages of documents in this case, everything
6 that has been requested we have responded to; and I
7 just -- I don't understand why she is thinking, oh, there
8 is something else out there.

9 And, you know, she says as you know,
10 judge, there are things that haven't been produced. What
11 do you mean as you know? Where, where is that? I don't
12 know that there is anything that hasn't been produced.

13 MS. KURTZ: And that is going to be the subject
14 of another motion for sanctions where defendants have not
15 complied with the court's order on the second motion to
16 compel, judge. They haven't answer the 6th and 7th
17 document request. They have not searched their emails
18 which in cases nowadays you've got to search emails.
19 They have not done a search of any electronic or emails
20 responsive to the discovery. This was addressed in our
21 second motion to compel and for sanctions, which is why
22 the court ordered --

23 THE COURT: Well, regarding this first motion
24 to compel, the one that we're arguing right now, not the

1 one contained in your second motion to compel, your
2 motion for sanctions I should say --

3 MS. KURTZ: Yes, so this is that -- and I'm
4 sorry, your Honor -- this is actually the third motion
5 for sanctions.

6 THE COURT: I am going to deny it. It is
7 without prejudice. If due to your forensic analysis you
8 discover that there are weighty documents that should
9 have been produced that weren't, I will reconsider
10 sanctions.

11 MS. KURTZ: Thank you.

12 MR. BODDICKER: And to be clear, judge, the
13 forensic analysis that you have authorized is for them to
14 look at those computers, those specific computers in the
15 fire department, related to pornography.

16 MS. KURTZ: Well, there are two separate
17 things. There is the pornography and then there is the
18 email and electronic documents.

19 THE COURT: Yes. That's what I am discussing,
20 the email and electric documents.

21 If they find, you know, emails that are,
22 I would say weighty, a weighty email, then I am going to
23 reconsider a motion for sanctions.

24 MR. BODDICKER: And, judge, here is the

1 question. How is she allowed to do any sort of forensic
2 examination of emails? Other than on those computers, is
3 that what we're talking about?

4 THE COURT: I have already ordered that. I am
5 not going to revisit that at this point. That is
6 pursuant to my --

7 MS. KURTZ: Yes, the second motion to compel.
8 And essentially, judge, we were supposed to work out a
9 protocol. And that has been part of this attempt to work
10 out a protocol of getting these questions answered so the
11 forensic expert can actually propose a protocol knowing
12 what the environment, the computer environment, is like.
13 So he can do that now with respect to the answers that we
14 finally got.

15 MR. BODDICKER: To give me something so we can
16 have a protocol as far as what they want to search?

17 MS. KURTZ: I mean what is typical in ESI
18 cases is the forensic expert comes up with protocol as to
19 how they are going to search the emails.

20 MR. BODDICKER: And, judge, just to be clear
21 here, too, because counsel has not even mentioned this.
22 The City has old email servers that were only in, you
23 know, in operation for a few years. Other than that it
24 was all in the cloud (phonetic) out in, I think, it was

1 Comcast which counsel has already subpoenaed their
2 documents. So I'm not sure exactly -- Are we looking at
3 these old servers, is that what the forensic expert is
4 going to be doing?

5 THE COURT: I ordered this before --

6 MS. KURTZ: Yes.

7 THE COURT: (Continuing) -- in conjunction with
8 a previous motion to compel.

9 MR. BODDICKER: What you ordered, judge, was
10 for our IT people to talk with their IT people which we
11 did; and we answered every single question that her
12 forensic expert asked, you know, which is exactly the
13 opposite of what counsel just told you but it's true and
14 then they put together the list of questions which we
15 have responded to.

16 MS. KURTZ: So, judge, what I would propose at
17 this point. Let me get him the protocol from the
18 forensic expert. If there is an issue, we can notice up
19 a motion before your Honor. But maybe, I don't know if
20 Mr. Boddicker has seen computer protocol forensic
21 examinations before, so maybe that's the stopping point,
22 I don't know.

23 MR. BODDICKER: Well, I certainly haven't seen
24 one from you.

1 MS. KURTZ: Well, because we have been trying
2 to get these questions answered.

3 THE COURT: Okay. So you're going to have a
4 201(k) with your tech people so they can consult each
5 other on that.

6 MS. KURTZ: Thank you.

7 Do you want to set a status?

8 THE COURT: Yes.

9 Within three weeks time you are going to
10 get that witness's deposition.

11 MR. BODDICKER: That is Velda Washington. We
12 still have my expert's deposition, Mr. McGovern. We
13 still have plaintiff's husband, Mr. Bystrycki, who has
14 not been taken yet.

