UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
OSF Healthcare System, a corporation, and	)	Docket No. 9349
Rockford Health System, a corporation, Respondents.	)	PUBLIC

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' UNTIMELY MOTION TO COMPEL DEPOSITION AND DOCUMENTS

Respondents' untimely motion to compel is an unwarranted request for a fishing expedition into the Commission's internal deliberations and investigative process. Neither FTC staff's initiation of a "full-phase" investigation into an acquisition, nor the collection of information from third parties, signifies that litigation is reasonably foreseeable. Indeed, staff routinely takes such actions as part of its investigations to determine *whether* proposed acquisitions raise competitive concerns and *whether* to recommend litigation to the Commission. Considering that only a very small fraction of staff's full-phase investigations ultimately result in litigation, the fact of an investigation does not indicate that litigation is remotely likely, let alone reasonably foreseeable. Complaint Counsel's litigation-hold obligations here did not attach at least until FTC staff had received and analyzed the relevant evidence, especially from Respondents themselves, and recommended that the Commission initiate litigation.

Respondents' inability to show that Complaint Counsel violated a litigation-hold obligation alone warrants rejection of their Motion. But, there are further grounds compelling

rejection. Complaint Counsel's actions reflected both judicially recognized document management practices and FTC policy. The evidence at issue that Respondents claim was not preserved is not relevant, nor is its absence prejudicial, to proving Respondents' claims or defenses. Finally, Respondents' requested relief – a wide-ranging deposition into Complaint Counsel's document preservation, collection, and production, along with production of privileged, internal communications – is unjustified.

I. FACTUAL BACKGROUND

Before litigation becomes reasonably foreseeable, FTC staff conducts an investigation to develop a recommendation for the Bureau of Competition and the Commission on whether an acquisition is likely to substantially lessen competition and whether the Commission should initiate litigation to challenge it. Declaration of Richard A. Feinstein ("Feinstein Decl.") ¶ 1 (Attached as Exhibit 1). That recommendation, however, cannot be made in a vacuum. Staff needs to gather evidence to define the markets potentially affected by the transaction, assess any competitive effects, and consider whether factors, such as entry or efficiencies, counteract any adverse impacts.

At the time parties provide notice of their transaction to the Commission, staff often does not have all of the evidence needed to assess it. In those cases, staff opens an investigation and takes steps to gather relevant evidence, including by issuing Requests for Additional Information ("Second Requests") and conducting investigational hearings. *Id.* ¶¶ 2, 3. Staff obtains evidence from third parties as well, including through the issuance of civil investigative demands ("CIDs"), subpoenas, and affidavits, and may hire experts to assist in analyzing the evidence. *Id.* ¶¶ 3, 5. Regardless of the investigatory tools used, staff evaluates the evidence and recommends

whether the Commission should close the investigation with no action or challenge the transaction. *Id.* ¶ 4.

Here, when Respondents noticed their transaction on February 11, 2011, staff opened an investigation and, on March 14, 2011, the Commission issued Second Requests. Respondents, however, did not produce responsive documents for nearly seven months, finally producing millions of pages of documents between October 7 and October 14, 2011. *Id.* ¶ 6. While awaiting Respondents' production, staff collected third-party evidence and tried to evaluate the transaction. None of the investigative tools used during this time, however, indicated that litigation was reasonably foreseeable, especially in the absence of Respondents' documents. *Id.* ¶¶ 5-7. Without those documents, staff could not conclude its investigation, let alone reasonably foresee litigation.

Once Respondents began complying with the Second Requests, staff had only 24 days to assess the submitted evidence and to forward, on October 31, 2011, a recommendation regarding the transaction. *Id.* ¶ 7. On that day, a litigation hold went into place, consistent with the Bureau's long-established, good-faith policy. *Id.* ¶ 9. Staff, however, also continued its evaluation of the transaction. *Id.* ¶ 7. The Commission voted out a complaint on November 18, 2011.

