SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of Radio Drama Network, Inc., Seeking Relief Regarding the Himan Brown Revocable Trust, Created By

HIMAN BROWN,

Grantor.

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DECISION and ORDER
File No.: 2010-2056/A

M E L L A, S.:

The following submissions were considered in deciding the motion described below:

Documents Considered	Numbered
Radio Drama Network's Notice of Motion for Spoliation Sanctions; Memorandum of Law in Support; Affirmation of Judith M. Wallace, Esq., in Support, with Exhibits; Affirmation of Alexander G. Malyshev, Esq., in Support, with Exhibits	1-4
Richard L. Kay's Memorandum of Law in Opposition; Affirmation of David F. Lisner, Esq., with Exhibits; Supplemental Exhibit; Affirmation of David F. Lisner, Esq., with Exhibit	5-8
Reply Memorandum of Law; Affirmation of Judith M. Wallace, Esq., in Further Support, with Exhibits	9-10

In this reformation proceeding (Reformation Proceeding), Radio Drama Network (RDN) moves for an order imposing sanctions for spoliation of evidence against Richard Kay (Kay). In particular, RDN seeks an order striking Kay's answer and affirmative defenses, or alternatively precluding Kay from offering testimony or evidence in his defense, or alternatively imposing adverse inference charges against Kay with respect to allegedly spoliated evidence, and imposing monetary sanctions.

I. Background

Familiarity with the facts and procedural background of the Reformation Proceeding are presumed at this time, having been described in various decisions issued by the court (*see e.g. Matter of Brown*, NYLJ, July 23, 2019, at 22, col 3 [Sur Ct, NY County]; Kay Ex. 1). As pertinent here, RDN, a charitable corporation established by Himan Brown (Himan) in 1984, was the original remainder beneficiary of the Himan Brown Revocable Trust (Revocable Trust) established by Himan in 2002. Himan's granddaughters, Barrie Brown and Melina Brown, are RDN directors. Kay, who was Himan's long-time lawyer, is a former director of RDN and the sole Trustee of the Revocable Trust. Pursuant to a 2004 restatement of the Revocable Trust, Himan dropped RDN as the remainder beneficiary and named in its place the Himan Brown Charitable Trust (HBCT), which would be established upon Himan's death (which occurred in 2010 at age 99). Kay is also the sole Trustee of HBCT.

RDN commenced the Reformation Proceeding in December 2015, alleging, inter alia, that Kay inserted certain revisions into the Revocable Trust instrument to trick Himan into changing the Revocable Trust's remainder beneficiary from RDN to HBCT, thereby giving Kay more control over Himan's substantial funds. According to RDN, Kay induced Himan to sign off on the revisions through fraud and undue influence and by failing to disclose to Himan their impact on Himan's testamentary plan. It seeks, among other relief, the imposition of a constructive trust on the assets of HBCT for the benefit of RDN.

In August 2025, RDN filed the instant motion seeking spoliation sanctions against Kay. Kay opposed the motion. Thereafter, the court heard oral argument.

II. The Parties' Primary Arguments

RDN's main arguments in support of its motion can be summarized as follows: 1) Kay blocked the implementation of a litigation hold at Pryor Cashman (the law firm at which Kay was a partner), resulting in the loss of email accounts of individuals with relevant knowledge of key issues; 2) Kay caused HBCT's emails to be deleted in 2018; and 3) Kay admitted to destroying his contemporaneous notes regarding the estate planning changes at the heart of the

Reformation Proceeding. As previously mentioned, RDN posits that Kay's alleged conduct merits severe sanctions, including but not limited to the striking of Kay's answer, preclusion, and the imposition of adverse inference charges. In opposition, Kay contends that RDN failed to demonstrate that 1) he had an obligation to preserve evidence at the time it was destroyed; 2) any records were destroyed with a culpable state of mind; and 3) the destroyed evidence was relevant to RDN's claims.[1]

III. Legal Standard

It is well settled that this court "possess[es] broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 551 [2015]). The Court of Appeals has noted that such relief "includ[es] the preclusion of proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action" (*id.*). In addition, "[w]here appropriate, a court can impose the ultimate sanction of dismissing the action or striking responsive pleadings, thereby rendering a judgment by default against the offending party" (*Ortega v City of New York*, 9 NY3d 69, 76 [2007]).