15 MS. KURTZ: No, his deposition was taken.
16 You're talking about Corey Patience (phonetic), the son
17 who was in -- he was in the Marine Corp.

18 MR. BODDICKER: Mr. Bystrycki hasn't been
19 taken yet. We had it set and then it was canceled.

20 THE COURT: You guys will double check. I want
21 to keep this on a shorter leash.

22 MS. KURTZ: A shorter leash.

23 THE COURT: Okay, thirty days.

24 MR. BODDICKER: Thirty days at what time,

1 judge?

2 THE COURT: Pick the day and my clerk will give
3 you the time.

4 (Which were all the proceedings
5 had on this date.)
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23
24

1 STATE OF ILLINOIS)

) ss:

2 COUNTY OF C O O K)
3
4

5 I, Linda K. Madison, a Certified Shorthand
6 Reporter, do hereby certify that I reported in shorthand
7 the proceedings had at the above-entitled cause and that
8 the foregoing is a true and correct transcript of my
9 shorthand notes so taken as aforesaid and contains all
10 the proceedings had at the aforementioned hearing before
11 the Honorable BRIGID MARY McGRATH.
12
13
14

15 Certified Shorthand Reporter
16 License #084-000970
17
18
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EXHIBIT 17

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

CITY OF COUNTRY CLUB HILLS, CARL
PYCZ, JOSEPH ELLINGTON, and ROGER
AGPAWA,

Defendants.

No. 2012 L 009916

Honorable Brigid Mary McGrath

**PLAINTIFF'S MOTION FOR SANCTIONS FOR
VIOLATIONS OF THE COURT'S ORDER REGARDING
INSPECTION OF COMPUTERS FOR PORNOGRAPHIC MATERIAL**

Plaintiff DENA LEWIS-BYSTRZYCKI, through her counsel, respectfully moves this Court to enter an order imposing discovery sanctions on the Defendant City of Country Club Hills for violations of this Court's order allowing the inspection of Defendant's computers for pornographic material. In support, Plaintiff states as follows:

1. On August 31, 2016, this Court granted Plaintiff's motion for a forensic examination of Defendant's computers relating to employees of the fire department watching pornographic material in the fire station. (Exhibit 1, 8/31/16 Order.)

2. Plaintiff has sent four formal notices of inspections for the computers at issue as well as numerous emails to try to confirm a date for the inspection.

3. Most recently, Plaintiff's counsel sent Defendants' counsel Plaintiff's Fourth Amended Notice of Inspection for January 16, 2017. Plaintiff's counsel also sent Defendants' counsel several emails to try to confirm the date of the inspection and that

the eDiscovery expert was confirmed for the inspection/forensic imaging on January 16, 2017.

4. Defendants and Defendants' counsel has continued to evade the court's order granting the forensic imaging, including most recently cancelling the inspection the same morning and only after the eDiscovery expert appeared at the fire station. In fact, the eDiscovery expert, Andrew Garrett was told to proceed by the staff on site prior to Defendant Chief Agpawa's and Defendants' counsel's subsequent cancellation of the inspection. (See Exhibit 2, Email Correspondence.)

5. This Court may impose on the offending party and/or their attorney "an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee" Ill. S. Ct. R. 219(c) (eff. July 1, 2002). Rule 219(c) states in relevant part:

c) Failure to Comply with Order or Rules. If a party, or any person at the instance of or in collusion with a party, unreasonably fails to comply with any provision of part E of article II of the rules of this court (Discovery, Requests for Admission, and Pretrial Procedure) or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

- (i) That further proceedings be stayed until the order or rule is complied with;
- (ii) That the offending party be debarred from filing any other pleading relating to any issue to which the refusal or failure relates;

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(iii) That the offending party be debarred from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;

(iv) That a witness be barred from testifying concerning that issue;

(v) That, as to claims or defenses asserted in any pleading to which that issue is material, a judgment by default be entered against the offending party or that the offending party's action be dismissed with or without prejudice;

(vi) That any portion of the offending party's pleadings relating to that issue be stricken and, if thereby made appropriate, judgment be entered as to that issue; or

(vii) That in cases where a money judgment is entered against a party subject to sanctions under this subparagraph, order the offending party to pay interest at the rate provided by law for judgments for any period of pretrial delay attributable to the offending party's conduct.

