IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE DELTA/AIRTRAN BAGGAGE FEE ANTITRUST LITIGATION)	**CIVIL ACTION FILE NUMBER 1:09-md-2089-TCB**

SPECIAL MASTER'S REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION FOR DISCOVERY SANCTIONS

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Special Master
November 21, 2014

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SPECIAL MASTER'S REPORT AND RECOMMENDATION

In an order dated May 14, 2014 [477], the Honorable Timothy C. Batten appointed the undersigned as a special master in this case to preside over any hearings and submit a report and recommendation to the Court resolving Plaintiffs' Motion for Discovery Sanctions [413]. The Court subsequently approved a scheduling order submitted by the Special Master [487]. Pursuant to the scheduling order, the Special Master received additional briefs from the parties [492, 497, 499]; held hearings with live testimony on August 12 and 13, 2014; and heard arguments of counsel on August 15, 2014. On September 3, 2014, the Special Master held an additional hearing for the presentation of evidence on the amount of attorneys' fees and litigation expenses that the Plaintiffs would be entitled to recover if such an award were made. On October 6, 2014, the Special Master heard additional argument relating to the deposition of Kelly

Turner Brown and other issues, and received additional correspondence from counsel through November 13, 2014. Based upon evidence of record and the arguments of counsel, the Special Master submits this Report and Recommendation.

I. SUMMARY

In their Motion for Discovery Sanctions, Plaintiffs claim that Defendant Delta Air Lines, Inc. has engaged in widespread discovery misconduct that merits meaningful evidentiary sanctions, including an order precluding Delta from disputing the existence of a conspiracy with Defendant AirTran Airways, Inc. to impose first-bag fees. Plaintiffs also pray for an award of monetary sanctions in the form of reasonable fees and expenses incurred as a result of Delta's misconduct. [413].[1]

As explained in detail below, the undersigned recommends that Plaintiffs' request for evidentiary sanctions be denied because the evidence does not establish that Delta acted in bad faith or that crucial evidence has been lost as a result of Delta's conduct. Because Delta failed to comply with

[1] This Report and Recommendation will cite to the record by docket number in brackets ("[]"), followed as needed by the page number of the filing that is generated by the Pacer filing system that appears at the top of the page. References to the transcript of the proceedings before the Special Master, and exhibits introduced at the hearings, will be in parentheses (e.g. (Tr. 88) or (Plaintiffs' Hearing Ex. 2)).

orders of this Court and its discovery obligations, however, the undersigned recommends that Plaintiffs' request for monetary sanctions against Delta be GRANTED and that Plaintiffs be awarded $1,855,255.09 in attorneys' fees and expenses.[2]

II. BACKGROUND AND PROCEDURAL HISTORY

It is necessary to review the procedural history of this case in some detail because Plaintiffs' Motion for Discovery Sanctions raises factual and legal issues that overlap with issues the Court has already addressed.

A. The First-Bag Fee Decision and Plaintiffs' Section 1 Sherman Act Claims

Plaintiffs allege that Delta and AirTran conspired to restrain trade in violation of Section 1 of the Sherman Act by agreeing to charge passengers a $15 first-bag fee. The factual background of the Plaintiffs' antitrust claims is set forth in detail in this Court's decision denying the Defendants' motion to dismiss, *In re Delta/AirTran Baggage Fee Antitrust Litigation*, 733 F.Supp.2d 1348 (N.D. Ga. 2010) (*Delta 2010*), and will be recounted here only to the extent necessary to give context to the Plaintiffs' spoliation and discovery abuse claims.

[2] Plaintiffs seek no relief against AirTran or any of the attorneys or law firms representing the Defendants.

On May 21, 2008, American Airlines became the first carrier to charge a first-bag fee. In an earnings call on July 16, 2008, a financial reporter asked Delta whether it had any plans to implement a first-bag fee. Delta said it was studying the issue but had "no plans" to implement such a fee. *Id.* at 1354. On October 23, 2008, AirTran CEO Robert Fornaro stated in an AirTran earnings call that AirTran also was considering a first-bag fee, but had not elected to impose one because "our largest competitor in Atlanta" (which was Delta) "hasn't done it." *Id.* at 1356. Mr. Fornaro stated that AirTran "would strongly consider" charging a first-bag fee, but would "prefer to be a follower." *Id.* On November 5, 2008, less than two weeks after AirTran's statement, Delta announced that it would begin charging passengers a $15 first-bag fee, effective December 5, 2008. On November 8, 2008, AirTran announced that it too would start charging passengers a $15 first-bag fee, also effective December 5, 2008. *Id.*

B. The DOJ CID and Delta's Initial First-Bag Fee Evidence Preservation

On February 2, 2009, the United States Department of Justice issued a Civil Investigative Demand on Delta ("the CID"), seeking information regarding Delta's decision to adopt the first-bag fee. As the Court noted in its 2012 decision in this case, the CID required Delta to identify each person

responsible for analyzing, recommending or approving changes to its bag fee policies and to produce all documents relating to that decision. *In re Delta/AirTran Baggage Fee Antitrust Litigation,* 846 F.Supp.2d 1335, 1338-39 (N.D. Ga. 2012)(*"Delta 2012"*). The Court observed:

> Based on Delta's response to the CID, it is apparent that Delta interpreted the CID's instructions as requiring it to copy all files on the computers of its employees that might contain any of the requested documents and suspend its standard electronic-document-destruction policy, i.e., Delta knew that it needed to cease and desist its practice of overwriting both daily and monthly back-up tapes.

Id. at 1339.

One day after receiving the CID, Delta Assistant General Counsel Scott McClain circulated a document preservation and litigation hold notice to twenty-two Delta officials who had been identified as custodians of documents potentially relevant to the first-bag fee decision. *Id.* The number of first-bag fee custodians ("the Custodians") later grew to twenty-five. The notices explained that Delta had been required by the DOJ to collect and produce all documents "relating to any actual or contemplated changes in checked baggage fee policies of Delta or any other airline." [413-4, page 346; 434-9, page 35]. The notice to senior executives instructed the custodians to "ask your assistants to take any necessary steps to prevent the

destruction or deletion of any of these documents currently in your possession." [413-4, page 346]. The notice to the less senior custodians, who might not have assistants, stated: "Please take any necessary steps to prevent the destruction or deletion of any of these documents currently in your possession." [434-9, page 35].

Delta's counsel followed up with the custodians or their assistants, calling and emailing repeatedly to confirm collection of responsive documents. [413-4, page 348; 413-4, page 350]. Delta then collected paper and electronic documents, including emails, from the custodians and produced them to the DOJ. *Delta 2012*, 846 F.Supp.2d at 1339. In May, 2009, Delta's counsel directed Delta's IT group, called "CSIRT," to copy the Custodians' hard drives and upload that data onto Clearwell, Delta's internal document review program.[3] In the meantime, while Delta was in the midst of complying with the DOJ CID, the first of the underlying cases in this multi-district litigation was filed on May 22, 2009.

Over the next several years, it became increasing clear that Delta made a number of crucial early mistakes in its initial effort to preserve and

[3] As discussed below, CSIRT failed to load all of this data onto Clearwell in 2009, resulting in Delta not producing the data until Delta discovered its mistake in 2011.

produce evidence in response to the CID, mistakes that would haunt Delta throughout this case. The first two mistakes to be uncovered concerned Delta's failure to suspend automatic deletion of active emails and overwriting of backup tapes.

1. *Delayed move from the Exchange Server to the Litigation Hold Server.*

Delta's standard Microsoft Outlook Exchange Server ("the Exchange Server") is programmed to send emails to a "deleted items folder" after 60 days, and then to delete the items permanently after another 60 days. To ensure that the Custodians' emails were not automatically deleted, upon receipt of the CID the Custodians' emails should have been moved from the Exchange Server to Delta's "Litigation Hold Server," which does not automatically delete emails. Delta instead waited until May 13, 2009 to direct Delta's IT department to move the Custodians' emails to the Litigation Hold Server.

2. *Delayed direction to IBM to preserve backup tapes.*

Delta's Exchange Server creates snapshots of the server as of the first Saturday of the month in which the tape is used. Because there are only three backup tapes used, every fourth month the oldest backup tape is

overwritten with new data. Delta, however, waited until sometime between May 19 and June 5, 2009 to direct IBM[4] to suspend the overwriting of backup tapes.

The impact of the delay in notifying IBM to preserve back-up tapes was as follows: when Delta received the CID, the oldest existing backup tape (created in November 2008) would have contained emails subject to Delta's auto-delete procedure dating back to July 2008. As a result of Delta's delay, the oldest existing backup tape (created in April 2009),[5] contained emails dating back only to December 2008. *In re Delta/AirTran Baggage Fee Antitrust Litigation*, 770 F.Supp.2d 1299, 1306 (N.D. Ga 2011)("*Delta 2011*"). This delay was the subject of the Plaintiffs' First Motion for Spoliation Sanctions, discussed next in Part C. As it turned out, Delta made a number of other crucial mistakes in May and June, 2009, but those were not uncovered for months or years.

[4] Delta contracts with IBM to create and maintain daily and monthly back-up tapes for disaster-recovery purposes.

[5] As it turned out, Delta had many backup tapes that were older than April, 2009, and the failure to find or produce these backup tapes became the subject of future motions for sanctions. *See Delta 2012,* 846 F.Supp.2d at 1343.

C. The First Motion for Spoliation Sanctions

Plaintiffs filed their first Motion for Spoliation Sanctions on November 8, 2010, arguing that Delta's failure to quit overwriting Exchange Server back-up tapes until three months after it received the DOJ's CID constituted spoliation. [196].

On February 22, 2011, the Court issued an order denying the First Motion for Sanctions for three broad and independent reasons – each important to the consideration of this Motion. First, the Court held that Delta's receipt of the CID did not trigger a duty *to the Plaintiffs* to preserve evidence. *Delta 2011*, 770 F.Supp.2d at 1308. Instead, Delta's duty to the Plaintiffs arose only when Delta could have reasonably foreseen civil litigation. *Id.* at 1307. The Court explained that the CID initiated a confidential investigation by the government and that Delta receives a number of CIDs that do not lead to civil litigation. "For these reasons, when Delta received the CID, it cannot be said that Delta should have anticipated this lawsuit." *Id.* at 1308. *See also id.* at 1307 n.10 (citing *Legal Holds: The Trigger and The Process*, 11 Sedona Conf. J. 265, 267, 271 ("The duty to preserve requires a party to identify, locate and maintain

information and tangible evidence that is relevant to *specific and identifiable litigation*.")).

Second, the Court held that, even if the CID triggered Delta's preservation duty, Plaintiffs had failed to show prejudice – that is, that critical evidence existed and was destroyed.[6] "In order to impose sanctions against Delta, the Court would have to substitute Plaintiffs' speculation for actual proof that critical evidence was in fact lost or destroyed." *Delta 2011*, 770 F.Supp.2d at 1309. "Where, as here, the moving party is not able to establish that the allegedly destroyed evidence is critical to the case, courts have consistently refused to impose spoliation sanctions." *Id.* at 1310 (citing numerous cases from this Circuit).

The third reason the Court gave for denying the first Motion for Sanctions is that Plaintiffs failed to carry their burden of showing that Delta had acted in bad faith. *Id.* at 1312. The Court noted that Delta had upon receiving the CID promptly circulated litigation hold notices to the Custodians, collected relevant documents, and produced them to the DOJ. *Id.* "At most, Delta's failure to act more quickly in the face of the CID

[6] "Most revealing is the fact that even though Plaintiffs have deposed multiple Delta witnesses regarding the existence of missing documents, they have failed to adduce any evidence that any key documents existed but were spoliated." *Delta 2011*, 770 F.Supp.2d at 1309.

constitutes negligence, which is insufficient to support spoliation sanctions under the law of this circuit." *Id.* at 1313. "Plaintiffs have not adduced any evidence that Delta destroyed or tampered with evidence out of a consciousness of a weak case." *Id.*

As the Court would later explain, however, an important reason for the denial of spoliation sanctions in *Delta 2011* was the repeated representations by Delta's counsel that Delta had produced all responsive and relevant documents. *Delta 2012*, 846 F.Supp.2d at 1340-1341 (quoting 19 different statements by Delta's counsel to the effect that all emails and documents had been produced). The Court later stated: "it would be impossible for Delta to have been more forceful in its assurances that it had fully complied with Plaintiffs' document requests and the DOJ's CID." *Id.* at 1341.

D. Second Motion for Sanctions

The Court's February 22, 2011 order denying Plaintiffs' motion for spoliation sanctions was not ten days old when Delta's counsel informed the Court that counsel had become aware of "potential issues" with Delta's document production. Delta had been alerted to these "potential issues" by the DOJ, which had happened upon previously unproduced documents

relating to Delta's first-bag fee decision while conducting a separate and unrelated investigation into Delta's proposed slots-swap negotiations with U.S. Airways. In March, 2011, Delta informed Plaintiffs and the Court that a review of the slots-swap investigation documents uncovered additional documents responsive to Plaintiffs' discovery requests in *this* case. Delta promised the Court that it would search the slots-swap investigation documents and produce all such additional documents. *Id.*

In its investigation of how Delta could have missed documents relating to the bag-fee decision – after being ordered by the Court to produce all such documents by June 2010 and after repeatedly informing the Court that Delta had produced all responsive documents – Delta uncovered two more colossal blunders in connection with the document production in this case.

1. *CSIRT's Failure to Load Hard Drive Data.*

As noted above, Delta's counsel in May 0f 2009 directed CSIRT to copy hard drives belonging to the Custodians and to upload that data into Clearwell for review and production to the Department of Justice (and, later, to the Plaintiffs in this case). Delta learned in March 2011 that in 2009 CSIRT failed to do so despite clear instructions from Delta's counsel,

who not only put the instructions in writing but also followed up two weeks later with CSIRT to confirm that the work had been done. *Id.* at 1342.

2. *Discovery of Older Backup Tapes.*

To assist the investigation of why bag-fee documents had been produced in the slots-swap investigation but not in the bag fee case, Delta engaged PricewaterhouseCoopers ("PwC"), *Delta 2012*, 846 F.Supp.2d at 1342. Shortly after the PwC engagement, Delta's counsel discovered a box of backup tapes in CSIRT's "Evidence Locker." *Id.* at 1343. CSIRT could not explain what the tapes were, who had requested that they be preserved, or why they were being preserved. *Id.* Delta's counsel characterized these blunders as "inadvertent mistakes." *Id.* at 1344.[7] Although Delta had originally represented to the Court that Exchange Server tapes were overwritten every fourth month, the Evidence Locker discovery established that this was not the case and, upon further investigation, Delta's counsel learned that IBM in fact had the practice of replacing at least some of the backup tapes and delivering them to CSIRT for safekeeping.[8]

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[7] The Court noted: "Delta further contends that its failure to locate the recently discovered back-up tapes was equally inadvertent, i.e., the result of the tapes' storage in an unexpected location: the evidence locker." *Id.* at 1348.

[8] The parties in their motion papers do not distinguish carefully between Exchange Server backup tapes and Litigation Hold Server backup tapes. In *Delta 2011* and *Delta*

Delta and PwC then searched the newly discovered data from the custodians' hard drives, and the backup tapes and produced an additional 60,000 pages of documents to Plaintiffs in April and May 2011. *Delta 2012*, 846 F.Supp.2d at 1343. Plaintiffs again filed a motion for sanctions, which the Court granted in part in its *Delta 2012* order.

Plaintiffs requested sanctions under Rules 26(g) and 37 of the Federal Rules of Civil Procedure, and sought reimbursement for their fees, a reopening of discovery, and an order barring Delta from using any of the late-produced documents at any stage of the litigation. As to sanctions under Rule 26(g), the Court observed that the rule "'imposes an affirmative duty to engage in pretrial discovery in a responsible manner,'" a "broad duty [that] is satisfied when an attorney makes 'a reasonable inquiry into the factual basis of his response, request, or objection.'" *Id.* at 1350 (quoting Rule 26(g) advisory committee's note). The Court found that Delta "did not conduct a reasonable inquiry." *Id.*:

> 1. As for the failure to load the hard drives: Delta never confirmed with CSIRT that CSIRT had actually run every collected hard drive through CSIRT: "This oversight is a huge hole in Delta's electronic discovery process, and

2012, the Court refers to backup tapes without making a distinction between servers. More recently, at the hearing on Plaintiffs' current motion, Delta's expert witness testified that "the vast majority" of the tapes discovered in 2011 were Litigation Hold Server backup tapes. (Tr. 510).