[1] Kay also contends that RDN made these same allegations and sought the imposition of these same sanctions in prior motions filed with this court between 2021 and 2023. He states that the court denied all prior sanction requests and opines that RDN has provided no basis for renewing these requests. The court directed Kay to file a supplemental exhibit consisting of RDN's alleged prior requests for sanctions. Upon review of same, the court finds that although RDN argued in prior motions that Kay engaged in spoliation, those motions generally concerned attempts to obtain discovery. Contrary to Kay's claim, RDN is not relitigating issues concerning sanctions.

IV. Discussion

A. Overview

The court notes at the outset that none of the spoliation-related actions allegedly undertaken by Kay warrant the severe sanction of the striking of his answer and affirmative defenses. Notwithstanding the absence of certain evidence, RDN is not prevented from prosecuting this action (*see Alleva v United Parcel Serv., Inc.*, 112 AD3d 543, 544 [1st Dept 2013] [determining that while defendant's failure to provide plaintiff with a certain file constituted spoliation, the "extreme sanction" of striking defendant's answer was not warranted because plaintiff could still "establish his case"]; *Schantz v Fish*, 79 AD3d 481 [1st Dept 2010] [similar]). In addition, the court declines to impose monetary sanctions under these circumstances.

The court further notes that RDN proposes no fewer than 27 adverse inference charges (*e.g.* "Kay's discussions with Himan in 2004 did not disclose, and Himan did not understand, that RDN and HBCT were different entities"; "Himan did not intend to disinherit RDN through the 2004 Revocable Trust amendment"; "Kay intended to disregard HBCT's primary purpose and failed to disclose that to Himan") (Mem. at 22). While, as will be discussed later, the court concludes that Kay's conduct necessitates the imposition of certain adverse inference charges, it concurs with Kay's position that RDN's proposed wording of such charges is unwarranted.

B. The Pryor Cashman Emails

Turning to the issue of the Pryor Cashman emails, the Court of Appeals has stated the following:

> "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and 'that the

destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense.'"

(*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d at 547; *see Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 482 [1st Dept 2010] [similar]). Notably, a "culpable state of mind, for purposes of a spoliation inference, includes ordinary negligence" (*Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d at 482 [internal quotation marks omitted]). Moreover, when evidence is destroyed either intentionally or due to gross negligence, the court may draw an inference as to relevance (*see id.*).

Here, there is ample support in the record for RDN's position that despite being directed by Pryor Cashman's founder and general counsel, Gideon Cashman (Cashman), to implement a litigation hold and allegedly representing to Cashman that he had taken steps to do so, Kay failed to ensure the implementation of a litigation hold at Pryor Cashman after RDN sent a preservation notice in January 2016 (RDN Exs. 11-14).[2] Moreover, during oral argument, Kay's counsel conceded that the email account of Lloyd Steele, a former Pryor Cashman attorney, was deleted sometime after Pryor Cashman and Kay were on notice that preservation was required. Steele is one of three individuals, the others being Gail Garrick (Kay's former legal assistant at Pryor Cashman) and Charles Skaar (a former Pryor Cashman paralegal), whose now-deleted emails could (according to RDN) have shed light on topics relevant to the Reformation Proceeding.

Kay attempts to downplay the deletion of Steele's email account. He asserts that Steele's involvement in Himan Brown matters was so attenuated that RDN never deposed him, that all of Kay's exchanges with Steele were preserved and produced because Kay's email account was

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[2] The court notes RDN's consternation over Pryor Cashman's decision to place Kay—the attorney being sued over allegedly fraudulent conduct—in control of the mechanics of putting a litigation hold in place. Indeed, Pryor Cashman's own Chief Information Officer confirmed that "when an attorney at Pryor Cashman is sued, the attorney would not be the one that would reach out to the IT department about implementing a litigation hold" (RDN Ex. 12 at 75-76).

never deleted, and that in any event, "there is no indication that [Steele] sent or received any relevant emails" (Opp. at 5).