II. ARGUMENT – RESPONDENTS' MOTION SHOULD BE DENIED

A. The Motion is Untimely

As an initial matter, the Court need not even consider Respondents' Motion to Compel Deposition and Documents ("Respondents' Motion") because it is untimely. Under Paragraph 9 of the Court's Scheduling Order, the deadline for Respondents to file a motion to compel was

March 12, 2012, *i.e.*, 20 days after the February 17, 2012, close of discovery. Respondents filed the Motion three days after that deadline, on March 15, 2012.[1]

B. Complaint Counsel Satisfied Its Legal-Hold Obligation

"It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation." *Pension Benefit Comm. of the Univ. of Montreal v. Banc of America Secs. LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010); *see also, U.S. ex rel. Alfatooni v. Kitsap Phys. Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002).[2] Respondents propose three triggers for staff's litigation-hold obligation: (i) February 14, 2011, approximately the beginning of staff's investigation; (ii) March 17, 2011, shortly after the Commission issued Second Requests; or (iii) any time staff communicated with third parties. Respondents' Motion at 5-6. None of these arbitrarily selected events suggests that staff should have reasonably anticipated litigation.

The start of a government investigation does not signal litigation. *FTC v. Lights of America Inc.*, 2012 U.S. Dist. LEXIS 17212, at *10 (C.D. Cal. Jan. 20, 2012); *FDIC v. Van Dellen*, No. CV 10-4915 DSF (SHx), slip op. at 5 (C.D. Cal. Feb. 6, 2012) (attached as Exhibit 2). As with virtually any proposed merger, staff undertook this investigation to gather and evaluate evidence to determine whether this merger would likely violate the antitrust laws, not to

[1] Respondents received many of the third-party communications attached to Respondents' Motion well in advance of February 17 and had ample notice of any claim long before the March 12 deadline.

[2] Respondents' reliance on *United Medical Supply v. United States*, 77 Fed. Cl. 257, 274 (Fed. Cl. 2007), and *Voom HD Holdings, LLC v. EchoStar Satellite*, 2012 N.Y. App. Div. LEXIS 559 (N.Y. App. Div. Jan. 31, 2012), is misplaced. In *United Medical Supply*, the U.S. had notice that litigation was reasonably foreseeable when the plaintiff filed a claim *against* it. 77 Fed. Cl. at 264. In *Voom*, the court held that the defendant had notice of foreseeable litigation when it sent a demand letter to the plaintiff. 2012 N.Y. App. Div. LEXIS 559, at *17.

initiate an enforcement action. Indeed, the overwhelming majority of merger investigations never lead to litigation. Feinstein Decl. ¶ 2.

Similarly, a Second Request does not indicate that litigation is reasonably foreseeable. *Lights of America*, *supra*, at *10. In recent years the Commission has challenged only about 5 percent of the transactions for which it issued Second Requests. Feinstein Decl. ¶ 2. That slim chance of litigation simply does not amount to reasonable foreseeability. Rather, the Second Request is one of staff's principal investigatory tools to assess *whether or not* to recommend litigation to the Bureau front office and ultimately the Commission.

Likewise, staff's communications with third parties do not portend litigation. To evaluate a merger, staff routinely gathers third-party evidence via declarations, investigational hearings, CIDs, and subpoenas. Respondents' exhibits demonstrate that the communications with third parties here were for investigatory, not litigation, purposes. For example, a February 17, 2011, staff email states: "One of the key functions of the [FTC] is to *investigate* mergers between firms in order to determine whether they are likely [to] result in economic harm." Respondents' Motion Ex. CC (emphasis added). It continues: "Should the FTC *become* convinced that the merger is a problem, it *may* initiate a legal action to block it." *Id.* (emphasis added).

In short, staff's use of its various investigatory tools does not trigger a litigation-hold obligation. Respondents' Motion should thus be denied.

C. Complaint Counsel Acted Appropriately

Even assuming counterfactually that a legal-hold obligation attached at an earlier stage of staff's investigation, staff acted appropriately. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 529-30 (D. Md. 2010). Staff's actions here did not amount to negligence, gross

negligence, or bad faith. *Id.* Far from it, staff assessed the evidence as it came in – much of it at the eleventh hour – and implemented a legal hold when it reasonably anticipated litigation.

Once litigation is reasonably foreseeable, the disposal of relevant documents must cease. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). But it is entirely permissible and proper for staff to dispose of documents not subject to a litigation hold as part of good document management practices. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005); *see also Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1322 (Fed. Cir. 2011).[3]