> Delta has not adequately explained why it did not ensure in 2009 that every collected hard drive was actually processed through Clearwell and searched." *Id.* at 1351.
>
> 2. "As for the back-up tapes, Delta has not tried to explain why counsel did not check CSIRT's evidence locker." *Id.* "Delta's counsel should have inspected the tapes in [the] locker, as it stores only the tapes that are collected for litigation and investigations, and Delta has not substantially justified its failure to do so." *Id.*
>
> 3. "Compounding the problem are Delta's repeated representations that it had produced everything." *Id.*

The Court found that sanctions under Rule 26(g) were appropriate because of Delta's "failure to ensure that all collected hard drives were actually searched and to locate the back-up tapes in the evidence locker and for its myriad inaccurate representations that it had done both." *Id.* As for the type of sanctions to be imposed, the Court noted that, since becoming aware of its deficient document production, Delta had "diligently worked to address the situation," had been "forthcoming with the Court and Plaintiffs about its progress," agreed "that discovery should be reopened," and acknowledged "that it should be required to pay at least a portion of the expense of the additional discovery." *Id.* at 1352.

As for "merits" sanctions under Rule 37, the Court stated that the "facts of this case do not warrant a sanction precluding Delta's use of the

recently produced documents. Even though Delta was dilatory in locating these documents, Delta immediately informed the Court and Plaintiffs about its discovery of the additional documents." *Id.* at 1358. "Furthermore, there is no evidence that Delta willfully withheld production of these documents, and there is no smoking gun of which the Court is aware at this point contained within the new documents." *Id.*

The Court found that rather than merits sanctions, the more appropriate sanction would be to require Delta to pay Plaintiffs' reasonable expenses and attorneys' fees caused by Delta's failure, and to reopen the discovery period. *Id.* at 1365.

E. The Third Motion for Sanctions

In September 2012, the Plaintiffs again informed the Court that they were concerned that Delta was withholding documents. [375-1, page 1]. Delta denied the charged, and for the next month the parties traded charge and countercharge in detailed letters to the Court. [375-2]. Delta then abruptly changed course. In a letter dated October 24, 2012, Delta's counsel disclosed that on October 17, 2012, Delta had found another 29 backup tapes that had not previously been reviewed or searched for responsive documents. Delta explained that IBM had delivered these tapes

to CSIRT in June 2011 after CSIRT had, just two months before, delivered 340 tapes to PwC for review. CSIRT inexplicably did not think to advise PwC or Delta's counsel that it was in possession of additional backup tapes. Delta's counsel stated: "The failure to deliver these tapes to PwC during the review process last year is embarrassing and Delta apologizes to the Court and to the other parties for any resulting additional inconvenience that has been caused." [375-2, page 10]. Delta's counsel proposed that the Court appoint an independent expert to review Delta's files and discovery efforts.

In response, the Court in a November 19, 2012 Order directed Plaintiffs to engage a discovery expert to provide a report to the Court that evaluated Delta's discovery efforts, including identifying the sources Delta searched for responsive documents and the efforts Delta undertook to preserve responsive documents and to provide a list of potentially new sources of documents [375, pages 4-5]. The Court ordered that Delta would be responsible for paying the fees and costs of the Plaintiffs' expert and Plaintiffs' attorneys' fees. [375, page 9]. "The Court will determine whether any additional sanctions against Delta are necessary after review of Plaintiffs' expert's report and the parties' filings with respect to Defendants' pending motions for summary judgment." [375, page 9].

F. The Pixley Report

Pursuant to the Court's November 2012 Order, Plaintiffs engaged Bruce Pixley. Mr. Pixley and his company conducted an intense investigation of Delta's discovery efforts and electronic files between late 2012 and May, 2013. Mr. Pixley issued his initial report on May 20, 2013, and with it an impressive $4,899,501.39 invoice. [394, page 2]. Delta objected to the reasonableness of the fees and, after a hearing, the Court agreed with Delta that the fees were unreasonable and awarded Plaintiffs one-half of the amount sought, $2,449,750.70. [394, page 38].

Significantly for present purposes, the Court's September 25, 2013 Order "does not address the merits of the [Pixley] report as it relates to Delta's document preservation, collection or production." [394, page 8 n.5]. Instead, the Order directed the Plaintiffs, after receiving Delta's responses to Mr. Pixley's report, to file a motion for sanctions "if they determine such a motion is appropriate in light of the record." [394, page 41].

III. PLAINTIFFS' CURRENT MOTION FOR DISCOVERY SANCTIONS – EVIDENCE

On December 3, 2013, Plaintiffs' filed the Motion for Discovery Sanctions that is the subject of this Report and Recommendation. [413]. In

their Motion, Plaintiffs claim that "Delta has engaged in widespread discovery misconduct that merits meaningful evidentiary sanctions under Rules 16(f), 26(g), 37(b)(2), 37(c)(1), and the Court's inherent powers." [413, page 1]. Plaintiffs seek an order precluding "Delta from disputing the existence of a conspiracy with AirTran to impose first bag fees." [413, page 1]. If preclusion is not granted, Plaintiffs seek an order requiring the jury "to draw an adverse evidentiary inference against Delta based on its pattern of misconduct." [413, page 1]. Plaintiffs further contend that Delta's pending motion for summary judgment should be denied because "Delta's actions create (at the very least) a fact issue regarding bad faith spoliation, which renders summary judgment inappropriate." [413, page 1]. Plaintiffs also pray for an award of reasonable fees and expenses incurred as a result of Delta's discovery misconduct. [413, page 2]. Plaintiffs do not seek any relief against AirTran. [413; 492, page 28].

As to the organization of this Report: This Report will first address, in this Part III, the common factual basis of Plaintiffs' various theories of recovery. Part III(A) addresses the 22 data sources that Delta allegedly destroyed; Part III(B) addresses the documents that Delta allegedly withheld; Part III(C) addresses Plaintiffs' claim that Delta on 21 occasions

made false statements about discovery. In Part III(D), this Report addresses additional grounds for sanctions that the Plaintiffs have asserted since filing their original motion in December 2013. Part IV will address Plaintiffs' claim for spoliation sanctions, and Part V will address Plaintiffs' claim for non-spoliation sanctions under Rules 16, 26 and 37. [9]

A. Alleged Destruction of 22 Data Sources

Unlike other spoliation cases that feature the loss or destruction of a single, pivotal piece of evidence – such as the car in *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005) – this case features the alleged loss or destruction of a variety of electronic information of uncertain evidentiary value. In their Brief, Plaintiffs state that "Delta has destroyed a substantial volume of evidence from relevant sources." [413-1]. Plaintiffs do not discuss this charge in their Brief, however, and instead direct attention to Appendix A to the Brief, which lists 22 different data sources allegedly destroyed by Delta.

[9] In their initial brief, Plaintiffs include another category of misconduct entitled "pattern of discovery violations." [413-1, pages 9 – 17]. These allegations are largely duplicative of allegations that have already been addressed by the Court (as Plaintiffs acknowledge, see 413-1 page 9 n.7, page 10 n.8), or are addressed in the consideration of Plaintiffs' other categories of alleged misconduct.

The evidence for each of the allegedly destroyed data sources is discussed below, but the sequence and grouping of the sources has been changed to simplify the presentation. The discussion of the facts relating to each data source focuses on the issues that are germane to the elements of a spoliation claim: whether missing evidence existed at one time, whether Delta had a duty to preserve it, whether the lost evidence was relevant to the case, and whether Delta acted in bad faith. *See generally* Part IV(A) (discussing spoliation generally).

1. Losses from the Evidence Locker.

Delta's IT group, CSIRT, maintained an "Evidence Locker." Five of the data sources that Delta is accused of destroying were kept in the Evidence Locker, four in a box labeled "CID 11." Delta's "Evidence Locker Spreadsheet" shows that Box CID 11 contained:

> Box of 2 2TB Hard drives and 10 320GB Hard Drives containing DOJ Baggage Images, Email and Home Directories. There is also three cloned hard drives from MSP. Folder of notes.

[413-3. Page 440, row 29]. These items were boxed by Delta's Glenn Haywood in May 2009 [K. Brown Dep., Ex. 3], and were in the Evidence Locker on August 20, 2009. [413-2 pages 2, 4, 6, 13; 413-3, page 440, row

29; Tr. 166-167]. By the time Plaintiffs' expert Mr. Pixley reviewed Box CID 11 in 2012; however, four items were missing, each discussed below.

a. Drive Number 4 [Data Source No. 3].

The story of Drive 4 could be a metaphor for the discovery problems encountered in this litigation. The Evidence Locker Spreadsheet shows that Box CID 11 contained "Box of 2 2TB Hard drives and 10 320GB Hard Drives containing DOJ Baggage Images, Email and Home Directories." [413-3, page 440, row 29]. In his investigation, Mr. Pixley found the 2 two terabyte drives (numbered 1 and 2), but only nine of the ten 320GB Hard Drives – numbered 3, and 5 through 12. In addition to Delta's Evidence Locker Spreadsheet, which says clearly that there were supposed to be ten 320GB hard drives, a Delta employee told Mr. Pixley that he saw the ten 320GB hard drives in the box (Tr. 223-24). From this evidence, Mr. Pixley made the reasonable conclusion that Drive 4 was missing.

For reaching this conclusion, Mr. Pixley and Plaintiffs received stern rebukes from Delta and its expert, Mr. Friedberg. According to Delta, Plaintiffs' suggestion that Delta lost or destroyed Drive 4 was one "of the more prominent examples of the blatantly false, misleading, or irrelevant accusations." [434, page 45]. Delta announced: "there is no such missing

hard drive." [*Id.*, page 47]. By this, Delta did not mean that it had *found* Drive 4; instead, Delta meant that Drive 4 never existed. Delta's expert Mr. Friedberg declared: "There was no Drive 4," [434-7, page 24], adding: "Speculation does not amount to spoliation," [*Id.*, page 25]. Delta goes to great lengths to attack Mr. Pixley for saying that a Delta technician confirmed the existence of Drive 4, when that individual had not actually seen Drive 4 with his own eyes. [434-1, page 8]. Delta did not, however, present any evidence of its own or, as we shall see, make much of an effort to find Drive 4 or find anyone who knew anything about it.

Though Delta repeatedly denied that Drive 4 ever existed, its main line of defense was that, even if the hard drive device were missing, there was no missing *data*. Mr. Friedberg arrived at this conclusion by finding that everything that Delta intended to image and preserve in May 2009 had in fact been preserved by Delta. This finding is indeed supported by the documentary record. On May 13, 2009, Mr. McClain notified the 25 custodians that Delta would be collecting the data on their hard drives and their network data. On May 22, 2009, Mr. Haywood, an employee in Delta's CSIRT department, confirmed that the imaging of all but one of the custodians' computers had been completed and the last was in process.

[*Id.*, page 9]. Years later, Mr. Friedberg's team analyzed the contents of CID Box 11, and found that the images of the 25 custodians' computers were stored on the two 2 terabyte drives, and copies of most of those images were also stored on the 320GB drives. [*Id.*, page 23]. According to Mr. Friedberg: "There is no lost or destroyed data here, as all of the images that Delta designated for collection and preservation were collected and preserved successfully." [*Id.*, page 26]. Mr. Friedberg added: "Routine forensic analysis would have revealed the same to Mr. Pixley." [*Id.*, page 26].

But as Mr. Pixley pointed out in his rejoinder, Mr. Friedberg's analysis established that *what remained* in CID Box 11 was a complete set; it did not show that Drive 4 never existed or, if it did exist, was empty. In his Supplemental Report, Mr. Pixley continued to insist that Drive 4 probably did exist at one time and suggested that it might have contained email and home directory data. (Plaintiffs' Hearing Exhibit 1, page 3; TR. 159) In response, Mr. Friedberg again criticized Mr. Pixley for speculating: "Mr. Pixley now speculates that the 'missing' Hard Drive 4 might have actually contained the custodians' email and home directory data." [484-2, page 5]. To this Mr. Friedberg demurred, explaining that if Drive 4 had

contained custodians' email and home directory data, then its contents had been preserved: "The original custodian data collected in 2009, including the home directory data for the May 2009 custodians and those custodians' email messages from Delta's email server, is on Hard Drive 20 in the 'DOJ Pulls' folder." [*Id*]. Again, this finding proved what Delta kept, not what Delta lost; because Delta had no external written record of what was supposed to be stored on Drive 4, the parties could only speculate as to what data Drive 4 actually contained. Mr. Friedberg on cross-examination testified: "I have no idea what was on hard drive four." (Tr. 564).

This was the state of the evidence through the August and September 2014 hearings on Plaintiffs' Motion for Discovery Sanctions before the undersigned. Because Delta had not kept either Drive 4 or a record of what evidence Drive 4 contained, the parties and their experts had wasted an enormous amount of time and money. Then, on September 26, 2014 (three weeks after the hearing), Delta's Kelly Turner Brown produced additional documents including one email relating to the Drive 4 mystery.[10] In a previously unproduced May 26, 2009 email from Delta CSIRT employee Glenn Haywood to Ms. Brown and Delta's John Sokol, Mr. Haywood states:

[10] This unusual turn of events is discussed in detail in Part III (D), below.

> I have labeled all drives and placed them into a box next to the encase station. The box is labeled CID 11. There are two 2TB drives that contain all of the images and are labeled DOJ Baggage 1 and 2. There are 10 320GB drives labeled DOJ Baggage Images 3 through DOJ Baggage Image 12 with the exception of DOJ 4 which is labeled Emails and Profiles. DOJ 4 is ready for Clearwell processing and I gave it to John. In the box are also the three cloned drives from MSP and my folder of notes.

(K. Brown Dep., Ex. 3). Mr. Haywood's email confirmed that Mr. Pixley's conclusion that Drive 4 existed was right all along, and that Delta and Mr. Friedberg's statements that Drive 4 never existed – unfounded and unreasonable to begin with – were wrong all along.

Worse, Delta never offered a coherent excuse for why Delta in the first four years of this litigation never found the email quoted above, even though it was written by and to the known custodians of Drive 4 at exactly the time when the drive would have been created, and mentions the drive and the other missing contents of the box by name.

Ultimately, however, this late-produced email is good for Delta. It supports Mr. Friedberg's conclusion that no data was lost because Drive 4 contained emails and profiles that were copied to Clearwell and to Hard Drive 20, where they remain today. (Tr. 213 (Pixley testimony confirming that copies of email and home directories appear in Clearwell and on Hard

Drive 20)). Moreover, it is undisputed that CID Box 11 was supposed to contain evidence Delta collected from the identified custodians in May, 2009, and it is undisputed that all of that evidence was preserved and accounted for. The following is from Mr. Pixley's cross-examination:

> Q [By Mr. Allen]: So have you seen any documentation in your review to suggest that Delta set out in May of 2009 to collect something that it failed to collect?
>
> A [By Mr. Pixley]: No, I don't.

(Tr. 219 – 220).

In sum, the record supports Delta's position that no evidence was lost or concealed. Delta, however, should have been able to account for Drive 4 and should have produced a copy of Mr. Haywood's email months or years ago, and its failure to do so has caused the parties a good bit of trouble and expense.

b. Three Cloned Hard Drives from Minneapolis-St. Paul [Data Source No. 1].

The entry in Delta's Evidence Locker Spreadsheet for Box CID 11 also referred to three cloned hard drives from "MSP," Delta's acronym for Minneapolis-St. Paul. [413-2 page 2; 413-3, page 440, row 29]. The three drives were placed in the Evidence Locker on August 20, 2009. [*Id.;* Tr.

167]. The email from Mr. Haywood produced in September 2014 by Ms. Brown (quoted above), states that the three cloned hard drives were in Box CID 11, but gives no further information about what the drives contained. No one knows where "the three cloned hard drives" are today or what data they contained. [413-2, page 3].