However, RDN posits that Steele drafted the minutes of a 2007 RDN Board meeting that never occurred, and that emails in Steele's now deleted account could have supported RDN's claim that Kay hatched a fraudulent scheme to gain control over Himan's assets.[3] In any event, the court finds that Kay's failure to ensure the preservation of Steele's email account constitutes gross negligence (*see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012] [stating that "[f]ailures which support a finding of gross negligence, when the duty to preserve electronic data has been triggered, include...the failure to issue a written litigation hold, when appropriate" and "the failure to cease the deletion of e-mail"]), such that the relevance of Steele's emails may be presumed (*see Siras Partners LLC v Activity Kuafu Hudson Yards LLC*, 171 AD3d 680, 680 [1st Dept 2019] [stating that "[p]laintiffs established that defendants possessed an obligation to preserve the evidence at the time of its destruction and that the evidence was destroyed with a 'culpable state of mind,' i.e., gross negligence, which raises the presumption of relevance"]; *Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609 [1st Dept 2016] [similar]).

To the extent that Kay argues that the failure to preserve Steele's emails (or any other material at issue on this motion) should be overlooked due to his voluminous document production, his contention is without merit. The fact that Kay provided numerous documents to RDN does not demonstrate that the provided documents replace the destroyed evidence, and

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[3] The court is unpersuaded by Kay's contention that the court's prior determinations with respect to RDN's breach of fiduciary duty and fraudulent concealment claims (*see Matter of Brown*, NYLJ, July 23, 2019, at 22, col 3; Kay Ex. 1) render the allegedly fabricated Board minutes irrelevant.

RDN is not required to take Kay's word for it that the missing evidence would not add to RDN's proof at trial (*see Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 251 [1st Dept 2011] [observing that "[p]laintiffs were entitled to inspect the tapes to determine for themselves whether the area of the accident was depicted," and "should not be compelled to accept defendant's self-serving statement concerning the contents of the destroyed tapes"]; *Ferrara Bros. Bldg. Materials Corp. & Best Concrete Mix Corp. v FMC Constr. LLC*, 54 Misc 3d 529, 534 [Sup Ct, Queens County 2016] [observing that "[t]he plaintiff [was] not required to accept the defendants' assurances that the [missing] metadata would not add to its proof at trial"]).[4]

Under these circumstances, the court finds that a sanction in the form of an adverse inference charge is warranted with respect to Steele's deleted email account (*see e.g. Siras Partners LLC v Activity Kuafu Hudson Yards LLC*, 171 AD3d at 680 [finding that "an adverse inference for dispositive motions and at trial" was appropriate where defendants destroyed electronic communications]; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d at 482-483 [adverse inference charge properly issued with respect to emails deleted from defendants' drive]).

Not surprisingly, the parties do not agree on the nature of the adverse inference charge to be provided with respect to the Steele emails (or any other emails or documents relevant to this motion). Kay urges the court to issue a charge based on PJI 1:77 (in the event that the court is inclined to issue any charge at all), which is appropriate when no pretrial determination has been

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[4] Similarly without merit is the contention of Kay's counsel during oral argument that Steele's emails were properly excluded from Pryor Cashman's litigation hold because Steele did not work on Himan's estate matters. First, the record reflects that no litigation hold was ever in place. Second, RDN's litigation hold request, which sought the preservation of "all documents or other evidence, whether in hard copy or electronic form, relating in any way to Himan Brown...and/or RDN" (RDN Ex. 9), was indisputably broad enough to encompass any documents or communications concerning the 2007 Board minutes, which Steele allegedly drafted.

made. He argues that a charge based on this provision "would not entail 'findings' that the absent records affirmatively establish RDN's claims," but would instead simply permit (but not require) the fact finder to 1) "infer that the absent records would not support Kay's position and would not contradict RDN's evidence," and 2) "draw inferences against Kay to the extent supported by other, actual evidence proffered by RDN" (Opp. at 21). By contrast, RDN asserts that the court should give an adverse inference charge premised on PJI 1:77.2, which is stricter than the provision proposed by Kay and is issued "[w]here the court has made a pre-trial determination that the loss, destruction or alteration of evidence was willful and prejudicial."[5]

The court finds that neither of these provisions adequately address the current circumstances. Instead, with respect to Steele's email account, the court will impose a charge based on PJI 1:77.4, which concerns situations such as this one where spoliation of evidence occurred due to gross negligence such that relevance is presumed.

The request to impose sanctions related to alleged spoliation of Garrick's and Skaar's emails is denied.[6]

C. The HBCT Emails

The court next addresses the issue of the deleted HBCT emails. The record reflects that all HBCT email accounts were maintained by the GoDaddy web hosting company and were deleted when HBCT's GoDaddy account lapsed in 2018.