Notwithstanding Respondents' attempts to impute nefarious intent, staff acted in good faith and consistent with the Bureau of Competition's well-established litigation-hold policy. That policy "ensures that responsive and relevant materials are preserved when staff anticipates potential litigation, while avoiding the untenable and unreasonable position of imposing litigation holds on hundreds, if not thousands, of investigations that are highly unlikely to ever lead to Second Requests, let alone litigation recommendations or actual litigation." Feinstein Decl. ¶ 8. Consistent with that policy, staff issued and implemented a litigation hold when it forwarded a complaint recommendation to the Bureau front office on October 31, 2011. *Id.* ¶ 9. Before then, staff did not reasonably anticipate litigation and could dispose of unneeded documents in accordance with the Bureau of Competition's policy in good faith. *Micron*, 645 F.3d at 1319-20; *see also* Fed. R. Civ. P. 37(e) (no sanction for disposal of documents "as a result of the routine, good-faith operation of an electronic information system"). Of course, even

[3] Respondents strangely accuse Complaint Counsel of "selective preservation and production" because Complaint Counsel did not dispose of every single document. Respondents' Motion at 8. In essence, Respondents are complaining that they received more documents than staff was required to retain.

before implementing the litigation hold, "staff retained documents, testimony, and information received during the course of its investigation from third parties through CIDs and subpoenas, well before Respondents responded to the Second Requests." Feinstein Decl. ¶ 10.

Only after Respondents responded to the Second Requests – and staff had the opportunity to review and evaluate those responses – did staff have a reasonable anticipation of litigation and a litigation-hold obligation. Critically, staff uncovered key evidence in Respondents' Second Request submissions, including documents reflecting Rockford-area hospitals' long-standing practice of exchanging competitively sensitive information and Respondents' recognition that health plans, employers, and patients would view the combined entity as a virtual must have. *Id.* ¶ 7. Shortly thereafter, staff forwarded a complaint recommendation to the Bureau front office and implemented the litigation hold. *Id.* ¶¶ 6-7.

D. Respondents' Cited Third-Party Communications Are Irrelevant

The Court should also deny Respondents' Motion because the communications identified by Respondents are neither relevant, nor probative of any of Respondents' claims or defenses. "Relevance" in this context "means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence." *Pension Comm.*, 685 F. Supp. 2d at 467 (citation omitted). Respondents must do more than "show that the destroyed evidence would have been responsive to a document request." *Id.* They must also "show that the evidence would have been helpful in proving [their] claims or defenses." *Id.* The absence of the allegedly missing communications must prevent Respondents from presenting "evidence essential to [their] underlying claim." *Victor Stanley*, 269 F.R.D. at 532 (citation omitted).

Respondents claim that the allegedly missing communications "raise[] questions about the bias and credibility of MCO testimony in this case." Respondents' Motion at 6. Even if it

were true (and it is not), such questions hardly amount to prejudice. To assess the import of these communications, one need only look at the communications Respondents attached to their Motion. *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 221 (S.D.N.Y. 2003). Staff's emails amounted to basic logistics required for any investigation – *e.g.*, scheduling investigational hearings (Respondents' Motion Ex. A) and providing courtesy copies of declaration templates (Respondents' Motion Ex. G) and transcripts containing prior testimony from the very same third parties in similar matters (Respondents' Motion Ex. A). These routine, non-substantive communications in no way support Respondents' attempt to manufacture bias or credibility issues, let alone provide a basis for their claims or defenses in this litigation. Respondents' unsupported, generalized assertions fall far short of the relevance or prejudice required for relief here. *See Van Dellen*, slip op. at 6-7 (attached as Exhibit 2).

Moreover, Respondents had access to these communications through other means. *See In re Delta/Airtran Baggage Fee Antitrust Litig.*, 770 F. Supp. 2d 1299, 1311 (N.D. Ga. 2011); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 646 (S.D. Tex. 2010); *Pension Comm.*, 685 F. Supp. 2d at 478. Months ago, staff identified for Respondents the third parties with whom staff had communications, including the health plans and their representatives. Respondents deposed, or had the opportunity to depose, the health-plan witnesses, including on their communications with staff. "[A]ny prejudice that may have been suffered by [Respondents] is mitigated by the fact that they have been afforded a full opportunity to depose" these witnesses. *In re: Delta/AirTran*, 770 F. Supp. 2d at 1311. Moreover, Respondents have received copies of allegedly missing communications from the health plans directly, which further mitigates Respondents' purported prejudice. *Rimkus*, 688 F. Supp. 2d at

646 (prejudice mitigated by documents available from other sources); *Pension Comm.*, 685 F. Supp. 2d at 478 (prejudice mitigated by documents available from other sources).