Both sides offer competing speculation as to what might have been contained on the three cloned hard drives from Minneapolis-St. Paul. Plaintiffs state in their motion that none of the witnesses interviewed by Mr. Pixley "attempted to dispute the relevance of the data" on the three cloned hard drives [*Id.*]. This is literally true only because none of the witnesses had any idea of what information was contained on these drives in the first place. [*Id.*]. Plaintiffs speculate that the drives "may have belonged to key custodians such as Richard Anderson or Ed Bastian," who may have maintained computers in Minneapolis-St. Paul as early as July, 2009. [413-2, page 3.]. But there is no evidence – forensic or otherwise – as to what data the cloned drives contained. Plaintiffs' expert, Mr. Pixley, testified at the hearing (Tr. 226) and in his deposition that he did not know what was on the drives or who they had belonged to: "But, again, whose

drives these are from MSP, I – I don't know. I just know that they're missing." [434-6, page 34 (Pixley Dep. at 127)].

Delta, for its part, speculates that the three cloned drives contained copies of the disk drives owned by the three Minneapolis-St. Paul-based Delta employees who had been identified by Delta as document custodians with respect to the first-bag fee matter: Teresa Wise, Paul Dailey, and Mike Becker. [434-7, page 26]. Internal Delta emails confirm that, on May 21, 2009, which was the day before Mr. Haywood's email quoted above, Delta created images of the three custodians' data. [434-16, page 51 (Delta Ex. 135); *see also Id.*, pages 54-55 (Delta Ex. 136)]. It is undisputed that Delta preserved forensic images of the drives belonging to these three custodians, and it is further undisputed that these three were the only three custodians based in Minneapolis-St. Paul. [434-7, page 9; Tr. 168, 372-373, 525].

Based on the foregoing, the evidence does not support a finding that Delta lost, destroyed or concealed any evidence in connection with the three missing cloned drives from Minneapolis-St. Paul.

c. Drives 3 and 8 [Data Source No. 7].

Mr. Pixley originally reported that Drives 3 and 8 were missing, but then determined that the contents of those drives had been copied onto the

two 2 terabyte drives, which Delta preserved in Box CID 11 [413-2, page 13; TR. 171]. Since Delta preserved the data, the disposition of the Drive 3 and Drive 8 devices is immaterial.

d. "Folder of Notes" [Data Source No. 2].

According to the Evidence Locker Spreadsheet, Box CID 11 also contained a "Folder of notes." [413-3, page 440, row 29]. In the email produced by Kelly Turner Brown in September, 2014, quoted above, Mr. Haywood refers to these as "my" folder of notes. The Evidence Locker Spreadsheet shows that the box containing the "Folder of notes" was added to the locker in May of 2009. [*Id.*]. The column entitled "Removed from Locker Date" is blank. [*Id.*] Delta does not dispute that the folder has been lost. [*E.g.*, 434-7, page 27-28].

No one knows exactly what information was contained in the folder of notes. Plaintiffs and Delta surmise that, given its title and location, the folder contained information about the contents of the rest of CID Box 11 – including Drive 4 and the nine other 320GB drives, the two 2 terabyte drives, the three cloned drives, etc. [*Id.* (Plaintiffs: the folder contained "collection notes of the May 2009 collection"); 434-1, page 7 (Delta: "it is

believed that the folder contained notes from CSIRT employees related to the May 2009 collection")].

Plaintiffs assert, and Delta does not deny, that Delta had the obligation to preserve any unique information contained in the folder of notes.[11] Delta argues that it should not be sanctioned for losing the folder of notes because there is no evidence that it contained any unique information. The gist of Delta's argument with respect to the folder of notes, and a similar issue raised by Delta's loss of the "Evidence Locker Notebook," discussed below, is that since Delta's documentation of its discovery efforts generally were sufficient, whatever information that was contained in the folder of notes (which cannot be known) would have been either redundant or immaterial.

Delta states that the information that it did preserve is "more than sufficient to answer any legitimate questions concerning Delta's document collection efforts and preservation efforts." [434, page 65]. This statement

[11]In an August 15, 2011 email to Delta's counsel, Plaintiffs' counsel states: "Plaintiffs request that Delta produce all documents in its possession related to Delta's efforts to locate, search, and review relevant documents and data, including but not limited to backup tapes and custodians' hard drives. Please let us know if Delta will agree to produce these documents." [480-6, page 1 (Plaintiffs' Exhibit 256)]. Plaintiffs do not state whether Delta responded to this request, and Delta does not address the point in its Sur-Reply.

is wildly inaccurate. A common thread through this entire litigation has been Delta's inability to answer – correctly, at least -- legitimate questions about what evidence was available and what it had done to preserve it.

At the hearing on the Motion for Sanctions, Mr. Friedberg testified as to the relative unimportance of the folder of notes by observing that a substantial amount of "collection documentation" is maintained electronically on forensic images of the hard drives themselves. This information is typically automatically generated and gives reliable information on where the data came from, when it was imaged, etc. (Tr. 521). While this information is undoubtedly helpful with respect to hard drives that Delta did not lose, collection information that is embedded in the forensic image is useless for those drives that Delta lost, such as Drive 4, or the three cloned drives from Minneapolis-St. Paul. With respect to those drives a separate, old fashioned folder of notes would have been useful.

The evidence supports the conclusion that the folder of notes contained at least some information about Drive 4 and the three cloned drives from Minneapolis-St. Paul and, if it did, that information was unique. As discussed above however, since the contents of the other data

sources are now reasonably certain, the prejudice caused by the loss of the folder of notes is reduced considerably.

e. Evidence Locker Notebook [Data Source No. 4].

Also in the Evidence Locker at some point was an "Evidence Locker Notebook" that might have recorded what evidence was stored in the Evidence Locker and who came in and out of the Evidence Locker. The Evidence Locker Notebook also is missing.

It is very difficult to assess the significance of the Evidence Locker Notebook. Plaintiffs do not discuss the Evidence Locker Notebook in their brief except to say, in a footnote, that it was destroyed by Delta and would have disclosed evidence of what other data Delta destroyed. [413-1, page 20 n.42]. Plaintiffs do not support this statement with any citation to evidence. In his report, Mr. Pixley states that the loss of the Evidence Locker Notebook (and the folder of notes, discussed above), "prevents Precision Discovery from knowing the contents of missing Drive 4, the missing 3 cloned drives, and the 2 wiped drives." [413-2, page 9]. But Mr. Pixley testified at the hearing that he did not know what information was contained in the notebook or how or when it was lost. (Tr. 227). In addition, Kelly Brown of Delta, whom Plaintiffs called in support of their

motion, testified that the Evidence Locker Notebook (which she called a "log") provided only a "vague" description of the contents of the Evidence Locker, and instead was for the purpose of keeping track of who came in and out of the Evidence Locker and why. (Tr. 411).

Based on this record, Plaintiffs have not met their burden of establishing that the Evidence Locker Notebook contained any information that was not preserved in other forms or formats, or that Delta acted in bad faith by losing, or losing track of, the notebook.

2. NAS Snapshot Data for Delta Executives [Data Source No. 5].

a. Delta failed to preserve NAS Snapshot.

In addition to network storage that was subject to auto-deletion, Delta also maintained two servers for what it called "Network Attached Storage" or "NAS." One server was for non-executives; the other server was for 8 high level executives. This issue concerns the executive NAS. To use the NAS, an executive would manually copy an email or non-email document into a NAS folder. There was no requirement that the NAS be used, and some executives did not use the NAS at all. Any deletion from the NAS would have to be manual. The NAS Executive Server had the capacity to regenerate "snapshots" of what was on the server at particular

points in time – generally weekly -- going back one year. The snapshots would be highly redundant, differing week-to-week only to the extent that changes, additions or deletions were made to the storage during the intervening week.

On July 9, 2009, Delta Assistant General Counsel Scott McLain emailed John Sokol of Delta's CSIRT group and requested that Mr. Sokol retrieve from the NAS Executive Server backup archives for eight senior Delta executives who had been identified as custodians in connection with the DOJ CID. [434-11, page 137]. Mr. McClain told Mr. Sokol to use the backup closest to (but after) November 4, 2008. [*Id.*, page 143]. Later the same day, Mr. Sokol responded to Mr. McClain, stating that the data was already on Clearwell and that "there is no exceptional archive for the executives." [*Id.*, page 145]. Sensing a misunderstanding, Mr. McClain then directed Mr. Sokol to check with his superior, Martin Fisher, because "we were told there were back-ups going back 12 months." [*Id.*] Mr. McClain sent a copy of this email to Mr. Fisher who confirmed that, indeed, Mr. McClain had been correct. Mr. Sokol then said he was "working on getting the information collected." [*Id.*] A week later, Mr. Sokol emailed Mr. McClain and confirmed that the information had been collected. [*Id.*].

Based on these exchanges, Mr. McClain believed that Mr. Sokol had captured a November 2008 snapshot of the NAS Executive Server. [*Id.*, page 138]. This snapshot would have captured any email or other document that an executive had manually stored on the NAS and not deleted before November 5, 2008, a period covering the critical dates in this case.

In 2012, Mr. McClain discovered that Mr. Sokol had not followed instructions by capturing a November 2008 snapshot, but instead had copied the NAS Executive Server as of July 2009. Delta's counsel informed the Court of this mistake in a letter dated September 24, 2012. [375-1, page 11] By the time of this discovery, the NAS could no longer generate a snapshot nearly as old as 2008 or 2009.[12]

b. Unclear what Evidence was lost.

The likelihood that relevant evidence was lost as a result of Delta's failure to preserve the NAS snapshot is uncertain. The NAS Executive Server is optional – documents or emails are not stored on the server unless the executive manually copies the document or email to a NAS

[12] Mr. McClain did not ask Mr. Sokol to generate any snapshots older than November 5, 2008. At the hearing, Mr. McClain explained that he chose the November 5, 2008 date because it would have captured emails through Delta's November 5 announcement that it would charge the $15 first-bag fee. (Tr. 327).

Executive Server folder. Delta preserved a July, 2009 snapshot, which would have contained everything in the November, 2008 snapshot except for emails and documents that were manually deleted in the meantime. Thus, for a document to be lost as a result of Delta's failure to capture the older snapshot, an executive would have had to save the document or email manually to the NAS Executive Server, then manually delete the document or email from the NAS Executive Server prior to the July 2009 snapshot.[13]

The evidence and expert testimony submitted by the parties sheds little light on how many emails were deleted (and not forensically recovered) or how many of those emails were relevant to the first-bag fee case. Plaintiffs' expert Mr. Pixley does not offer any kind of quantitative analysis of the deleted NAS Executive Server emails. He made no count of the number of extant emails on the NAS Executive Server or any estimate of the number of deleted emails lost. Instead, Mr. Pixley concludes that Delta's failure to preserve the snapshot "resulted in the destruction of potentially responsive emails from key custodians." [434-2, page 23].

[13] After February 2009, as a result of the DOJ's CID, each of these executives had received instructions to preserve all documents relating to the bag fee changes. [434-11, page 140].

Delta's expert Mr. Friedberg investigated the July 2009 snapshot of the NAS Executive Server, and found a "total count" of 57,599 existing emails. Mr. Friedberg recovered 119 emails that had been deleted, none of which were related to the first-bag fee decision. From this Mr. Friedberg concludes that the prior snapshots which Delta failed to preserve "would be unlikely" to be sources of new data relevant to the litigation. [434-7, page 31].

Mr. Friedberg's conclusion does not follow from his findings. As he notes, deleted emails on the NAS server are not forensically recoverable after they are randomly overwritten by other data. Mr. Friedberg recovered 119 emails, but he does not say whether that was 99% of the deleted emails or 1% of the deleted emails. The fact that none of the recovered emails were relevant might seem to suggest that the executives tended to respect the litigation hold notice (and not delete relevant emails), but the litigation hold notice was in force for only a small fraction of the time the executives were deleting emails. Without knowing the number of emails the executives deleted that were not recovered (which could be quite large), or knowing the percentage of relevant emails to all emails (which could be quite small), the fact that none of the recovered emails were relevant says

little about whether the executives were abiding by the litigation hold notice or about the primary focus of this inquiry: the number of lost relevant emails.

The probability that Delta destroyed relevant emails by not capturing the November 5, 2008 snapshot is highly dependent upon how frequently Delta executives manually deleted emails. Significantly, Mr. Pixley on cross-examination testified that he could not recall discovering evidence that a Delta executive had deleted emails:

> Q: [By Mr. Allen] . . . your investigation, started in November of 2012; right?
>
> A: [By Mr. Pixley] Yes.
>
> Q: Did I get that right, '12, and has continued until June, you said you were still looking in June; right?
>
> A: Yes.
>
> Q: Have you identified any information, any information that would support a concern that executives were deleting information that they had stored on the NAS?
>
> A. Not that I can think of right now.

(Tr. 212).

As must be the case in many situations in which evidence has been lost, any conclusions about the content or significance of the lost evidence here does not rise above mere speculation. The Plaintiffs, however, have

the burden of proof, and the speculation that the lost emails might have been relevant to this case is insufficient to establish spoliation. As the Court held in *Delta 2011*, 770 F.Supp.2d at 1309: "In order to impose sanctions against Delta, the Court would have to substitute Plaintiffs' speculation for actual proof that critical evidence was in fact lost or destroyed." *Id*.

c. Delta's conduct: negligence or bad faith?

The evidence, detailed below, shows that Delta's failure to capture the NAS Executive Server snapshot was negligent or grossly negligent, but not deliberate, willful, or in bad faith.

Delta's negligence extended far beyond the failure of Mr. Sokol to follow the instructions from legal counsel. The purpose of the NAS Executive Server is to capture and save important information created or used by Delta's senior executives. Yet Delta entrusted the server to people whom Delta never trained how to use its most important features. Delta has acknowledged that Mr. Sokol "did not know how to capture the historical snapshot from the executive server." [434-1, page 10 n.2]. Ms. Kelly Turner Brown, whom Delta would promote to lead CSIRT, testified:

"I'm not exactly sure how the NAS server works." (K. Brown Dep., page 120).

Delta's legal team also was generally unaware of the NAS server's functionality. In a June 26, 2009 letter to Delta's outside counsel, the Department of Justice confirmed its understanding (based on discussions with Delta's counsel) that the "executive servers" dedicated to the senior management of the company "are subject to the same back-up procedures as the other servers." [434-3, page 498]. This clearly was not the case. At the time of this letter, the other servers would have back-ups going back only several months – in other words, not reaching the critical 2008 time period. The NAS Executive Server, however, had the capacity to generate snapshots going back a year and covering the critical time period. Mr. McClain testified that he did not learn of the NAS snapshot function until July 2009, shortly before he gave the instructions to Mr. Sokol. (Tr. 318).

Delta also did not disclose the NAS Executive Server's functionality to Plaintiffs. In his October 7, 2010 deposition, taken pursuant to Rule 30(b)(6), Mr. McClain testified as follows:

> Q: Are there different servers for Delta Management, for Senior Management?
>
> A: I don't know.

[434-5, page 174]. Mr. McClain – as Delta's designated Rule 30(b)(6) witness – should have known the answer to this question. Worse, given that Mr. McClain had given specific instructions to Mr. Sokol the year before in which he specifically referenced the "executive servers," his failure to remember their existence is particularly mystifying. (*See* Tr. 359 (McClain hearing testimony on his failure to remember the existence of the executive server)).

In addition, Delta also did not disclose the existence of the NAS Executive Server in its sworn interrogatory responses. [413-5, page 42-46]. In Delta's lengthy description of the efforts that it undertook in 2009 to preserve and collect documents, Delta did not even mention the NAS or Mr. McClain's attempt to capture the November 5, 2008 snapshot. [*Id*.].

This evidence of ineptitude and disarray contributes to the finding that non-spoliation sanctions are appropriate. This evidence, however, is different in kind than what would be necessary to infer bad faith, particularly given the clear evidence that Delta intended, but failed, to preserve the earlier snapshot. Mr. McClain directed Delta's technician, Mr. Sokol, to secure this information. [434-11, page 139]. Mr. Sokol responded, indicating that he understood the directions. [434-1, page 10 n.2.] The

evidence shows that Delta's legal team wanted to preserve the snapshot, and not to conceal or destroy evidence.

3. Backup Tapes.

Delta repeatedly failed to preserve server backup tapes, which are routinely overwritten unless promptly taken out of circulation. Delta either neglected to take the tapes out of the systems (in which case they would be overwritten), or took the tapes out of the system and lost track of them. In their Motion for Discovery Sanctions, Plaintiffs again raise a number of claims relating to Delta's handling of backup tapes:

a. Litigation Hold Email Exchange Server Email Backup Tapes [Data Source No. 10].