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[5] PJI 1:77.2 states the following: "Before this trial began, the court decided that (plaintiff AB, defendant CD) willfully [state as appropriate: destroyed, altered, failed to (preserve, produce)] [describe specific evidence not preserved or produced], and that the evidence would have been important on the issue(s) of [state relevant issue(s)]. You should therefore presume that had it been (preserved, produced), the evidence would have been against (AB's, CD's) position on the issue(s) of [state relevant issue(s)]."

[6] It appears that Garrick's emails may have been deleted after Garrick left Pryor Cashman and before RDN issued its preservation notice. RDN similarly cannot establish that Skaar's emails were improperly deleted.

Kay notes that the email loss occurred before RDN sought discovery from HBCT. He explains that the GoDaddy account lapsed because the account renewal emails went to an email address that was unmonitored after Matthew Forman (Forman), who had previously monitored the account, left HBCT in 2017. Kay states that he had no role in creating or operating the GoDaddy account, that he never used an HBCT email address, and that "any inadvertent email loss was limited to emails on which Kay was not copied" (Opp. at 7).

Notwithstanding Kay's efforts to abdicate responsibility for the lost HBCT emails, the court concludes that Kay had an obligation to preserve those emails. Kay, an attorney, was sued by RDN in his capacity as HBCT Trustee in 2015. Thus, although it does not appear that RDN requested a litigation hold on HBCT emails, the need to preserve HBCT's emails should have been obvious long before the emails were lost. Kay, as Trustee, had a duty to ensure that proper supervision of the GoDaddy account continued after Forman's departure, but failed to do so. The court finds that such failure constitutes negligence by Kay.

Kay implies that in any event, all relevant HBCT emails were produced either through Kay's Pryor Cashman email production or through productions from the personal email accounts of HBCT employees Ann Kay and Karen Kay. However, RDN opines that communications on which Kay was not copied could still have contained information about how Kay, his friends, and his family personally benefited from Kay's control of HBCT. More specifically, RDN reasons that the lost HBCT emails are relevant to the Reformation Proceeding because post-2010 documents can be relied on to show that Kay engaged in a scheme to control Himan's assets (*see Matter of Radio Drama Network, Inc.*, 214 AD3d 461, 463 [1st Dept 2023] [finding that "evidence of Kay's conduct after 2010, including his communications with Forman…, the choice of grant recipients, and any benefits Kay or his family may have derived from [HBCT] are relevant to RDN's claim that Kay engaged in a scheme to obtain control over Brown's assets"]). RDN further observes that in opposition to RDN's motion to remove Kay as Trustee, Kay asserted "that there is insufficient evidence of personal benefit to the Kay family" (Reply at 11). It contends that Kay's assertion reveals why the "mass destruction" of HBCT emails was prejudicial to RDN (Reply at 11).

Based on the foregoing, the court finds that an adverse inference charge pursuant to PJI 1.77.3 is warranted as to the lost HBCT emails (*see J.A. v Wyckoff Hgts. Med. Ctr.*, 2022 NY Slip Op 50097[U], *4 [Sup Ct, Bronx County 2022] [ruling that "[t]he trier of fact will be instructed that Wyckoff Heights failed to preserve [certain] monitoring strips, and the trier of fact will be charged (PJI 1:77.3) with resolving whether these monitoring strips are relevant to the ultimate issues in dispute"]). That provision is appropriate where, as here, the court has determined that the alleged spoliator was negligent as opposed to grossly negligent.

D. Kay's Contemporaneous Notes

RDN complains that Kay, an experienced lawyer, "repeatedly admitted he was concerned about litigation at the time he diverted [Himan's] $100 million estate," while at the same time admitting that "he lost or destroyed his own contemporaneous notes about the estate planning changes at issue here—*key* evidence in this proceeding where there are no other living witnesses" (Mem. at 1 [emphasis in original]). According to RDN, "Kay points to *no other evidence* of [his] conversations with Himan at the critical time prior to the 2003-2004 will and revocable trust changes" (Reply at 11 [emphasis in original]). It opines that a reasonable party in the same factual circumstances would have foreseen litigation. RDN further contends that here, where Himan warned Kay in 2002 that there would be a challenge to his estate plan, it was an exceptional deviation from estate planning practice to destroy notes regarding client conversations. It characterizes Kay's conduct as egregious and deliberate.