In lieu of or in addition to the foregoing, the court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is wilful, a monetary penalty. When appropriate, the court may, by contempt proceedings, compel obedience by any party or person to any subpoena issued or order entered under these rules. Notwithstanding the entry of a judgment or an order of dismissal, whether voluntary or involuntary, the trial court shall retain jurisdiction to enforce, on its own motion or on the motion of any party, any order imposing monetary sanctions, including such orders as may be entered on motions which were pending hereunder prior to the filing of a notice or motion seeking a judgment or order of dismissal.

Where a sanction is imposed under this paragraph (c), the judge shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order.

III. S. Ct. R. 219(c).

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6. As a sanction under Rule 219(c) for failing to comply with the Court's orders, this Court should grant Plaintiff among the following relief:

- a. An adverse inference against Defendants on the issue of male employees watching pornographic material in the fire station;
- b. An order requiring the inspection/forensic imaging to take place on January 26, 2017 and January 27, 2017, if necessary; and
- c. An order requiring Defendants to reimburse Plaintiff for her attorneys' fees and costs, and the cost of her eDiscovery expert having to appear and travel time to/from the fire station as a result of Defendants' last minute cancellation of the inspection.

7. This is Plaintiff's fourth motion to compel and at least third motion for sanctions because of Defendants' and their counsel's continued refusal and failure to comply with the courts orders in this case.

WHEREFORE, for the above stated reasons, Plaintiff asks this Court to enter an order imposing discovery sanctions on the Defendant City of Country Club Hills for violations of this Court's order allowing the inspection of Defendant's computers for pornographic material, and for such other relief that is just and equitable.

Respectfully Submitted,

DENA LEWIS-BYSTRZYCKI

/s/Dana L. Kurtz

Attorney for Plaintiff

KURTZ LAW OFFICES, LTD.
32 Blaine Street
Hinsdale, Illinois 60521
Phone: 630.323.9444
Facsimile: 630.604.9444
Firm No. 43132

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PROOF OF SERVICE

The undersigned, an attorney, on oath states that I served this notice by electronic filing to the parties shown below on January 20, 2017.

Daniel Boddicker

Email: dboddicker@keefe-law.com

/s/Dana L. Kurtz

Dana L. Kurtz

Under penalties as provided by law pursuant to ILL. REV. STAT., CHAP. 100, Sec. 1-109, I certify that the statements set forth herein are true and correct.

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EXHIBIT 1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Serajewski, Bystrezycki

v.

Chry
Cortez Club Hills, et al

No. 2012 L 9914

ORDER

This matter coming before the court on several motions, it is hereby ordered:

- (1) Plaintiff's Second Motion to Compel as to the forensic imaging of certain computers is granted as stated on the record (see transcript);
- (2) Plaintiff's Motion to Strike Defs' economic expert is denied;
- (3) Plaintiff's 3rd Motion for Sanctions is denied without prejudice for the reasons stated on the record;
- (4) Plaintiff to provide Defs with protocols for ESI/forensic imaging of laptops and computer ESI documents;

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Atty. No.: 43132

Name: Kurtz Law Offices

Atty. for: Plaintiff

Address: 32 Blake St

City/State/zip: Hinsdale IL 60521

Telephone: 630.323.9444

(5) Status set for September 26, 2016 @ 9:45 AM

ENTERED:

Dated:

ENTERED
JUDGE BRIGID MARY McGRATH - 1800

AUG 31 2016

Judge
Brigid M. McGrath

Judge's No.
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL 1800

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EXHIBIT 2

Karen L. Moreno

From: Dana Kurtz
Sent: Tuesday, January 17, 2017 11:52 AM
To: Daniel Boddicker
Cc: Karen L. Moreno; Heidi Sleper; Elena Vieyra (evieyra@keefe-law.com)
Subject: FW: Inspection

Importance: High

Dan,

I did not hear back from you yesterday. Please let me know today if the inspection can proceed tomorrow, Thursday, or Friday. If so, then I will not file a motion for sanctions requesting my fees and costs. If I don't get confirmation that the inspection can proceed this week, then I will see my fees and costs and contempt order from the court.

Dana

Dana L. Kurtz, Esq.



KURTZ LAW OFFICES, LTD

www.kurtzlaw.us

32 Blaine Street, Hinsdale, Illinois 60521

Office: 630.323.9444

Facsimile: 630.604.9444

E-mail: dkurtz@kurtzlaw.us



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Making a difference in the lives of others, every way we can. Please visit and support www.lmsdr.org.