Plaintiffs list the loss or destruction of litigation hold backup tapes as an issue in their Appendix [413-2, page 19]. After explaining the complicated background, this Report will consider what, if any, evidence was lost.

i. Background

The evidence shows that once Delta employees become likely custodians of discoverable information, Delta moves those custodians from the Exchange Server, which automatically deletes emails after 60 days, to

the Litigation Hold Server, which does not automatically delete emails. A user on the Litigation Hold Server could still manually delete emails, but the servers, including the "deleted items" folders, were backed up daily by IBM.

It is undisputed that Delta did not find Litigation Hold Server backup tapes until, at the earliest, 2011, when a box of the tapes appeared in the Evidence Locker. Plaintiffs claim that, by then, many had been lost or overwritten. Delta blames its vendor, IBM. "Prior to the discovery of the additional tapes in 2011, IBM clearly did not have a regular practice of delivering backup tapes to Delta CSIRT. This is made clear by the fact that dozens of such backup tapes were found in numerous locations in *IBM's* workspaces in 2011." [434-1, page 20 (emphasis in original)]. IBM in turn blames Delta: Two IBM employees told Mr. Pixley in a transcribed interview that they understood IBM's practice to be to replace the backup tapes once they were full and deliver those full backup tapes back to Delta. [434-3, pages 108, 116].

Delta does not, of course, escape responsibility by blaming its vendor IBM. It is also clear, whether IBM or Delta's account here is more correct,

that Delta, even long after this litigation arose, had not given IBM instructions on what to do with the tapes.

Similarly, Delta's legal counsel was unaware of the existence of Litigation Hold Server backup tapes – some dating back to 2008 - until February, 2011. (Tr. 374). Mr. McClain testified: "I did not ask [CSIRT's] Kelly Turner Brown specifically for these back-up tapes because I did not know they existed." (Tr. 376). Mr. McClain continued:

> June, May and June of 2009 when [CSIRT's] Martin Fisher and I were trying to get back-up tapes, I was asking for the oldest available back-up tapes. We were asking for the oldest available back-up tapes from I.B.M. and nobody said then or at any time up until February 2011, oh, well, we have a big box of back-up tapes and maybe some of them are from 2008. No one – no one said that. Did I specifically ask them? I did not. I wish I had.

(Tr. 377).

As Mr. McClain acknowledged at the hearing, Delta's technical team, CSIRT, and Delta's backup tape vendor, IBM, did not take it upon themselves to tell legal counsel about the backup tapes. As a result of this ignorance and lack of communication, Delta made no effort when this litigation was filed to preserve, organize or produce Litigation Hold Server backup tapes.

ii. What evidence was lost

It is unclear what evidence was lost. In 2011, three seven-tape sets of backup tapes from the Litigation Hold Server were found in Delta's Evidence Locker. [434-1, page 20]. Thus alerted to the possibility that the tapes for the Litigation Hold Server backup system might have been saved by IBM, Delta undertook a search in 2011 for additional backup tapes and found many. According to Delta: "This search yielded dozens more litigation hold backup tapes in IBM's offices in two different buildings and covering multiple years." [*Id*.].

It is undisputed that Delta never found a complete set of backup tapes. Neither party, however, discloses which backup tapes were recovered and which are missing. Instead, Plaintiffs in their Appendix state vaguely that "the majority of these daily backups were lost or destroyed," [413-2, page 19]. Plaintiffs' expert, Mr. Pixley, apparently had direct access to the backup tapes that had been preserved, but he was no more specific. [413-3. Page 162]. Mr. Pixley states that he found that Delta "was missing numerous relevant litigation hold server backup tapes," but does not identify the tapes or explain the basis for his conclusion that the tapes were "relevant." [*Id.*]

Delta states in its Response Brief that it "preserved and restored the litigation hold server backup tapes from the critical time period." [434, page 61]. Delta's expert Mr. Friedberg testified that the restored back-up tapes provided substantial "coverage" of the relevant time period. Mr. Friedberg explained that the Litigation Hold Server has no auto-delete function. In addition, a manually deleted email is stored for a week in a "dumpster" file that it beyond the reach of the user. (Tr. 513). Thus, unless there were a seven-day gap between back-up tapes, there would be no gap in coverage. Mr. Friedberg concluded that, overall, the coverage was sufficient for him to conclude that the loss of unique emails was "unlikely." (Tr. 496)[14].

On balance, Mr. Friedberg's conclusion that the loss of unique emails was unlikely is supported by the evidence, and a conclusion that relevant evidence was lost by Delta's mishandling of the Litigation Hold Server backup tapes would be speculative.

[14] On cross-examination of Mr. Friedberg on the issue of back-up tape coverage, Plaintiffs' counsel did not challenge Mr. Friedberg's conclusion as to the adequacy of coverage on 42 of the custodians. (Tr. 560-561). On cross, Mr. Friedberg did testify that there were 75 custodians and that he did not review Mr. Pixley's conclusion that 33 of them had no back-up coverage, and admitted that there were at least 10 custodians with no back-up coverage at all. (Tr. 561). But Plaintiffs do not explain who these additional custodians were or what role they might have had in the first-bag fee decision.

As with the failure to capture the NAS snapshot, Delta's mishandling of the Litigation Hold Server backup tapes was at least negligent but not in bad faith. Once Delta's legal counsel learned of the existence of the tapes, Delta undertook a massive effort to recover what had been lost. Delta's neglect resulted in Delta producing documents late, for which it is subject to sanctions, but it is not the basis for a finding of spoliation.

b. Atlanta Email Exchange Server Backup Tapes [Data Source No. 9].

Plaintiffs contend in this Motion that Delta should be sanctioned for waiting until June, 2009 to instruct IBM to preserve the Exchange Server backup tapes, when that instruction should have been delivered when Delta received the DOJ CID in February, 2009. This is the same claim that Plaintiffs raised in their First Motion for Sanctions in 2010 [196], discussed above. The Court rejected this claim on numerous grounds. *Delta 2011*, 770 F.Supp.2d at 1307-1315. Plaintiffs advance no reason to revisit the issue.

c. Non-Atlanta [MSP] Email Exchange Server Email Backup Tapes [Data Source No. 11].

In the Appendix to their motion, Plaintiffs contend that backup tapes for email exchange servers outside of Atlanta were overwritten monthly instead of being preserved. [413-2, page 21 -22]. Plaintiffs did not explain this issue in their briefs, did not address it at the hearing, and Mr. Pixley's two sentence description of the issue in his expert report gives no detail and cites no evidence. [434-2, page 28]. Plaintiffs appear to contend that the emails for "non-Atlanta" custodian Gail Grimmett were not preserved because she moved to New York. Ms. Grimmett's emails, however, remained on the Atlanta server. [434, page 46]. Plaintiffs do not explain this issue or provide nearly enough information or evidence to support a claim of spoliation or discovery abuse.

d. Uncollected Tapes Mislabeled as Not Being Relevant [Data Source No. 12].

Plaintiffs contend: "When relevant backup tapes were collected in early to mid-2011, IBM did not collect backup tapes when the labels suggested that the tapes were not relevant." [413-2, page 23]. Delta acknowledges that some of the labels were incorrect, making the labels an

unreliable indication of the content of the tapes. [413-3, page 103]. PwC's Brian Wilkinson agreed:

> Q: [By Mr. Low] Were the labels of the tapes generally accurate?
>
> A: [By Mr. Wilkinson] No. There was quite a few tapes that had older dates than what data was actually on there.

[413-4, page 433].

The factual dispute is whether IBM based its decision on which tapes to collect and which to ignore based on the bogus labels, in which case "potentially responsive tapes were not collected." [434-2, page 28].

Neither party points to clear evidence supporting their position on mislabeled tapes. Both rely on their experts, but the experts had no personal knowledge of whether IBM relied on the labels. The only actual evidence that either side references is Mr. Pixley's interview of IBM's David Sims. But Mr. Sims' statements were vague and somewhat equivocal. He first testified that IBM only collected tapes if the label indicated relevancy:

> Q: [By Mr. Pixley] Sure. And if the label wasn't relevant, then they weren't turned over?
>
> A: [By David Sims] I don't think so.
>
> Q: Okay. Well, the reason why I asked is we found some tapes that were mislabeled that may have contained

> relevant information, so that's why I'm asking the question.
>
> A: Okay. I'm sorry, I didn't know.

[434-9, page 14]. Later in the interview, however, Mr. Sims indicated that IBM collected any "Exchange related tapes that we had." [434-9, page 15]. Mr. Sims' statements do not resolve the issue one way or the other.

Plaintiffs have not carried their burden of establishing that Delta lost or destroyed mislabeled backup tapes that contained relevant evidence. The failure to label backup tapes correctly, however, is another example of Delta's general failure to exercise care in the preservation of possible sources of evidence.

e. 53 Tapes Collected in 2011 [Data Source No. 13].

Plaintiffs state that Delta "collected 53 email backup tapes in April 2011 from Recall, but destroyed the tapes without scanning them." [413-2, page 24. In response, Delta states that "fifty-three of the backup tapes inventoried by PwC in 2011 were tapes in the regular rotation of disaster recovery backup tapes at that time in 2011." [434-1, page 26]. Delta states: "There is no reason to suspect that email backup tapes in rotation in 2011 could have had anything to do with Delta's first bag fee decision more than two years earlier." [*Id.*] Plaintiffs do not respond on this issue in their

Reply Brief [479 *passim*]. In their Prehearing Brief, Plaintiffs appear to concede that email backup tapes in the 2011 rotation would not be responsive, but make a new argument, speculating that these tapes might have been mislabeled. [492-1, page 3]. PwC's Brian Wilkerson testified at the hearing on the Motion for Discovery Sanctions that the 53 tapes were back-up tapes of 2011 emails which were created in 2011, years after Delta made the decision to charge a first-bag fee. (Tr. 467-468). Plaintiffs have failed to carry their burden of showing that the 53 tapes contained relevant evidence.

f. File & Print Server Backup Tapes [Data Source No. 22].

Plaintiffs list in their Appendix "File & Print Server Backup Tapes" as another item that Delta destroyed or concealed. In response, Delta cites evidence to the effect that no custodial data is maintained on File & Print servers. [434, page 60]. Plaintiffs offer no rebuttal evidence.

4. Data Sources That Delta Did Not Attempt to Preserve.

With respect to some data sources, Delta concedes that it did not preserve them but contends that it never had the duty to do so. As discussed in greater detail below, with respect to each of these data sources, Plaintiffs have failed to establish the source of Delta's obligation. Plaintiffs

acknowledge that Delta did not have the duty to save every scrap of paper relating to first-bag fees, but do not articulate a less expansive theory.

On cross-examination, Plaintiffs' expert Mr. Pixley stated that it was not necessarily reasonable to search "the entire company" for documents relating to first-bag fees. (Tr. 277-78). He added, however, that "I think that that scope could have been expanded a little bit more than what they [Delta] had." The cross-examination continued:

> Q: [By Mr. Atkins]: Well, let's start with the point you have to make judgments.
>
> A: [By Mr. Pixley]: Yes.
>
> Q: And you have to make judgments about which custodians to search?
>
> A: Yes.
>
> Q: And you have to make judgments about which search terms to use?
>
> A: Yes.

(Tr. 278). As Mr. Pixley's testimony suggests, reasonable parties may disagree as to where to draw the line between data sources that Delta should have been obligated to preserve and data sources that were simply too burdensome or too unlikely to yield responsive documents. The time to

raise that issue, however, is in a motion to compel, not in a motion for sanctions.

In any event, Delta is not subject to sanction for its failure to preserve the data sources discussed below.

a. Data collected in the Slot Swap Investigation [Data Source No. 8].

In response to a separate Justice Department investigation into Delta's proposed agreement to exchange airplane slots with U.S. Airways ("the slot swap investigation"), Delta in September 2009 preserved a 12.6 terabyte "snapshot" of "the entire Delta network."[15] [Tr. 380]. According to Delta, after the government "imposed unacceptable conditions on the initial slot swap transaction," Delta and U.S. Airways did not pursue the transaction. The 12.6 terabyte "snapshot" was never searched in the slot swap matter or any other matter. [Tr. 379]. In July, 2010, Delta's in house counsel Scott McClain authorized the snapshot to be destroyed. [Tr. 380].

Plaintiffs claim that Delta should have preserved the 12.6 terabyte snapshot for review and potential production in this case. Plaintiffs do not discuss this issue in their main brief, [413], and mention it only in passing

[15] In briefing, Delta refers to this as "Delta's NAS environment." [434, page 58].

in their reply. [479, page 28]. Plaintiffs list this as an issue in the Appendix A filed with their initial motion, but do not discuss it in any detail. [413-2, page 14].

At the hearing, Plaintiffs' counsel repeatedly stated that Delta had destroyed 12.6 terabytes of data, but did not offer evidence that any of the data was unique. Indeed, to the extent that the 12.6 terabyte snapshot contained relevant data, it was duplicative of the snapshot that Delta took, and preserved in July 2009. (Tr. 228).

Plaintiffs have not established that Delta had a duty to preserve the 12.6 terabyte snapshot or that, if it did, any unique responsive documents were lost by its destruction.

b. Files from Custodians with Multiple Computers [Data Source No. 16].

Delta created and preserved forensic images of the hard drives of the primary computer belonging to each Custodian. In September, 2009, Delta also preserved forensic images of the other computers belonging to three of Delta's top executives as a result of their capture in the separate slot swap investigation: Mr. Anderson, Mr. Bastian and Mr. Hauenstein. Plaintiffs

complain that these images should have been made along with the others in May 2009.

Plaintiffs speculate that some data on these secondary computers might have been deleted between May and September, 2009. [413-2, page 28]. Plaintiffs do not, however, offer any evidence to support this assertion. Moreover, Delta's expert, Mr. Friedberg, performed a forensic examination of the Anderson, Bastian and Hauenstein drives and found no evidence that documents pre-dating the May 2009 collections were deleted between May and September, 2009. [434-7, page 34]. There is no indication in the record that Mr. Pixley conducted a similar forensic examination of these computers or, if he did, found any evidence of deletions. [*See* Pixley Supplemental Report, Plaintiffs' Hearing Exhibit 1, page 16].

In sum, Plaintiffs have not established that Delta's failure to image the secondary computers of these executives in May of 2009 constitutes spoliation.[16]

[16] Plaintiffs also contend that Delta erred by not making images of other custodians' tertiary drives. As to this allegation, there is very little evidence from either side. There is no evidence as to how many custodians had secondary computers relating to work at Delta, whether any of the computers contained unique copies of work data, or what demands or agreements were made between the parties relating to the presentation or production of these data sources. Plaintiffs' expert Mr. Pixley conceded in his deposition that custodian's additional computers do not always need to be imaged [434-6, page 74 (Pixley dep. at 286)].

c. User Created Documents on Hard Drives and Documents on Shared Drives Not Collected in CSIRT's Narrow Collection [Data Source No. 17].

Plaintiffs have failed to carry their initial burden of articulating a coherent spoliation claim relating to this item. Plaintiffs' one-page abbreviated description of this allegedly destroyed data source is, frankly, incomprehensible. Apparently, Plaintiffs are claiming that for 29 "relevant custodians," Delta should have, but did not, create forensic images of their hard drives. [413-2, page 29].

Instead of covering this basic information in their brief or Appendix, Plaintiffs refer to Mr. Pixley's report. [434-2, pages 33-38]. Mr. Pixley identifies these 29 individuals, but he does not explain what role these individuals might have had in the bag fee decision. Based on Plaintiffs' submission, it is not possible to determine what duty Delta had to preserve this data or what data might have been lost by its destruction.[17]

[17] Although this is not clear, Plaintiffs' Appendix [413-2, page 29] could be read to suggest that Delta had the obligation to image the hard drives of these custodians because of Scott McClain's March 9, 2010 email to Plaintiffs' counsel, in which he stated: "Yes – we'll search shared drives where the custodians store files as well as their own hard drives and any other storage location they use." [413-4, page 317]. But there is nothing in this email, or the surrounding email exchanges, which suggest that Mr. McClain intended to commit Delta to go beyond the understood list of 25 Custodians or, with respect to other custodians, to create forensic images of their hard drives. In its

d. Original Collected Data [Data Source No. 6].