Under these circumstances, RDN posits that Kay "should not be permitted to offer self-interested testimony or evidence about alleged conversations with Himan in 2003 and 2004 regarding the estate plan after destroying all contemporaneous notes or records of those alleged conversations" (Mem. at 21). More specifically, RDN asks the court to preclude Kay from presenting testimony or evidence either on summary judgment or at trial that Himan 1) intended to disinherit RDN; 2) understood that there was a charitable trust containing all of his assets that Kay alone would control; 3) consented to Kay's ability to donate to charities unconnected to Himan and not promoting the spoken word; and 4) understood and intended that Kay would use Himan's money for Kay's personal benefit. RDN similarly seeks preclusion of testimony or evidence "of Kay's purported justifications for drafting estate planning instruments from which he benefited" (Mem. at 20).

In opposition, Kay asserts that the estate planning notes are the only Kay-authored documents not produced to RDN in connection with this litigation, and that "RDN makes no showing regarding the notes' content, scope or relationship to the final testamentary instruments, because RDN never asked [him] any questions about the notes at his depositions" (Opp. at 10). He opines that RDN's position that his estate planning notes "would reveal a scheme to defraud Himan and divert his assets strains credulity and is, at best, pure speculation" (Opp. at 10). In any event, Kay argues, RDN provides no legal support for its contention that in the early 2000s, Kay was on notice of a credible probability of litigation giving rise to a duty to preserve the estate planning notes. Lastly, Kay asserts that the destruction of the notes consistent with his "ordinary-course discarding" (Opp. at 2) was at most merely negligent.

In *Matter of Eno* (196 AD 131, 163 [1st Dept 1921]), cited by Kay, the First Department made the following pronouncements:

> "It is well settled that the deliberate destruction of written evidence gives rise to the inference that the matter destroyed or mutilated is unfavorable to the spoliator. This unfavorable presumption will not dispense with the necessity of the other party introducing some other evidence of its contents, that it may appear that the documents destroyed were in fact relevant to the case. The presumption does not arise from the mere destruction of documents. It must appear that the documents were written evidence relevant to the issues, or at least the documents should by notice be required to be produced upon the trial."

Here, Kay stated that he "took brief notes of some of [his] conversations with Himan regarding his estate planning," and that Kay "would have used those notes in describing Himan's wishes" to Kay's then-associate, Alan Laufer (Kay Ex. 23). It is undisputed that Himan's intent is at issue in this Reformation Proceeding, and Kay's notes would have shed light on the topic. Kay's notes are thus clearly relevant to this lawsuit.

Furthermore, Kay admitted that Himan had warned him in the early 2000s that there would be a challenge to Himan's estate plan (RDN Ex. 1 at 97-98, 153-154). Kay was therefore on notice that his estate planning notes (which Kay acknowledges were likely destroyed prior to Himan's death) would be sought during litigation initiated after Himan's death[7] (*see Strong v City of New York*, 112 AD3d 15, 22 [1st Dept 2013] [stating that spoliation sanctions may be warranted if an alleged spoliator was on notice that the spoliated evidence "'might be needed for future litigation'"]; *Lewis v State of New York*, 2021 NY Slip Op 51213[U], *3 [Ct Cl 2021] [observing that "[t]he obligation to preserve evidence arises when a party is on notice that the matter will likely result in litigation"]). The court concludes that Kay's failure to preserve his

[7] Indeed, RDN observes that following Himan's death in 2010, his son Barry Brown filed objections to the probate of Himan's will in 2011. One of his objections was that Kay had improperly diverted Himan's assets from RDN to HBCT. The probate dispute remained active until 2016 (*see Matter of Brown*, 144 AD3d 587 [1st Dept 2016]; *Matter of Brown*, NYLJ, Jan. 8, 2015, at 24, col 6 [Sur Ct, NY County]).

notes concerning planning of what he must have known was a $100 million estate constitutes an "exceptional deviation" from the practice "of most estate practitioners" (*Matter of Petretti*, 2024 NY Slip Op 50716[U], *5-6 [Sur Ct, Queens County 2024]).