From: Dana Kurtz
Sent: Monday, January 16, 2017 10:24 AM
To: Andrew Garrett

Cc: Daniel Boddicker; Valerie Espinili; Karen L. Moreno
Subject: Re: Inspection

Dan, I understand that you just talked to Karen and that you are going to try to get your IT person over there, and that you did not understand this was just on the porn issue.

Sent from my iPhone.

Dana L. Kurtz, Esq.
Kurtz Law Offices, Ltd.
32 Blaine Street
Hinsdale, Illinois 60521
Office: 630.323.9444
Facsimile: 630.604.9444
E-mail: dkurtz@kurtzlaw.us

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On Jan 16, 2017, at 11:19 AM, Andrew Garrett <agarrett@garrettdiscovery.com> wrote:

I probably should not be copied on these emails.

I was told to proceed by the staff on site prior to discussions with the chief and counsel.

I offered to preserve the data on site by creating a forensic image of the hard drives using a NIST certified write blocker / hard drive imager (Logicube Forensic Falcon). I offered to leave the forensic copies on site with staff so that I take no data and do not examine any data.

This proposal was not accepted by counsel for the defendant.

I explained that if something were to happen to the data between now and the time I was approved by the parties to come back on site that the forensic copies could be used and this would avoid any claims of spoliation from this date forward.

This proposal was also denied.

Respectfully,

Andy Garrett
eDiscovery / Computer Forensic Expert
Garrett Discovery Inc.
P. 312.818.4788
M. 217.280.7782

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From: Daniel Boddicker <DBoddicker@keefe-law.com>
Sent: Jan 16, 2017 10:12 AM
To: 'Dana Kurtz'
Cc: Andrew Garrett; Valerie Espinili; Karen L. Moreno
Subject: RE: Inspection

Absolutely not true. I just talked with Mr. Garrett. No Fire Department personnel instructed him to go ahead, nor do those there have authority to so instruct him. I specifically told him it was not happening.

Dana we have not agreed on even the search terms. There is much to do before it can be allowed. Happy to discuss search terms with you. Those you proposed are too broad and unacceptable.

Daniel J. Boddicker
Attorney - Bio
Keefe, Campbell, Biery & Associates, LLC
118 N. Clinton Street, Ste. 300
Chicago, IL 60661
dboddicker@keefe-law.com
T 312-756-1800
F 312-756-1901
D 312-756-3721
C 312-371-4128

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-----Original Message-----

From: Dana Kurtz [<mailto:DKurtz@kurtzlaw.us>]
Sent: Monday, January 16, 2017 10:08 AM
To: Daniel Boddicker
Cc: Andrew Garrett; Valerie Espinili; Karen L. Moreno
Subject: Re: Inspection

Mr. Garrett was also advised by fire department personnel to "go ahead" with he inspection.

Sent from my iPhone.

Dana L. Kurtz, Esq.
Kurtz Law Offices, Ltd.
32 Blaine Street
Hinsdale, Illinois 60521
Office: 630.323.9444
Facsimile: 630.604.9444
E-mail: dkurtz@kurtzlaw.us

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> On Jan 16, 2017, at 11:03 AM, Dana Kurtz <DKurtz@kurtzlaw.us> wrote:

>

> Dan, the eDiscovery expert, Andrew Garrett, copied on this email, is the only person appearing today. No need for

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you or I to be there. The inspection should proceed as noticed. If it does not and you continue to refuse to allow it to proceed despite the court order, I will file a motion for contempt and seek fees and costs and sanctions.

>

> Mr. Garrett traveled 2.5 hours and is at the station right now.

>

> Sent from my iPhone.

>

> Dana L. Kurtz, Esq.

> Kurtz Law Offices, Ltd.

> 32 Blaine Street

> Hinsdale, Illinois 60521

> Office: 630.323.9444

> Facsimile: 630.604.9444

> E-mail: dkurtz@kurtzlaw.us

>

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EXHIBIT 18

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Lewis Bystzycki

v.

Country Club Hills, et al

No. 2012 L 9114

ORDER

In this matter coming to be heard on Plaintiff's Motion for Sanctions for Violations of the Court's Order Regarding Inspection of Computers for Pornographic Material, it is hereby ordered:

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- (1) The motion is granted;
- (2) inspection/imaging will proceed on January 24, 2017 @ 10:00am by agreement;
- (3) The request for reimbursement of expert's time and expenses is granted, to provide detailed invoice of time and hourly rate by Jan. 30, 2017;
- (4) Defs' objections to protocol are waived because not raised in a timely manner.