Plaintiffs claim that Delta, between May 2009 and 2012, destroyed an unknown amount of data ("likely hundreds of gigabytes") from CSIRT's network server. [413-2, page 12]. In their Prehearing Brief, however, Plaintiffs acknowledge that Delta preserved a copy of the data on a different hard drive. [492-1, page 1]. In addition, Delta's expert, Mr. Friedberg, conducted a forensic examination of the data and confirmed that it had not been altered when it was copied. [Friedberg Report, page 27]. These facts do not show spoliation or the violation of any discovery obligation.

e. USB Devices and Data from SharePoint Sites [Data Source Nos. 14 and 15].

In two similar claims, Plaintiffs contend that Delta failed to preserve USB devices that had been used by the custodians and failed to create an image of the "SharePoint" network files. Delta does not deny that it failed to preserve these sources, but contends that it discharged its duty of preservation by instructing the custodians to provide relevant information wherever located, including on USB devices and the SharePoint site. [484,

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response, Delta does not address this issue, except to say: "Based on the standards of reasonableness and proportionality governing the rules of discovery, Delta had no duty to image every one of their hard drives or collect entire shared server 'folders whose names suggested that they contained relevant documents.'" [434, pages 62-63].

pages 15-16]. Plaintiffs contend that Delta had the obligation to preserve every USB and to make a forensic image of the entire SharePoint site.

Though Plaintiffs describe in broad and general terms what they contend to have been Delta's obligation under the law and under its alleged agreements with Plaintiffs, Plaintiffs do not point to any specific agreement relating to USB devices or the SharePoint site. Neither the USB nor SharePoint claim is discussed by name in Plaintiffs' opening brief or reply brief. [413-1; 479]. In the Appendix, Plaintiffs do not describe either claim in any detail and do not identify the source of Delta's obligation to preserve these data sources. [413-2, page 26; *Id*., page 27].

Since Plaintiffs have not explained the source of Delta's duty to preserve the USB devices or the SharePoint site, Delta's failure to preserve these data sources does not constitute spoliation or a breach of Delta's discovery obligations.

f. IBM Custodians' Documents [Data Source No. 18].

Plaintiffs contend that Delta failed to preserve files of certain unnamed "IBM Custodians" relating to "Delta's preservation and collection efforts, including documents related to e-mail backup tapes." [413-2, page 30]. In support of its allegation that Delta failed to preserve these files,

Plaintiffs cite Mr. Pixley's report. Mr. Pixley in turn states "[t]hese potentially responsive IBM documents from several custodians were destroyed." [434-2, page 39]. Mr. Pixley goes on to explain that his firm had requested documents from six IBM custodians, but had received files from only three. [*Id*., page 40]. In support of his conclusion that IBM documents were destroyed, Mr. Pixley cites only his interview of IBM's James Sims. [*Id.*] In his May 8, 2013 interview, Mr. Sims told Mr. Pixley that, prior to his departure from IBM in 2012, he did not recall anyone asking him to hold any documents or search for any documents. [434-3, page 117].

In response, Delta in sworn responses to interrogatories explains the efforts Delta undertook to obtain documents from IBM. [434-10, pages 140-142]. Delta states that it made such requests multiple times in 2009 and then again in 2011 and 2012, and that IBM produced documents to Delta which Delta in turn produced to the Plaintiffs on multiple occasions. [*Id.*] Plaintiffs do not offer any evidence refuting Delta's exhaustive submission on this issue. Plaintiffs also do not explain how they were prejudiced by the loss of evidence in IBM's possession. There is no basis in

this record for any finding of spoliation or discovery abuse by Delta relating to the files from the "IBM custodians."

g. Emails and Other Files of Airport Committee Custodians [Data Source No. 21].

Plaintiffs initially requested documents related to the "Atlanta Airport Affairs Committee," and then expanded the scope to include six other airport committees. Plaintiffs state in their Appendix that Delta's production of documents relating to these committees was insufficient, but give no specifics [413-2, page 36], and provide no response to Delta's effective rebuttal. [434-1, page 41]. Plaintiffs have not made a sufficient showing here of spoliation or other discovery violation.

5. Deleted Emails.

a. Auto-Deleted Emails [Data Source No. 19].

As noted above, Delta's Exchange Server was set to sweep active emails automatically into the deleted items folder after 60 days; another 60 days later, items in the deleted items folder were eligible to be permanently deleted. [413-2, page 32]. Plaintiffs contend that Delta's duty to preserve evidence in this case arose when Delta received the DOJ CID in February, 2009, and that Delta's failure to move the custodians to the Litigation Hold

Server until May, 2009 constituted spoliation of evidence. The Court has already ruled that Delta's receipt of the CID did not trigger a duty *to the Plaintiffs* to preserve evidence. *Delta 2011*, 770 F.Supp.2d 1299, 1307-1308 (N.D. Ga. 2011). Plaintiffs have pointed to no new evidence that would support a reconsideration of the Court's ruling. There is no evidence that Delta, prior to the filing of the first lawsuit in this case, had sufficient notice of this litigation to trigger a duty to preserve evidence.

Moreover, even if Delta's duty to preserve evidence was triggered by the DOJ CID, Plaintiffs have not shown spoliation between February and May 2009. To establish that Delta destroyed documents during this time period, Plaintiffs would have to show that Custodians ignored Delta's "litigation hold" notices that were sent to all Custodians immediately upon receipt of the DOJ CID on February 3, 2009, affirmatively deleted emails and other documents during this three month time period, and then deleted the files from the deleted items folders and trash bins. Plaintiffs contend that it is possible that the custodians violated the litigation hold notice because the notice "only required custodians to turn over those documents that the custodians affirmatively identified to Delta counsel as responsive," and allowed custodians not to turn over any documents if they

told counsel that they were "sure" they had no responsive documents in their files. [413-2, pages 32-33 (Plaintiffs' claim); 413-4, page 346 (email litigation hold notice from Mr. McClain to senior executives)].

Delta's notices, however, were not unreasonable under the circumstances. The notices opened by explaining that Delta had been required by the DOJ to collect and produce all documents "relating to any actual or contemplated changes in checked baggage fee policies of Delta or any other airline." [*Id.*; 434-9, page 35]. The notice to senior executives instructed the custodians to "ask your assistants to take any necessary steps to prevent the destruction or deletion of any of these documents currently in your possession." [413-4, page 346]. The notice to the other custodians, who might not have assistants, stated: "Please take any necessary steps to prevent the destruction or deletion of any of these documents currently in your possession." [434-9, page 35]. Delta's files also show that counsel followed up with the custodians, calling and emailing repeatedly to confirm collection of responsive documents. [413-4, page 348; 413-4, page 350].

In sum, Plaintiffs' speculation about the effect of an allegedly inadequate litigation hold notice does not relate to, much less prove, that Delta destroyed or concealed evidence.

b. Manually Deleted Emails [Data Source No. 20].

Delta says that there is no evidence that any custodian deleted emails. Plaintiffs state in their Appendix that "Delta custodians deleted relevant documents after receiving a litigation hold." [413-2, page 35]. Plaintiffs do not, however, point to any evidence supporting this claim, which they appear to have abandoned.

B. ALLEGEDLY CONCEALED OR LATE-PRODUCED DATA

Plaintiffs contend that another factor weighing in favor of sanctions is the number of late-produced or concealed documents. [413-1, pages 17-18]. Plaintiffs list 16 categories of concealed, but ultimately produced, data sources in Appendix D. In Appendix C, Plaintiffs discuss the content of the relevant late-produced documents. Plaintiffs state that the late-produced documents materially advance their antitrust case by proving "plus factors," disproving Delta's defenses, and addressing concerns identified in the Court' Order denying the motion to dismiss. [*Id*., page 17]. In response, Delta and AirTran argue that none of the late-produced documents support Plaintiffs' conspiracy claims in the least. [434, page 80-86; 430 *passim*].

Plaintiffs concede that the late production of documents has not uncovered any "smoking guns." [413-1, page 18]. Significantly, on cross-

examination, Mr. Pixley did not recall seeing *any* communications between anyone at Delta with anyone at AirTran concerning first-bag fees. (Tr. 275-76).

A review of the late-produced documents does not reveal a pattern from which any inference of bad faith could be drawn. It does not appear that the documents produced late are, on balance, any better or worse for Delta and AirTran than the ones that were produced on time. The late-produced documents also do not shed any light on whether other evidence was destroyed.

Making a refined assessment of the probative value of the late-produced documents is beyond the scope of this Report and Recommendation and is unnecessary to its resolution, for the following reasons. Since the documents have now been produced, they are not relevant to Plaintiffs' spoliation claim. Since these documents are, by and large, responsive to Plaintiffs' discovery requests, Delta should have produced them on time whether or not they create a genuine issue of material fact sufficient for Plaintiffs to withstand defendants' Motions. *See* Part V, below (discussing Plaintiffs' non-spoliation claims).

The content and probative value of this evidence can and will be assessed, along with all the other evidence, when those motions are considered by the Court. *Harkabi v. SanDisk Corp.*, 275 F.R.D. 414, 421 (S.D.N.Y. 2010) ("It appears that Plaintiffs will have the benefit of all of their [late-produced] emails not just at trial, but also during depositions. Thus, the prejudice . . . from late-produced emails is contained.")

C. ALLEGEDLY FALSE STATEMENTS

Plaintiffs contend that another reason Delta should be severely sanctioned is that it made a number of false statements "to avoid producing responsive documents and to cover up misconduct." [413-1, page 20]. Plaintiffs do not discuss the specific alleged misstatements in their brief, and instead refer to their Appendix B, which lists 21 alleged misstatements in no particular order. Each of the 21 alleged misstatements is addressed below, reorganized for ease of presentation.

As detailed below, although there is authority for the proposition that bad faith is "reflected in [defendant's] persistent efforts at dissemblance," *Telectron Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 131 (S.D. Fla. 1997), the facts here do not support the inference that Delta made

misrepresentations to conceal spoliation or block Plaintiffs' efforts to discover evidence.

1. Statements by Delta that have already been litigated

Plaintiffs cite a number of the alleged false statements that have already been the subject of the Court's decisions in this case:

a. Inaccurate assurances of completion of discovery.

From 2010 t0 2012, Delta's counsel assured the Court on multiple occasions that Delta had completed discovery. *See* Appendix B, page 1 [413-2, page 38]. As the Court stated in *Delta 2012*: "it would be impossible for Delta to have been more forceful in its assurances that it had fully complied with Plaintiffs' document requests and the DOJ's CID." 846 F.Supp.2d at 1341. The Court found that "[t]ime has proved those representations to be woefully inaccurate," and sanctioned Delta for "for its myriad inaccurate representations." *Id*. at 1351, 1353 n.13. Plaintiffs do not explain why Delta should be sanctioned for this conduct that the Court has already addressed.

b. Email system.

Plaintiffs' state: "Delta falsely represented that in June 2009 it preserved backup tapes for 'Delta's entire e-mail system' that Delta believed

were created in April 2009." Appendix B, page 12 [413-2, page 49]. Again, the Court has already sanctioned Delta for these representations. *Delta 2012*, 846 F.Supp.2d at 1358-59.

c. Hard drive data.

In 2009, Delta collected data from hard drives but then inexplicably failed to load them into the Clearwell system that Delta used to review and produce documents. *See* Appendix B, page 6 [413-2, page 43]. Before Delta caught this mistake in 2011, Delta made a number of misstatements about the progress of discovery. Delta has already been sanctioned for these misstatements as well. *Delta 2012*, 846 F.Supp.2d at 1365.

d. Instruction to IBM.

Plaintiffs contend that Delta misrepresented the date that it instructed IBM to preserve backup tapes. *See* Appendix B, page 1 [413-2, page 38]. This issue was thoroughly litigated in *Delta 2011*. The Court concluded, "after carefully reviewing the documents," that it "would not reject Delta's verified representation that the instruction was issued sometime between May 19 and June 5, 2009." 770 F.Supp.2d at 1304 n.5. Plaintiffs do not offer any reason to revisit this issue.

2. NAS Storage

On page 2 of Appendix B, Plaintiffs contend that Delta (a) failed to disclose the existence of the NAS Executive Server backup files in interrogatory responses[18] and (b) later inaccurately claimed to have preserved and searched a November 5, 2008 NAS server backup file. [413-2, page 39]. This claim is addressed above in connection with Plaintiffs' claim that Delta spoliated evidence by not timely generating NAS backup snapshots. *See supra* Part III(B)(2).

3. 53 current rotation backup tapes

Mr. McClain testified in his deposition that tapes relating to the bag fee case "were preserved." Plaintiffs contend that this statement is false because PwC in 2011 deleted 53 backup tapes by returning them to the tape rotation. Appendix B, page 4 [413-2, page 41]. The 53 tapes that PwC returned to the tape rotation, however, were then-current backup tapes, i.e., covering emails from 2011, that were not remotely responsive to discovery in this case. [413-3, page 269 n.6]. Mr. McClain's general statements in his deposition were not incorrect or misleading.

[18] This is correct. [413-5, pages 39-59 (Delta's discovery with no mention of NAS Executive Server)].

4. Slot Swap Data

In several instances, Plaintiffs misstate the record in attacks upon Delta's counsel. On page 5 of Appendix B, Plaintiffs charge that Mr. McClain "represented that Delta had collected and searched the same data sources in this litigation as it had searched in the slot swap investigation." [413-2, page 42]. This is not correct. Mr. McClain testified exactly to the contrary:

> Q: Were there any types of electronic files that were collected in the slot-swap investigation that were not collected in connection with this case?
>
> A: Yes, because as I said, it was a very broad second request in an HSR [Hart Scott Rodino] transaction, and it covered many, many topics that this case didn't cover.

[413-3, page 101]. Mr. McClain went on to qualify his answer carefully:

> Q: What were the sources of electronic files, if any, that were searched in the slot-swap investigation that were not searched in the bag fee investigation that had files for relevant custodians?
>
> Mr. Allen: Objection. Compound. Vague. You may answer his question.
>
> THE WITNESS: If what you are asking is for a particular relevant custodian whether there was file types or data types that were collected from that custodian in the slot-swap transaction that were not collected in the first-bag fee, then the answer is none. We collected the same data sources. *But there were many other kinds of data*

> *sources. There were many other kinds of custodians, and that's what I was referring to.*

Id. [emphasis added].

In a separate charge involving the slot swap data, Plaintiffs claim that Mr. McClain and Delta's outside counsel, Mr. Denvir, "represented that the entire slot swap collection was preserved and was searched in this case," only to authorize the destruction of a 12 terabyte collection of data from the "slot swap collection" in 2010. Appendix B, page 3 [413-2, page 40]. Plaintiffs also cite a letter a year later from Mr. Denvir to the DOJ, which describes a 2 terabyte collection of slots swap data that clearly was being searched at that time, [413-5, page 29], well after Plaintiffs contend Mr. McClain authorized the destruction of a 12 terabyte collection. It is not clear what Plaintiffs are claiming counsel misrepresented; Plaintiffs may be confusing two or more sets of data collected for different proposed slot swap transactions. [413-3, page 8-9 (McClain testimony describing two rounds of slot swap investigations)]. In any event, Plaintiffs have not shown that the statements by Mr. Denvir or Mr. McClain were inaccurate, much less that they were driven by Delta's desire to cover up misconduct.

5. SharePoint Data

In Exhibit B, page 12, Plaintiffs state that Delta, through Mr. McClain, "told Plaintiffs that Delta had searched SharePoint for responsive documents," but Delta made no effort "to actively search SharePoint." [413-2, page 49]. Mr. McClain did testify generally in 2012 that SharePoint had been searched. [413-3, page 106]. Two years earlier Mr. McClain testified clearly (and correctly) that Delta did *not* conduct a wholesale search of SharePoint, but instead conducted a targeted search:

> Q: Did you search any SharePoint sites?
>
> A: Yes. As I just said, if there were targeted – you know, if we needed to collect data from them, we collected data from them.
>
> Q: Which SharePoint sites did you search?
>
> A: Any – any SharePoint sites where custodians identified that site as being the source of documents that we needed to collect in the case. . . .*We did not image – you know, wholesale image the network system of Delta and search it for responsive documents, and that applies to SharePoint sites or other sources of raw data. That's – that is not a reasonable way of conducting discovery in a case*.