Under these circumstances, Kay's failure to retain his estate planning notes warrants the issuance of a limited preclusion order (*see Strong v City of New York*, 112 AD3d at 24 [deeming appropriate a limited preclusion order preventing defendant "from introducing testimony as to the contents of [a deleted] audio recording"]; *Lewis v State of New York*, 2021 NY Slip Op 51213[U] [precluding defendant from offering testimonial or documentary evidence as to notice of certain conditions, where defendant failed to retain the relevant "cell inventory sheets, prior grievances, and work orders"]). Accordingly, Kay is precluded at trial from testifying about any discussions he had with Himan regarding estate planning from 2003 through 2004, or from describing the contents of his estate planning notes regarding Himan from 2003 through 2004.[8]

E. Miscellaneous Issues

RDN argues that Kay's failure to tell cleaners to preserve documents in Himan's apartment in 2010 is sanctionable. However, the court finds no basis to impose sanctions under these circumstances. RDN has not established that Kay had any reason to suspect that documents relevant to this proceeding would be kept in Himan's apartment, nor can it establish that relevant documents (if any) had not already been removed by individuals other than the cleaners.

RDN next asserts that sanctions are warranted because Kay donated some of Himan's personal property to the YIVO Institute for Jewish Research without consulting Melina Brown,

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[8] As previously noted, RDN also asks the court to preclude Kay from presenting certain evidence on summary judgment. Kay's motion for summary judgment dismissing RDN's reformation petition was denied from the bench on November 21, 2025. To the extent, if any, that the limited preclusion order is relevant to the summary judgment motion, it will be discussed in the forthcoming decision and order explaining the court's denial of that motion.

as he had agreed to do. However, there is no suggestion that these items, which consist of scripts, tapes, cassettes, and photographs, are lost or destroyed (*see Ecor Solutions, Inc. v State of New York*, 17 Misc 3d 1135[A], 2007 NY Slip Op 52261[U], *7 [Ct Cl 2007] [noting that "[d]ocuments which still exist cannot be found to have been spoliated"]). Moreover, RDN had the opportunity to subpoena these items, but chose not to do so (*see Blackstock v AVR Crossroads, LLC*, 211 AD3d 568, 568 [1st Dept 2022] [deeming spoliation sanctions unwarranted where plaintiffs had "made no effort to conduct nonparty discovery" to obtain a certain document]).

RDN also complains that Kay failed to preserve "estate planning files" by sending them to Pryor Cashman's central storage space. During oral argument, the court sought clarification from RDN's counsel regarding the nature of these files. Although counsel provided further details regarding what RDN characterizes as "estate planning files," the court remains unpersuaded by RDN's contention that alleged estate planning files were spoliated. On this record, RDN has not established 1) the existence of any requirement to send such files to storage; 2) that such files would necessarily have contained any notes prepared by Laufer; or 3) that other documents that purportedly belong in the estate planning files were not produced (other than Kay's notes, which are separately addressed above).

Lastly, RDN contends that Kay lost or destroyed a 2011 designation of Forman as co-trustee of HBCT. The court notes that Kay essentially conceded in his opposition papers that such a document previously existed,[9] although Kay's counsel attempted to walk back this

[9] Specifically, Kay states that "RDN's complaints [include] a missing ministerial document whose contents are not in dispute" (Opp. at 2), that "[a]lthough a 2011 designation was not found, its contents are reflected in Forman's testimony and other discovery" (Opp. at 8), that "[t]he date the 2011 designation was lost is not known, but there would have been no purpose in storing the obsolete document indefinitely" (Opp. at 17), and that "there can be no prejudice to RDN from the document's absence: Forman testified about its contents" (Opp. at 17).

concession during oral argument. In an interesting turn of events, following oral argument, Kay produced the relevant document. Accordingly, the dispute over the designation is now academic.

The court considered all other arguments raised and deemed them to be without merit.

V. Conclusion

For the foregoing reasons, RDN's motion is granted to the extent that 1) an adverse inference charge pursuant to PJI 1:77.4 shall be issued at trial with respect to the deleted emails of Lloyd Steele; 2) an adverse inference charge pursuant to PJI 1:77.3 shall be issued at trial with respect to the deleted HBCT emails; and 3) at trial, Kay is precluded from testifying about any discussions he had with Himan regarding estate planning from 2003 through 2004, and from describing the contents of his estate planning notes regarding Himan from 2003 through 2004.

This decision constitutes the order of the court.

The Clerk of the Court is directed to email a copy of this Decision and Order to the attorneys listed below.

Dated: July 10, 2026

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