Atty. No.: 43132

(5) Status set for February 2, 2017 @ 9:45am

Name: Kurtz Law Offices, Ltd

Atty. for: Plaintiff

Address: 32 Bane St

City/State/Zip: Hinsdale IL 60521

Telephone: 630.323.9444

ENTERED:

Dated: JUDGE LYNN M. EGAN

JAN 23 2017

Circuit Court - 1683

Judge
Brigid M. McGrath

Judge's No.
1800

EXHIBIT 19

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Lewis Bystzyci

v.

Country Club Hills, et al

No.

2012 L 9916

ORDER

The parties reporting of status, it is hereby ordered:

- (1) The ESI/email imaging/retrieval shall occur within 14 days by March 23, 2017;
- (2) Def's represents they filed a motion for Protective Order - briefing schedule set per separate order;
- (3) Next status to be held at the hearing on the motion for protective order.

Atty. No.: 43132

Name: Kiri Law Offices Ltd

Atty. for: Plaintiff

Address: 32 Clare St

City/State/zip: Hinsdale IL 60521

Telephone: 630 323 9444

ENTERED:

Dated: _____

Judge
Brigid M. McGrath

ENTERED
 JUDGE BRIGID MARY MCGRATH
 Judge's No. 1806
 FEB - 6 2017
 (Signature)

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EXHIBIT 20

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

DENA LEWIS-BYSTRZYCKI,

Plaintiff,

v.

CITY OF COUNTRY CLUB HILLS, CARL
PYCZ, JOSEPH ELLINGTON, and ROGER
AGPAWA,

Defendants.

No. 2012 L 009916

Honorable Brigid Mary McGrath

**PLAINTIFF’S EMERGENCY MOTION TO PRESERVE ESI AND
IMAGING BASED ON EVIDENCE OF SPOLIATION**

Plaintiff DENA LEWIS-BYSTRZYCKI, through her undersigned counsel, respectfully moves this Court to order the immediate imaging of the City of Country Club Hills’ email server and google emails for the Country Club Hills Fire Department to preserve the data based on evidence of spoliation. In support of this Motion, Plaintiff states as follows:

1. On August 31, 2016, this Court granted Plaintiff’s Second Motion to Compel and for Sanctions, and ordered the forensic imaging of certain Fire Station computers.

2. Immediately following the Court’s order granting the forensic imaging, Defendants had someone “completely” “wipe” the hard drives and reload the operating system of the very same computers the Court ordered be imaged. Defendants did this in a deliberate attempt to destroy evidence.

3. As Plaintiff's ESI expert explained to the Court:

I haven't written a report, your Honor. I gave her a preliminary verbal report. I said there's thousands of Web searches for pornography. It's all over the board. And I also let her know that it appears that they've wiped the hard drives, reloaded them, and I gave her three dates in which that was completely done, and that's a complete wipe, but the problem was, once the computers were hooked back up, the server pushed down profiles that had information of the previous Web history and the searching of pornography.

(2/8/17 Court Transcript at 13.)

4. This Court also ordered as part of Plaintiff's motion to compel that Plaintiff's ESI expert would be allowed access to Defendants' server and email accounts because Defendants have not complied with their discovery obligations to produce emails responsive to Plaintiff's discovery or even search for ESI or other documents responsive.

5. Plaintiff has been attempting to get the imaging of Defendants' server and email accounts pursuant to the Court's order granting Plaintiff's motion to compel since April 2016. Defendants have continually stalled and delayed in the production of their ESI and emails, despite the Court's order compelling the imaging.

6. In light of recent evidence that Defendants engaged in spoliation immediately following the Court's August 31, 2016 order requiring imaging of certain Fire Department computers, Plaintiff is concerned that Defendants have or will destroy other ESI and emails that are responsive to Plaintiff's discovery requests in this case, despite their ongoing obligations to preserve ESI.

7. Plaintiff has conferred with Plaintiff's ESI expert, and he is available on Friday, February 17, 2017 to image the email server and google emails to ensure that they are preserved until the parties can work out the details of a protocol on the search terms.

WHEREFORE, for the above stated reasons, Plaintiff respectfully requests this Court to order the immediate imaging of Defendants' email server and google emails on February 17, 2017 to ensure that the documents are preserved and not subject to Defendants' destruction, and grant Plaintiff such other relief that is just and equitable.