[*Id*., page 4 (emphasis added)]. Mr. McClain's testimony was accurate.

6. PwC Tape Search

On page 10 of Appendix B [413-2, page 47], Plaintiffs state that Mr. McClain "represented that, with respect to the 340 tapes that it disclosed in April 2011, it had searched all relevant tapes." This is a strained reading of Mr. McClain's testimony. Mr. McClain testified to a process by which tapes that were deemed irrelevant were culled before being searched. The process may have been flawed, but Plaintiffs do not point to any statement by Mr. McClain that was incorrect. Mr. McClain testified that Delta's consultant, PwC, was the party actually searching the tapes and had superior knowledge of the issue. In response, Plaintiffs' lawyer stated that he would follow up with PwC. [413-3, page 109]. Plaintiffs had a full opportunity to obtain the details, and there is no evidence that Delta was making any effort to cover up any wrongdoing.

7. Box of 29 Tapes

Three of Plaintiffs' alleged misrepresentations of fact concern the same box of tapes that IBM delivered to CSIRT on June 3, 2011. [413-2, page 41; *Id*., page 46; *Id*., page 46-47]. On Page 4 of Appendix B [*Id*., page 41], Plaintiffs state that Delta's counsel agreed to produce tape labels and "markings on the box in which CSIRT stored 53 tapes delivered by IBM to

CSIRT on June 3, 2011." *Id*. This is incorrect. As Plaintiffs state several pages later, Delta delivered 29 tapes to CSIRT on June 3, 2011, not 53. [*Id*., page 46]. Plaintiffs also appear to claim that Delta destroyed the labeling on the tapes and on the box "likely because it was clearly labeled as containing relevant tapes that Delta received in June 2011 but failed to disclose until October 2012." [*Id*., page 41]. Although Delta may have lost the box that at one point contained the tapes, the tapes themselves were clearly labeled. [434-12, pages 51-52 (photograph showing 29 tapes with labels)].

Delta's failure to process and produce these tapes in a timely manner may have been a breach by Delta of its underlying discovery obligations, but the evidence does not support Plaintiffs' claim that Delta made misrepresentations to cover up misconduct relating to the box of 29 tapes.

8. The subject matter of the DOJ CID

During the January 27, 2011 hearing on Plaintiffs' First Motion for Sanctions, Delta's counsel stated that the DOJ's CID did not indicate that "the Government was conducting an investigation into Section 1 price fixing." [264, page 40]. This statement was plainly incorrect. The CID itself, as well as the cover letter from the Department of Justice, state

plainly that the government was conducting an investigation into violations of Section 1 and Section 2 by "agreements or coordination involving checked baggage fees." [*Id.*, pages 379, 381].

Plaintiffs do not claim, however, that counsel's misstatement deceived anyone in the courtroom. (Tr. 596). Plaintiffs were well aware of the subject matter of the CID, having explained its scope in detail in their prior brief to the court. [196, page 6]. Indeed, as reflected by the Court's opinion, there is no indication that the Court was not fully aware of the scope of the CID. *Delta 2011*, 770 F.Supp.2d at 1303. This is not to excuse counsel's misstatement, but there is no indication in the record that the misstatement prejudiced Plaintiffs or had any impact upon the course of the litigation.

9. Statements of advocacy

Plaintiffs claim that statements in which Delta has denied liability or disagreed with Plaintiffs' positions constituted sanctionable misrepresentations. *See* Appendix B, page 8 [413-2, page 45] (Delta's counsel stated in an April 2012 letter that there is "no evidence" that Delta spoliated documents in this case); Appendix B, page 3 [*Id.*, page 40] (Delta's 2012 statement that no further discovery is necessary); Appendix

B, pages 10-11 [*Id.*, pages 47-48] (statement that Delta "has conducted a diligent search"); Appendix B, page 11 [*Id.*, page 48] (statement that Delta's conduct has not resulted in "the loss of relevant evidence in this case"). Particularly in context, these are statements of opinion, not statements of fact.

Similarly, Delta stated in July 2012 that the "discovery on discovery" document production "is complete." *See* page 10 of Appendix B. [*Id.*, page 47]. In the months that followed, however, Delta continued to produce additional "discovery on discovery" documents. Delta explains in its Response Brief that Delta produced many of these documents to resolve disputes with Plaintiffs over the scope of "discovery on discovery." [434, page 24 n.39]. Plaintiffs do not address Delta's rebuttal in their reply. [479 *passim*]. Though Delta may be responsible for overall delays in producing documents, Plaintiffs have not shown that Delta should be sanctioned for prematurely stating that its production was complete.

10. Evidence locker spreadsheet

Plaintiffs challenge Delta's statement to the Court on September 24, 2012, in the context of a discovery dispute, that Delta had produced documents reflecting "what documents were placed in or removed from the

Evidence Locker." [413-3, page 329]. Plaintiffs do not explain how this statement was false – Delta produced the Evidence Locker Spreadsheet in discovery. [*Id.*, pages 106-107].

11. IBM Document Production

Finally, Plaintiffs contend that Delta falsely represented that it had produced all IBM documents in Delta's possession when, in fact, Delta had failed to conduct an adequate search of IBM's employees' records. Appendix B, page 13 [413-2, page 50]. On its face, Plaintiffs' claim appears to belong in a motion to compel, not a motion for sanctions. In addition, the only evidence that Plaintiffs cite in support of the proposition that Delta failed to perform an adequate search of IBM's records is the statement by Delta's expert Mr. Pixley, who had no personal knowledge of the events in question. [413-3, page 174]. The evidence cited in Plaintiffs' Appendix B does not show that Delta conducted an inadequate search of IBM, much less that Delta made a sanctionable misrepresentation.

D. SUPPLEMENTAL CLAIMS

Since the filing of Plaintiffs' Motion for Discovering Sanctions in December 3, 2013, two additional categories of alleged misconduct have been asserted by the Plaintiffs. First, Plaintiffs contend that their expert,

Mr. Pixley, in a search of Delta's database in the spring of 2014 discovered relevant documents that Delta had not produced. Second, after the August, 2014 evidentiary hearings on the motion, one of the witnesses at the hearing (Delta's Kelly Turner Brown) contacted Plaintiffs' counsel and stated that she had additional evidence of Delta's alleged wrongdoing. This disclosure led to her deposition, the production of additional Delta documents that should have been disclosed earlier, another hearing, and additional charges of wrongdoing.

1. Mr. Pixley's Discovery of Additional Documents

Delta has produced about 265,000 pages in this case. The vast majority of these documents (93%) were produced by the end of 2012, that is, before Mr. Pixley was engaged by the Plaintiffs. [413-2, pages 106-107]. During and after Mr. Pixley's investigation – for which he charged about $5 million – Delta produced another 17,000 pages. [*Id.*, page 107].

In response to the criticism that his work was not worth the time and money it cost, Mr. Pixley set out in March 2014 to perform what he called a "spot check" of Delta's database[19] to verify if, in fact, Delta had produced all

[19] The database was actually created by Mr. Pixley's company, Precision, but contained data from various Delta sources. The database that Mr. Pixley searched in March 2014

responsive documents.[20] After about ten hours of searching, Mr. Pixley found several documents that were responsive to Plaintiffs' discovery requests that had not been produced by Delta. (Tr. 186-187). In June, 2014, Mr. Pixley spent another hour or so searching the database, and found another document. (Tr. 199-200).[21] Delta concedes that "a few" of the documents that Mr. Pixley found in his 2014 spot check "are responsive and should have been produced, but none are material to Delta's bag fee decision, much less 'critical' to any issue in this case." [484, page 8].

Neither party appears to be very curious about whether there are other documents in Delta's database that should have been produced by Delta. Mr. Pixley decided to stop searching because the eleven-hour process was "tedious" and his spot check "wasn't designed to be something to any great magnitude." (Tr. 252). Delta's counsel was apologetic and took full responsibility for the failure of his firm's contract lawyers to catch

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was the same database that Delta was searching to produce responsive documents. (Tr. 190).

[20] Pursuant to the terms of Mr. Pixley's engagement and prior orders of the Court, Mr. Pixley, but not Plaintiffs generally, has direct access to Delta's discovery databases.

[21] Mr. Pixley submitted a Supplemental Report directly to the Court, and then a revised Supplemental Report was marked as Plaintiffs' Hearing Exhibit 1.

these documents in the document review, but did not indicate that Delta had undertaken an additional search for responsive documents.

At the hearing, the parties focused attention upon two documents that Mr. Pixley found that Delta now concedes should have been produced. (Tr. 387). The first document is a memo in draft form of minutes from a September 23, 2008 "CEO Forum," an internal meeting that Delta CEO Richard Anderson held with a large group of company officials to bring them up to speed on various issues. The minutes of the meeting were to be published on Delta's internal web site for those who did not attend the forum. In the draft minutes, Mr. Anderson is quoted as saying:

> We are now trying to decide whether or not we should charge for the first checked bag. Adding a charge for checking the first bag, could bring us hundreds of millions in additional revenue next year. That's real money we could direct toward improving employee pay more quickly but the flip side of doing so could negatively affect our customers and revenue.

(Plaintiffs' Hearing Exhibit 2 (Exhibit 108 at 3)). The document clearly is responsive to Plaintiffs' discovery requests, as Delta concedes, and should have been flagged for production by Delta's lawyers.

The second document is an email chain to and from members of Delta's cross-functional fee-team. (Plaintiffs' Hearing Exhibit 2 (Exhibit 108 at 27)). The email chain contains the term "first bag fee," was written

during the most important three week period in the case, and includes emails to and from an executive, Gail Grimmett, whom Delta identified early on as a "custodian" in the case. Plaintiffs argue that spoliation is shown because the email chain references meeting minutes, but Delta never produced any meeting minutes from this team. In response, Delta denies it is hiding any minutes. Delta states that there is no other evidence that minutes were taken of these meetings and then adds (without noting the inconsistency) that the person who normally prepared the minutes did not attend the meeting. [484-1, 10-11].

Though the failure of Delta to produce these and the other documents found by Mr. Pixley in his spot check is a factor to be considered in the determination of whether and how Delta should be sanctioned, there is no spoliation here because the documents still exist. In addition, though these documents clearly should have been produced, these documents shed little light on Delta's actual decision-making process. To the extent they do support Plaintiffs' case on the merits (which is not clear one way or the other), Plaintiffs may use them in response to the Defendants' Motion for Summary Judgment.

2. Additional documents and testimony from Kelly Turner Brown.

Kelly Turner Brown joined Delta's CSIRT in roughly 2006 and in 2010 became the team lead. CSIRT is directly and indirectly responsible for a number of the mistakes that Delta made in discovery in this case, including some mistakes that were made when Ms. Brown was team lead. Ms. Brown was moved to another position within Delta in 2012, where she remains today. (Tr. 396-97).

Ms. Brown was interviewed by Mr. Pixley in 2013 and then was called by Plaintiffs as a witness in the hearings on the Plaintiffs' Motion on August 13, 2014. Ms. Brown's testimony was generally supportive of the work that CSIRT had done, but critical of the efforts of Delta's counsel, Mr. McClain. (Tr. 396). At the conclusion of her testimony on direct and cross-examination at the August 13, 2014 proceedings, the Special Master asked the following questions:

> Mr. Brown: Okay. Ms. Brown, do you know – and you're under oath.
>
> The Witness: Yes.
>
> Mr. Brown:—Do you know of any facts that would suggest that Delta, including its attorneys, took any action to conceal evidence that was discoverable fairly in this litigation?

> The Witness: I wouldn't say that I know that.
>
> Mr. Brown: Do you believe it?
>
> The Witness: I wouldn't say I believe it, no.
>
> Mr. Brown: You're not saying that with a lot of conviction. Is that because you don't know one way or the other or because you suspect it to be the case and are afraid to say?
>
> The witness: I don't know.
>
> Mr. Brown: What did you say?
>
> The Witness: I said I don't know one way or the other.

(Tr. 420). As the exchange suggests, Ms. Brown's answers were barely audible.

A month later, on September 15, 2014, Ms. Brown called Plaintiffs' counsel, Michelle Kraynak, and told Ms. Kraynak that she had documents that Delta had not produced in the case. Ms. Kraynak immediately terminated the conversation and contacted Judge Batten, who agreed to hold an emergency telephone conference with the parties. Judge Batten ruled that the Ms. Brown should be deposed and her testimony given whatever weight it was due by the Special Master in consideration of the Plaintiffs' motion for discovery sanctions. [512, page 10].

Ms. Brown was then deposed on September 26, 2014. Her deposition led to another hearing before the Special Master on October 7, 2014, and further informal briefing by the parties, which concluded with submissions on November 5 and November 13, 2014.[22]

Ms. Brown's deposition testimony and production of additional documents raises two issues, discussed below.

a. Delta's Compliance in General and Bad Faith.

The first and most important issue raised by Ms. Brown's testimony is whether it sheds any light on Delta's alleged bad faith. At the start of her deposition, Ms. Brown reflected on her exchange with the Special Master, quoted above, in which she swore that she did not know, one way or the other, whether Delta had concealed or destroyed evidence. In her post-hearing deposition, Ms. Brown testified that, after the hearing, she went over some of the relevant documents and changed her mind about the answers that she would have given to questions asked by the Special Master:

> Q: If you were asked those questions again today, after having gone back and looked at these documents, would you answer these questions differently?

[22] The Special Master greatly appreciates the professional manner in which the lawyers for Plaintiffs and Delta handled this unusual turn of events.

A: Yes.

Q: What would your answers be?

A: I feel that they did, and I know that they did.

Q: That they did what?

A: Withheld data.

Q: Intentionally?

A: Intentionally.

Q: Do you think they also intentionally destroyed data?

A: They let it happen. They let it happen.

Q: Do you think it was intentional that they let data be destroyed?

A: Yes.

(K. Brown Dep., pages 69-70).

There are a number of reasons why Ms. Brown's most recent testimony should be given very little weight. First, there is no reason to believe that Ms. Brown was not telling the truth when she testified at the hearing that she did not know one way or the other whether Delta had destroyed or concealed evidence. Ms. Brown clearly had considered all of these issues by the time of her hearing testimony and was given ample opportunity to express her beliefs. Her earlier testimony also was

plausible: Ms. Brown was not in a position to know what Delta, as a company, preserved or destroyed.[23]

Second, Ms. Brown's more recent conclusion that Delta destroyed evidence is based at least in part upon a total misunderstanding of how the NAS Executive Server works. Ms. Brown testified that she decided to call Plaintiffs' counsel Michelle Kraynak after reading the July 2009 email from Mr. McClain to Mr. Sokol, discussed above, in which Mr. McClain instructs Mr. Sokol to "use as our back up date the back up closest to (but after) November 4, 2008." [434-11, page 143]. Ms. Brown testified:

> The e-mail that I saw from Scott McClain to John Sokol indicating that he did not want data to be collected older than November 4th, Exhibit 4, really made me realize at that point that they were hiding data or trying to not provide all the data that they could have at that time.

(K. Brown Dep., page 67). Ms. Brown has it exactly backward. A NAS snapshot no older than November 4, 2008, would collect *only* data older than November 4. It could very well be that had Ms. Brown understood how

[23] Delta – for better or for worse – did not keep Ms. Brown informed about Delta's efforts and difficulties in the discovery process. For example, Ms. Brown was unaware that Delta had lost Drive 4 (*id*. at 193), and she was unaware of the issues concerning the three cloned drives from Minneapolis-St. Paul (*id*. at 18-19), even though those items were lost from a box in the Evidence Locker which was under her team's control.

the NAS Executive Server worked she would not have changed her belief as to whether Delta destroyed documents.

Third, and closely related, Ms. Brown is a fact witness, not an expert witness, and her testimony is important to the extent that it is based on her personal knowledge: what she saw, heard, did, and understood. She acquired no new personal knowledge in between the time she testified at the hearing and her deposition. To the contrary: she testified that she changed her mind based on her review of communications between other people, communications that she was not privy to and did not fully understand.

For the foregoing reasons, Ms. Brown's testimony that she believed Delta destroyed documents will not be given weight in considering whether or how Delta should be sanctioned.

b. The merger tapes.