Respectfully Submitted,

DENA LEWIS-BYSTRZYCKI

s/Dana L. Kurtz

One of Plaintiff's Attorneys

Dana L. Kurtz, Esq. (6256245)
KURTZ LAW OFFICES, LTD.
32 Blaine Street
Hinsdale, Illinois 60521
Phone: 630.323.9444
Facsimile: 630.604.9444
E-mail: dkurtz@kurtzlaw.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **PLAINTIFF'S EMERGENCY MOTION TO PRESERVE ESI AND IMAGING BASED ON EVIDENCE OF SPOLIATION** was served via the Court's ECF system and via email upon the parties designated below on February 16, 2017.

Daniel Boddicker

dboddicker@keefe-law.com

s/Dana L. Kurtz

Dana L. Kurtz

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EXHIBIT 21

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
 COUNTY DEPARTMENT, LAW DIVISION

Lewis Bystrocycki,
City of Country Club Hills et al

No. *2012 L 9916*

CASE MANAGEMENT ORDER

This case is before the court for initial subsequent status, of motion counsel for plaintiff,
 defendant, third party defendant present, it is hereby ordered:

- Plaintiff's emergency motion to preserve ESI & IMAGING BASED ON SATIATION.*
- 4296 1. Non-opinion written discovery to be completed by _____
 - 4218 2. Non-opinion oral discovery to be completed by _____
 - 4296 3. _____ shall complete outstanding written discovery by _____
 - 4218 4. _____ shall be presented for deposition by _____
 - 4253 5. Plaintiff shall serve Rule 213 f (2) and (3) disclosures by _____
 - 4253 6. Defendant shall serve Rule 213 f (2) and (3) disclosures by _____
 - 4218 7. Plaintiff's 213 f (2) and (3) witnesses to be deposed by _____
 - 4218 8. Defendant's 213 f (2) and (3) witnesses to be deposed by _____
 - 4295 9. All discovery to be completed by _____
 - 4231 10. All dispositive motions shall be filed and noticed no later than _____ for:
 - 4619 11. This matter is continued to _____ at _____ for:

(check one or more)

<input type="checkbox"/> Service Status	<input type="checkbox"/> Pleadings Status	<input type="checkbox"/> Written Discovery Status
<input type="checkbox"/> Compliance Status	<input type="checkbox"/> Settlement Status	<input type="checkbox"/> Oral Discovery Status
<input type="checkbox"/> Default / Prove Up	<input type="checkbox"/> Final Pretrial	<input type="checkbox"/> Expert Discovery Status
<input type="checkbox"/> Pretrial (parties must be present unless excused by order of Court)		
<input type="checkbox"/> Other _____		

4482 12. Jury/Bench trial is set to begin on _____ at 10:30 a.m.

It is further ordered: *Plaintiff's motion is granted, in part email! The imaging of hard email servers and google drive shall occur before 12:00 noon of February 10, 2017 (Sat) with the help of IT consultant Brent Sachnoff w/ BES Industries present. Brent Sachnoff will maintain the imaging and ensure all data is preserved until further order of the court.*

Atty No. *43132*
 Atty Name: *Kerr Law Offices Ltd*
 Attorney for: *Plaintiff*
 Address: *32 Clark Street*
 City: *Hinsdale IL 60521*
 Phone: *630.323.9444*

Enter: **ENTERED**
 JUDGE SANJAY TAILOR - 1870
 Judge Sanjay T. Tailor No. 1870
FEB 17 2017
 DOROTHY BROWN
 CLERK OF THE CIRCUIT COURT
 OF COOK COUNTY, IL
 DEPUTY CLERK

(c) 312.952.7112 Dorothy Brown, Clerk of the Circuit Court of Cook County, Illinois

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EXHIBIT 22

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Renee Bystroziak

v.

Country Club Hills et al

NO. 2012 L 9916

ORDER

This matter coming to be heard on

Defendant's Motion for Protective Order

status call, and the Motion being fully briefed:

IT IS HEREBY ORDERED that the Plaintiff's Defendant's Motion To / For

Protective Order

is hereby set for hearing/ruling on

April 26 2017

, at 11:30 a.m. / p.m.

Atty No.:

43132

Name:

Kurtz Law Offices

Atty. For:

Plaintiff

Address:

32 Baker St

City/State/Zip:

Hinsdale IL 60521

Telephone:

630.323.9444

ENTERED:

Judge Bridgid Mary McGrath

ENTERED
JUDGE BRIGID MARY McGRATH-1800
FEB 24 2017
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

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