Based on Ms. Brown's deposition testimony, Plaintiffs claim that Delta lost or destroyed a box of over 100 backup tapes collected in 2008 for the Delta/Northwest merger after they were provided to PwC in 2011 to be inventoried. During her deposition, Ms. Brown testified that she saw a box in Delta's Evidence Locker in February 2011 that she contends contained

backup tapes collected in 2008 for DOJ's review of the merger with Northwest. Ms. Brown testified that those tapes were then turned over to PwC by Delta employee Anthony Laidler in March 2011. (K. Brown Dep., 36, 127). She further testified that PWC did not log those tapes during its 2011 inventory of the backup tapes in Delta's possession. (K. Brown Dep., 127). Based on Ms. Brown's deposition, Plaintiffs argue that 100-plus tapes existed in 2011 but were lost or destroyed after they had been provided to, but not logged by, PWC.

Delta contends that the merger tapes were among the 1,093 it sent to Iron Mountain in mid-2008. Delta had the 1,093 "merger tapes" destroyed in the ordinary course of business in mid-2008, before its duty to preserve evidence in this case arose. Delta's position is consistent with documentation from Iron Mountain. [434-11, page 51].

Ms. Brown's testimony provides little basis to doubt Delta's straightforward account. Ms. Brown acknowledged that the tapes that she saw in the Evidence Locker in 2011 were not labeled "merger," and she has given inconsistent accounts of the labeling on the box containing the tapes. Ms. Brown testified in her deposition that the box was labeled "merger," (K. Brown Dep., 34), but told her manager in August 2011 that the "box wasn't

labeled." [413-3, page 127]. She also admitted that she does not remember if she was present when the tapes were discovered in the evidence locker on March 9, 2011 and provided to PwC. (Tr. 417-418; K. Brown Dep., 129:11-21).

Ms. Brown's speculation that PwC did not log the tapes that it received from Delta is unfounded and contrary to the testimony of former PwC employee Brian Wilkinson. Mr. Wilkinson testified at the hearing that PwC logged and preserved all of the tapes located in CSIRT's evidence locker in 2011, as well as additional tapes located by IBM. (Tr. 460, 463).

In sum, Plaintiffs have not established that the tapes Ms. Brown saw in 2011 were the merger tapes or that PwC failed to preserve them.

IV. SPOLIATION SANCTIONS

Plaintiffs have moved for the imposition of sanctions because of Delta's alleged spoliation. "'Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'" *Delta 2011*, 770 F.Supp.2d at 1305 (quoting *Graff v. Baja Marine Corp.*, 310 Fed.Appx. 298, 301 (11th Cir. 2009)). In this case, whether Delta should be sanctioned for spoliation turns upon two broad issues: prejudice and bad faith. *See Delta 2011*, 770 F.Supp.2d at 1305 (citing *Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 WL 2927962, at *2 (S.D.Fla. July 23, 2010), and *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997).

With this background, the analysis will turn to consider whether Delta destroyed relevant evidence and whether Delta acted in bad faith.

A. Prejudice: The Significance of the Evidence Destroyed

To "justify the imposition of spoliation sanctions, courts within this circuit have recognized the importance of the movant proving that 'critical' or 'crucial' evidence was destroyed." *Delta 2011*, 770 F.Supp.2d at 1310 (quoting *Flury*, 427 F.3d at 943, 947). *See also Eli Lilly & Co. v. Air Express Int'l USA, Inc.*, 615 F.3d 1305, 1318 (11th Cir. 2010) ("spoliation

analysis hinges upon the significance of the evidence and the prejudice suffered as a result of its destruction"). There is authority, however, for the proposition that evidence of bad faith may allow for an inference that the missing evidence was unfavorable to the spoliating party. *Bashir*, 119 F.3d at 931. *Cf. SE Mech. Serv. v. Brody*, 657 F.Supp.2d 1293, 1300 (M.D. Fla. 2009).[24]

Each of the 23 categories of allegedly destroyed categories of evidence is addressed above in Parts III(A) and (D). As discussed above, 21 of these 23 categories of data sources clearly do not involve potentially spoliated evidence because of one or more of the following reasons: (a) the evidence itself has been preserved, even if in a different form or format,[25] (b) Delta

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[24] The *Brody* court, applying Florida law, explained:

> In spoliation cases, courts must not hold the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence because doing so allows the spoliators to profit from the destruction of evidence. . . . However, it should not be inferred that missing evidence was unfavorable unless the circumstances surrounding the evidence's absence indicate bad faith.

675 F.Supp.2d at 1300 (citation omitted).

[25] This category includes: Three Cloned Drives from Minneapolis-St. Paul (Data Source No. 1); Drive 4 (Data Source No. 3); Original Collected Data (Data Source No. 6); Drives 3 and 8 (Data Source No. 7).

had no duty to preserve the data source in the first place,[26] (c) the data did not concern the merits of the case,[27] (d) Plaintiffs did not prove that the evidence was lost,[28] or (e) the Court has already considered whether Delta should be sanctioned for the destruction of the evidence.[29]

As to the two other categories -- the NAS Executive Server snapshot and the Litigation Hold Server backup tapes – whether Delta destroyed *and did not recover* relevant evidence is a closer call. However, as discussed in detail above, there is no evidence as to the content of any unrecovered data and no basis upon which to conclude that Delta destroyed

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[26] This category includes Data Collected in Slot Swap Investigation (Data Source No. 8), USB Devices (Data Source 14); Data from SharePoint Sites (Data Source 15); Files from Custodians with Multiple Computers (Data Source No. 16); User Created Documents on Hard Drives (Data Source 17); 53 Tapes Collected in 2011 (Data Source No. 13); "auto-deleted emails" (Data Source No. 19); and Emails and Other Files of Airport Committee Custodians (Data Source No. 21). Most of these data sources could also fall into the category of sources with respect to which Plaintiffs did not prove that any evidence was lost.

[27] This category includes the Folder of Notes (Data Source No. 2) and the Evidence Locker Notebook (Data Source No. 4). The loss of these data sources, however, is relevant to a consideration of whether Delta acted in bad faith.

[28] This category includes Non-Atlanta Email Exchange Server Email Backup Tapes (Data Source No. 11); Uncollected Tapes Mislabeled as Not Being Relevant (Data Source No. 12); IBM Custodians' Documents (Data Source No. 18); Manually Deleted Emails (Data Source No. 20); File and Print Server Backup Tapes (Data Source 22); and the Merger Tapes (supplemental).

[29] This category includes the Atlanta Email Exchange Server Backup Tapes (Data Source No. 9).

relevant, much less "critical" or "crucial," evidence.[30] "Where, as here, the moving party is not able to establish that the allegedly destroyed evidence is critical to the case, courts have consistently refused to impose spoliation sanctions." *Delta 2011*, 770 F.Supp.2d at 1310 (citing numerous cases from this Circuit).

B. Bad Faith

It is well-settled in this Circuit that "a finding of bad faith is a prerequisite to spoliation sanctions." *Delta 2011*, 770 F. Supp.2d at 1313. A more difficult and complex legal issue is what constitutes bad faith. The term usually refers to "deliberate fraud or misconduct," *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1239 (11th Cir. 2007), but a finding of

[30] Requiring as an element of a spoliation claim that the destroyed evidence be "critical" or "crucial" to the case is not unreasonable when more is known about the lost evidence. In *Bashir*, for example, the lost evidence was the train's "speed tape," of obvious importance in an accident case. In *Flury*, the lost evidence in a products liability case was the car itself. In these instances, what the evidence would actually prove – whether it would be good for the defendant or the plaintiff - was unknown, but the significance of the evidence was without question. Where the allegedly destroyed evidence is unspecified electronically stored information, establishing that the information is critical or crucial to the case may be far more difficult, resulting in the potential that a spoliator, even one acting in bad faith, can escape responsibility for extensive destruction of evidence simply because the content, and even the prior existence, of evidence is unknowable. In this case, however, Plaintiffs would not be able to establish spoliation even if there were no requirement that the lost evidence be "critical" or "crucial" to the case. Plaintiffs have not met their burden of showing that evidence that was likely to be "relevant" to the case has been lost, or that Delta has acted in bad faith.

bad faith is said not to require evidence of "malice." *Flury*, 427 F.3d at 946. Direct evidence of bad faith is not necessary; a court may find bad faith by "'drawing inferences from the conduct before it.'" *Bryne v. Nezhat*, 261 F.3d 1075, 1125 (11th Cir. 2001). In *Kraft Reinsurance Ireland, Ltd. v. Pallets Acquisitions, LLC,* 843 F.Supp.2d 1318, 1327 (N.D. Ga. 2011), the district court held that "reckless disregard for potential prejudice to the opposing party, although not rising to the level of malice, amounts to bad faith." *See also Swofford v. Eslinger*, 671 F. Supp.2d 1274, 1282 (M.D. Fla. 2009) (finding bad faith from "knowing and willful disregard for the clear obligation to preserve evidence that was solely within the possession and control of the Defendants"). *Compare United States v. Gilbert*, 198 F.3d 1293, 1298-99 (11th Cir. 1999) (observing the 'ordinary meaning' of 'bad faith' 'is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will").

Even if Delta had destroyed relevant or crucial evidence, spoliation sanctions would not be appropriate in this case because Delta did not act in bad faith. This conclusion is reached based upon a review of the substantial

evidentiary record and consideration of live testimony and cross-examination of witnesses. Given a case of this complexity, it is not possible to isolate a single factor that leads to this finding. Instead, the conclusion that Delta did not act in bad faith is based upon a number of considerations:

1. In some spoliation cases, the inference of bad faith may be drawn by the absence of any other explanation for the disappearance or destruction of evidence. In this case, however, the evidence gives a fairly clear picture of how and why certain evidence was destroyed -- the affirmative acts causing the losses are "credibly explained as not involving bad faith." *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317, 1331 (S.D. Fla. 2010). For example, it is no mystery as to why the NAS Executive Server snapshot for November 2008 was not captured; it was not captured because the Delta computer technician whose job it was to secure the data did not know how to use this feature of the computer. There also is no mystery as to why Delta lost track of the Litigation Hold Server backup tapes: Delta's technical teams (IBM and CSIRT), whose job it was to secure backup data just like this, did not

remove all of the tapes from the server or, for the ones that were removed, put them aside for safe-keeping.

The evidence shows that the destruction of evidence had nothing to do with the content of the evidence destroyed or the identity of the custodian. Not all mistakes are innocent, of course, but there simply is no evidence that Delta intended these mistakes to be made so that it could gain unfair advantage in the lawsuit.

2. Plaintiffs contend that Delta's bad faith may be inferred from the fact that Delta destroyed so many categories of documents and terabytes of electronic information. As explained above, however, for most of these data sources, the evidence does not support a finding that Delta lost or destroyed (and did not recover) substantial evidence. More to the point, with respect to each data source, the evidence does not point to bad faith.

3. Plaintiffs have stated repeatedly that Delta's bad faith is established by their dissemblance, and list 21 different instances in which Delta has made misrepresentations "to avoid producing responsive documents and to cover up misconduct." [413-1, page 20; see also *id.*, page

27]. As set forth above in detail in Part III(C), however, the evidence does not support Plaintiffs' charges.

4. It is unlikely that Delta, had it been acting in bad faith, would have recommended in 2012 that the Court appoint an independent examiner to investigate Delta's compliance with its discovery obligations. Of course, asking for such oversight and scrutiny does not automatically negate a finding of bad faith; indeed, it is not difficult to imagine a corrupt organization seeking a whitewash rather than a genuinely independent review. Making this recommendation to the Court, however, left Delta wide open to the discovery of any wrongdoing.

5. In support of their argument that Delta acted in bad faith, Plaintiffs target actions of Delta's Assistant General Counsel, Mr. McClain. Here Plaintiffs miss the mark. Plaintiffs state that Mr. McClain "moved evidence and cleared out" the Evidence Locker maintained by CSIRT without "tracking what he removed." [413-1, page 28 n.62]. Mr. McClain testified on cross-examination at the August 13, 2014 hearing that Delta made the decision to move the evidence from the Evidence Locker maintained by CSIRT to Delta's corporate records department (Tr. 367-368):

> Q: [By Plaintiffs' Counsel] You didn't take an inventory of what you removed [from the Evidence Locker and moved to Corporate Records]?
>
> A: Did I personally?
>
> Q: Yes.
>
> A: I'm not the only employee of Delta Airlines. I was working with our corporate records and information management staff and with CSIRT to make sure that this material was stored properly. They kept a record of what they received. They still have that record, and its been available to you[31] and to [Plaintiffs' expert] Pixley throughout this process.

(Tr. 369). There is nothing about Mr. McClain's actions here that is evidence of bad faith.

6. Plaintiffs also contend that Delta's bad faith is evidenced by Mr. McClain's "angry" reaction to the disclosure of relevant evidence to PwC. [413-1, page 28 n.62]. Plaintiffs' account of this incident is not clear or well substantiated. Plaintiffs called Delta's Kelly Turner Brown as a witness about this incident at the August 13, 2014 hearing. Ms. Brown did not state (and was not asked) when the incident occurred. She did reference an August 11, 2011 email that appears to describe a conference call on August

[31] After Mr. McClain testified, counsel for Delta represented that the corporate records that Mr. McCain referenced in his testimony had not been made available to Plaintiffs' counsel because it included privileged information, but that the corporate records log had probably been made available to Plaintiffs' expert, Mr. Pixley. (Tr. 394-395).

10, 2011 (Tr. 406-07), five months after the tapes were actually delivered to PwC. [484-5, page 2]. Mr. McClain testified that he wasn't angry, but in "shock" that CSIRT still had tapes in the Evidence Locker. (Tr. 440).[32] Mr. McClain testified that Mr. Laidler handed over the tapes to Mr. McClain, and Mr. McClain handed the tapes over to PwC. (Tr. 440). Mr. McClain's account, which shows that Delta wanted PwC to recover and preserve the evidence, is corroborated by PwC's Brian Wilkinson. [484-5, page 2].

This incident is further evidence of the disarray within Delta's teams charged with the responsibility of securing evidence, but it does not show bad faith.[33]

7. Plaintiffs cite *Kraft Reinsurance Ireland, Ltd. v. Pallets Acquisitions, LLC*, 843 F.Supp.2d 1318, 1327 (N.D. Ga. 2011), for the proposition that "reckless disregard for potential prejudice to the opposing party" is sufficient to satisfy the "bad faith" element of a spoliation claim.

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[32] Ms. Brown confirmed that she had known about the tapes for some time prior to their discovery by Mr. McClain. She had intended to tell Mr. McClain about the tapes but was distracted by other matters. (Tr. 406).

[33] Delta has been unable to explain CSIRT's failure to communicate with legal counsel about data sources, such as backup tapes in the Evidence Locker. Plaintiffs' contend that this was a function of Delta's practice of not "cross-referencing" matters; that is, data sources collected for one matter would not routinely be searched for another matter. (Tr. 29, 375-76). The practice probably slowed Delta's discovery and processing of responsive evidence.

In *Kraft*, the spoliator allowed the key evidence in the case – shipping pallets allegedly infested with mold – to be incinerated over several months. Judge Totenberg explained the Court's holding:

> For over two months, Plaintiff knew that the evidence it had a duty to preserve was being destroyed, and it failed to notify Defendant that it was slowly being incinerated and did not attempt to make any reasonable arrangements to preserve even a small sample. Such reckless disregard for potential prejudice to the opposing party, although not rising to the level of malice, amounts to bad faith, and thus the fourth factor [of *Flury*, 427 F.3d at 946] weighs in favor of imposing sanctions.

Id., 843 F.Supp.2d at 1327.

Kraft is easily distinguishable on its facts because the spoliator had actual knowledge of the destruction of the evidence, and could have stopped it, and knew that the evidence being destroyed would be critically important in litigation. In this case, Delta should have known that its servers were destroying evidence, but Delta has demonstrated that the evidence, or most of it, was recovered. Again, Delta's recklessness did not result in the loss of critical or crucial evidence.

For the foregoing reasons, the undersigned finds that Delta did not act in bad faith and that, accordingly, it should not be sanctioned for spoliation.

V. SANCTIONS UNDER RULES 16, 26 AND 37

Plaintiffs also seek non-spoliation sanctions under Rules 16, 26 and 37.

A. Legal Framework

The precise scope and interaction of the requirements and remedies set forth in Rules 16, 26 and 37 are uncertain, particularly in a case of this procedural complexity. In *Delta 2012*, however, the Court discussed the applicability of the various rules, and concluded that "Delta's recent and belated document production violated this Court's deadlines, was not timely, and runs afoul of Rule 26(e)," warranting sanctions available under Rule 37(c)(1). *Delta 2012*, 846 F.Supp.2d at 1358 *et seq.*

Since the Court's 2012 decision, Delta has belatedly produced approximately 100,000 pages of documents. Whether Delta's continued late production warrants additional sanctions is addressed in Part B, immediately below. Part C addresses the appropriate remedy for the breach.

B. Delta's Breach

On May 13, 2010, the Court granted the Plaintiffs' motion to compel and ordered Delta to produce all documents related to defendants' decision

to impose a first-bag fee by June 20, 2010. That deadline was extended, and partially overtaken, by a number of other orders and by communications among the parties and the Court. Still, there is no dispute that Delta should have produced all responsive documents by the end of the discovery period, that it did not do so, that the discovery period had to be extended, and that Delta continued to produce (or Plaintiffs' expert continued to find) documents that should have been produced years before. Though Delta focuses its defense of untimely document production on the issue of remedy, it does not concede that it should be found in breach. Delta's arguments are not persuasive.

1. Delta makes no credible argument that it has been in substantial compliance with its discovery obligations. More than half the documents it ended up producing were produced after the close of the initial discovery period; almost 100,000 pages were produced after the Court's 2012 Order sanctioning Delta for its late production. [413-2, pages 106-107].

2. There is authority for the proposition that a party should not be sanctioned for violating a court order or missing a deadline if the party was unable to comply with it or the violation was unavoidable. *In re Chase &*

Sanborn Corp., 872 F.2d 397, 400 (11th Cir. 1989) (to escape liability for violating a court order, non-moving party must establish that it made all reasonable efforts to comply). Delta does not and could not claim that, despite its due care, it was unable to comply. As painfully detailed above, when Delta's duty to preserve evidence was triggered with the filing of this lawsuit, Delta did not know where it kept its electronic data or how to stop destroying it. Delta had not trained its computer staff to use the computers or provided its teams with instructions or protocols for the handling of evidence. Delta continued to delete Exchange Server emails older than 60 days, failed to load images of custodians' hard drives into the production database, continued to delete NAS Executive Server snapshots older than 53 weeks, continued to lose or overwrite Litigation Hold Server backup tapes, lost disk drives, lost evidence in its "Evidence Locker," fumbled the backup tape recovery effort, labeled backup tapes incorrectly, failed to flag obviously responsive documents for production, and failed to maintain electronic or paper records of what it had done, what it had searched, and what it had found.

3. In its Response Brief, Delta offers a half-hearted defense, claiming that its production of documents from backup tapes in 2011 and

2012 were not late because "Delta had no duty to restore and search backup tapes during the original discovery period; rather Delta volunteered to search the tapes when they were discovered." [434, page 76]. This is incorrect. Putting aside the issue of whether Delta had the duty to restore and search backup tapes in the first instance, the recovery of the backup tapes was necessary to mitigate the impact of Delta's destruction of other evidence that it *did* have the duty to preserve.[34]

4. Copies of some of the many documents that Delta produced late had been produced before. But Delta does not quantify the number of late documents that it contends are duplicates. Delta also concedes that "certain documents should have been produced to Plaintiffs sooner than they were." [434, page 77].

Based on the foregoing, as in 2012, "Delta's recent and belated document production violated this Court's deadlines, was not timely, and runs afoul of Rule 26(e)." *Delta 2012*, 846 F.Supp.2d at 1358.

[34] Delta does not dispute that it had the duty to preserve the snapshots from the NAS Executive Server and that it failed to do so. Delta argued that one reason it should not be sanctioned for spoliation of the snapshots is because their loss has been mitigated by Delta's recovery effort. Delta's expert Mr. Friedberg states: "Again, the [NAS Executive Server] snapshots would have been highly duplicative of the current contents of the server that were preserved *as well as the email backup tapes that Delta restored and processed*." [434-7, page 15 (emphasis added).

C. Choice of Remedy

The Court has a wide degree of discretion in its decision as to what Rule 37 sanctions to impose. The threshold question is whether to impose "merits" sanctions, such as an order precluding Delta from disputing the existence of a conspiracy with AirTran, on the one hand, or monetary sanctions, on the other hand. Delta states: "It would be a profound miscarriage of justice to grant any sanction that prevents Delta from fully and fairly defending itself in this meritless case in which the Plaintiffs seek literally *billions* of dollars in damages for a totally fabricated 'conspiracy'." [434, page 95-96 (emphasis in original)]. AirTran forcefully argues that there "is a significant risk that the merits-based sanctions Plaintiffs have requested against Delta would unfairly prejudice AirTran." [486, page 4]. AirTran does not agree that any additional sanctions are appropriate, but urges that if sanctions are imposed, that the Court impose monetary sanctions on Delta and allow the case to proceed on the merits.

"Merits" sanctions are not warranted in this case. As discussed in detail above, the evidence does not support a finding of "bad faith" or "willfulness" that would justify the imposition of the more severe sanctions. The cases cited by Plaintiffs in support of merits sanctions are instructive

by comparison. Plaintiffs rely heavily on *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536 (11th Cir. 1993), and *Bates v. Michelin North America, Inc.*, 2012 WL 453233 (N.D. Ga. Jan. 13, 2012). In these cases, however, the District Court made explicit findings of bad faith *and* the sanctioned party had failed to disclose or destroyed evidence that was clearly harmful to their case. *Malautea*, 987 F.2d at 1541; *Bates*, page 16. In this case, the evidence does not support a finding either of bad faith or that Delta has destroyed or hidden evidence that was harmful to its case.

The argument could be made that the choice of sanctions should be based more on the impact upon or prejudice to the innocent party, as opposed to the bad faith of the party who has violated its discovery obligations. If that were the test, however, the result would be the same: the prejudice that Plaintiffs have suffered as a result of Delta's breach of its discovery obligations has been mitigated by the reopening of the discovery period, and Delta's production of documents well in advance of the consideration of Defendants' motion for summary judgment. *Delta 2012*, 846 F.Supp.2d at 1349; *see also id.* at 1353 ("the timing of its production (pre-trial and pre-motions for summary judgment), and the lack of a 'smoking gun' support lesser sanctions"); *SCADIF, S.A. v. First Union Nat'l*

Bank, 208 F. Supp.2d 1352 (S.D. Fla. 2002) (sanctioning late-producing party with reprimand, finding that late-produced documents were produced before trial and "not particularly relevant").

The imposition of monetary sanctions is well within a district court's discretion under Rule 37. *Serra Chevrolet, Inc. v. General Motors Corp.*, 446 F.3d 1137, 1151 (11th Cir. 2006). As the Court found in *Delta 2012*, an award of attorney's fees is an appropriate sanction in this case. Such an award compensates Plaintiffs for the additional time and expenses that they have incurred as a result of Delta's failure to comply with its discovery obligations. Such an award also serves as a deterrent to Delta and to other litigants. As the Supreme Court stated in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-64 (1980), "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.'" (quoting *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976)).

D. Attorneys' Fee Calculation

The magnitude of the monetary award under Rule 37 is bound only by that which is reasonable in light of the circumstances. *Carlucci v. Piper*

Aircraft Corp., 775 F.2d 1440, 1453 (11th Cir. 1985). In determining the amount of sanctions to be imposed, a district court should not merely accept the movant's claimed expenses, but must inquire into the basis for those expenses and provide a reasoned analysis for the amount of the award. *Id.*

On September 3, 2014, the Special Master held a hearing on the amount of attorneys' fees to be awarded, if such an award were made. Plaintiffs' counsel submitted a statement of fees and, at the hearing, acknowledged several categories of charges that required revision. Plaintiffs' counsel submitted a revised statement of fees and expenses on September 9, 2014 (marked by the Special Master as Plaintiffs' Hearing Exhibit 34). The revised statement shows total fees of $2,351,242.35, at historical rates, for work from June 1, 2013 through August 15, 2014, broken down among the firms as follows:

Firm Name	**Fees**
Kotchen & Low LLP	$1,779,614.85
Schreeder, Wheeler & Flint LLP	$83,961.00
McCulley McCluer PLLC	$138,297.00
Conley Griggs LLP	$61,530.00
RPWB	$282,504.50
Berger & Montague P.C.	$2,655.00
Law Offices of David Bain	$2,680.00

Total	$2,351,242.35

(Plaintiffs' Hearing Exhibit 34).

At the hearing, the parties called expert witnesses to testify for and against the reasonableness of these fees. Both experts were extremely well qualified and well prepared. Randolph A. Mayer, an Atlanta lawyer with 40 years experience, testified for Plaintiffs. Mr. Mayer testified that he had reviewed the Plaintiffs' timesheets, the pleadings, and the Court's orders in this case. Mr. Mayer testified that the hourly rates of the Plaintiffs' lawyers were reasonable or, in the case of Mr. Conley, lower than reasonable. (Tr. 977-978).

Mr. Mayer also testified that the total amount of fees and expenses sought was reasonable. He testified that he did not see "red flags" suggesting excessive billings, such as "collateral ad hominem battles with opposing counsel, poor documentation, excessive staffing." (Tr. 979). Mr. Mayer further testified that his reading of Judge Batten's prior orders was that Judge Batten "had lost faith in Delta's ability to police itself" and that Judge Batten was "determined to get to the bottom of it." (Tr. 980). Mr. Mayer testified: "So in that context when the Court's lost faith in the ability of a party to police itself, it seems to me it's rational to pursue every

avenue." (Tr. 980-81). Mr. Mayer acknowledged in response to questions from the Special Master that Plaintiffs undoubtedly pursued "blind alleys," but such pursuits were expected and not unreasonable in a case of this complexity. (Tr. 988-989).

Delta called Rocco Testani as their expert. Mr. Testani is a trial lawyer at Sutherland, Asbill & Brennan. Mr. Testani had also reviewed the Plaintiffs' time sheets and the pleadings in this case. Mr. Testani concluded that the fees were excessive because of a considerable duplication of effort, mismanagement of the projects, too many timekeepers, and too much research and other similar work performed by partners leading to an excessive effective hourly rate. (Tr. 993). As to the "partner-heavy" totals, Mr. Testani testified that the time entries showed too much time was spent by partners "doing research, writing, and document review." (Tr. 996). Mr. Testani testified at length on direct and cross about his own analysis of the allocation of time between partners and associates on the case, and concluded that a more efficient allocation would have reduced the fees by between 15 and 25 percent. (Tr. 999, Tr. 1022-1024). Mr. Testani also testified that the amount of work that Plaintiffs' counsel billed after the

filing of the initial brief was excessive because, by then, the law and the facts should have been well-established. (Tr. 1015).

On balance, based on a review of the record and the testimony in this case, the undersigned agrees generally with Mr. Mayer that the hourly rates and the overall amount of fees and expenses sought by Plaintiffs are not excessive, but should be adjusted downward to reflect some of Mr. Testani's observations and other concerns. The amount of time that the Plaintiffs' lawyers spent on the motion is certainly substantial, and might seem excessive if the only work reviewed were the final product. But in cases of this complexity and magnitude, there is – and should be – a significant amount of work that does not make the final cut.

Moreover, the Plaintiffs' fees and expenses, as high as they are, could have been higher still. This multi-district litigation is composed of 12 member cases, each with a different set of plaintiffs and law firms. Coordinating the work of a number of different plaintiffs' lawyers, each with a claim to a place at the table, can be extremely difficult and time consuming. In this case, however, the work appears to be fairly well consolidated, with lead counsel for the Plaintiffs, Kotchen & Low, managing the bulk of the work.

In addition, many plaintiffs' lawyers might have been tempted to engage Delta in an arms race by hiring a discovery expert, or multiple experts, with the credentials, obvious skills, and price tag of Delta's expert. Delta would have been hard pressed to complain about the cost of such an engagement, which could have added hundreds of thousands of dollars to the final tab.

There are, however, three downward adjustments to be made to the amount of the award. First, based on a review of Plaintiffs' time and submissions in this case, it appears that a portion of the Plaintiffs' work on the Motion for Discovery Sanctions is not directly caused by Delta's breach because it would have been necessary in any event in order to defend against Defendants' Motion for Summary Judgment and to support class certification. This work is most directly reflected in Plaintiffs' Appendix C, where Plaintiffs marshal evidence of price-fixing "plus factors," [413-2, page 53]; alleged collusive communications before the parallel price increase [413-2, page 55]; unilateral action against self-interest [413-2, page 64]; pretextual reasons for imposing a first-bag fee [413-2, page 67]; motive [413-2, page 70]; antitrust defenses [413-2, page 72]; and evidence supporting class certification [413-2, page 80]. It is not possible to

calculate on a minute-by-minute basis the amount of effort that Plaintiffs' counsel devoted to this work that would have been necessary even absent a Delta breach.[35] Based on the content of Appendix C, including its hundreds of references to evidence and detailed analysis of the case law, a 10% across-the-board reduction in the amount of the attorneys' fees claimed is appropriate.

Second, Delta's expert Mr. Testani correctly observed that Plaintiffs' fees should be adjusted to reflect a more efficient allocation of time between partners and associates. Mr. Testani testified that greater use of lower-cost associates would have reduced the amount of the fees by between 15% and 25%. Based on Mr. Testani's testimony, and a review of the timesheets, it is appropriate to make a further reduction of 20% of the fee (calculated after the 10% reduction explained above).

Third, in a letter to the Special Master dated September 15, 2014, counsel for Delta noted several billing mistakes in Plaintiffs' revised

[35] As counsel for Delta noted at the fee hearing, the Eleventh Circuit authorizes "across-the-board" cuts to fee requests that are excessive. *Galdames v. N&D Inv. Corp.*, 432 Fed.Appx. 801, 805 (11th Cir. 2011) ("If the court concludes that the number of claimed hours is excessive, it may engage in 'an across-the-board cut,' so long as it provides adequate explanation for the decrease."). *See also Loranger v. Stierheim,* 10 F.3d 776, 783 (11th Cir. 1994) ("When faced with a massive fee application, however, an hour-by-hour review is both impractical and a waste of judicial resources.").

submission. (The Special Master has marked the letter Defendants' Hearing Exhibit 10). The undersigned has calculated these mistakes to warrant an additional $2,345.50 reduction in the amount of the fee.

The amount that Plaintiffs seek in reimbursements for expenses, $164,706.10, also has been reviewed and appears reasonable.

Based on the foregoing adjustments, the amount of the monetary sanction is $1,855,255.19, as shown by the following table:

Revised Total Fees Claimed	$2,351,242.35
Less Work on Merits (10%)	-$235,124.24
Subtotal:	$2,116,118.12
Partner-Associate Adj. (20%)	-$423,223.62
Miscellaneous corrections	-$2,345.50
Total Adjusted Fees	$1,690,548.99
Total Expenses	$164,706.10
Total Award	$1,855,255.09

To be clear, this award of attorneys' fees and expenses is not intended to be open-ended. This recommendation does not include an award of fees and expenses that Plaintiffs may have incurred since the hearing or the submission of the revised statement. The fact that Plaintiffs will continue to incur such fees and expenses without reimbursement has already been taken into account in the determination of the reasonableness of the fees awarded.

Both sides can quibble with this calculation of fees and the award generally. Delta may claim that it is unfair for Delta to have to pay such a high percentage of the fees when a good percentage of Plaintiffs' particular allegations of spoliation were unsuccessful. Plaintiffs could counter that none of this would have been necessary but for Delta's numerous breaches and that, moreover, Plaintiffs have not been compensated for the probability, however slight or speculative, that Delta did destroy relevant evidence. Charge and counter-charge could go on forever. But it is time for the case to proceed to the merits.[36]

CONCLUSION

For all the foregoing reasons, the undersigned RECOMMENDS that Plaintiff's Motion for Discovery Sanctions be GRANTED and that Plaintiffs be awarded sanctions in the amount of $1,855,255.09.

This 21st day of November, 2014.

Bruce P. Brown
Special Master

[36] As Judge Richard Mills stated about delay in another long-running multi-district case, "some things just have to give way to the shortness of life." Transcript of Oral Argument, *In re MDL-1824 Tri-State Water Rights Litig.*, No. 09-14657 (11th Cir.) at 56.