E. Respondents' Requested Relief is an Unjustified Fishing Expedition

Given that there are no grounds for granting the Motion, Respondents' expansive request for "discovery concerning the preservation, collection and production of documents relating to Complaint Counsel's investigation of Respondents' affiliation" lacks any justification whatsoever. Respondents' Motion at 8. On top of that, Respondents also ask the Court to give them unbridled access to staff's internal communications and deliberations concerning third parties. *Id.* Of course, staff violated no litigation-hold obligation and acted in good faith, and Respondents suffered no prejudice. But even assuming Respondents had shown any grounds for relief, their request is extreme. *See Pension Comm.*, 685 F. Supp. 2d at 469 (sanction must be "least harsh" to adequately remedy harm).

The Commission's Rules specifically exempt staff's internal communications from discovery. 16 C.F.R. § 3.31(c)(2). When it adopted this rule, the Commission explained that such materials "are frequently duplicative and almost always protected by the deliberative process or attorney-client privileges or as work product." 74 Fed. Reg. 1804, 1812 (2009). Respondents have provided no basis for the Court to ignore those rules or justify violation of attorney-client privilege or work product protections by producing these internal communications. Nor could they. The damage to staff's ability to engage in internal debate and analysis without fear that those deliberations will be disclosed cannot be overstated. Accordingly, Respondents' Motion is untenable and should be denied with prejudice.

Dated: March 22, 2012

Respectfully submitted,

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Complaint Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 22, 2012, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-135
Washington, DC 20580

I also certify that on March 22, 2012, I served *via* electronic mail a copy of the foregoing with:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
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I further certify that on March 22, 2012, I served *via* electronic mail a copy of the foregoing with the following counsel:

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EXHIBIT 1

Declaration of Richard A. Feinstein

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
OSF Healthcare System, a corporation, and	)	Docket No. 9349
Rockford Health System, a corporation, Respondents.	)	PUBLIC

DECLARATION OF RICHARD A. FEINSTEIN

I, Richard A. Feinstein, declare as follows:

1. I am the Director of the Bureau of Competition of the Federal Trade Commission. The statements made in this declaration are made based upon my personal knowledge unless otherwise indicated. My responsibilities include supervising Bureau of Competition staff in their investigations of proposed mergers to determine whether they may violate the antitrust laws and warrant recommending an enforcement action to the Commission. I submit this declaration in support of Complaint Counsel's March 22, 2012 Opposition to Respondents' Untimely Motion to Compel Deposition and Documents.

2. Each year, the Commission and Department of Justice receive thousands of Hart-Scott-Rodino ("HSR") filings for proposed mergers. To aid Commission staff's investigations of those proposed mergers, staff may seek issuance of Requests for Additional Information ("Second Requests") and may also ask the Commission to grant compulsory process, which allows staff to seek discovery through Civil Investigative Demands ("CIDs") and subpoenas. But, of those thousands of HSR filings each year, very few lead to litigation. Indeed, from fiscal 2008 through 2010, the Commission and Department of Justice received over 7,100 HSR filings for more than 3,400 HSR reportable transactions. During that same period, the Commission filed just three administrative complaints – *i.e.*,

less than one-tenth of one percent of the total HSR reportable transactions and only about five percent of the transactions for which the Commission issued Second Requests in those three years.

3. Staff engages in a variety of tasks to gather information in the course of investigating proposed mergers. Among other things, staff: (i) seeks declarations from market participants to develop reliable testimony that informs staff's recommendation and ultimately the Commission's decision about whether and what action to take; (ii) reviews documents gathered through subpoenas or Second Requests; (iii) reviews data and information obtained through CIDs; and (iv) elicits testimony from parties and third parties through investigational hearings.

4. Bureau of Competition staff evaluates the information gathered using these tools, among others, to determine whether an investigation warrants a recommendation to the Bureau's front office, or the Commission, for an enforcement action. Critically, none of these tasks signifies anything more than the fact that staff is conducting an investigation or suggests that staff is likely to recommend litigation. Indeed, the question of whether to recommend litigation, or to actually litigate, cannot even begin to be analyzed until these investigatory tools are used to produce relevant evidence. Nor does the fact that staff may be engaging in these tasks have any bearing on the analysis or likely recommendations of Bureau of Competition management, the Bureau of Economics, or the Office of General Counsel, each of which could influence the Commission's ultimate vote on whether to file an administrative complaint.

5. Moreover, the Commission – not staff or Bureau management – makes the decision of whether to litigate. Staff frequently gathers affidavits from third parties, hires experts to analyze proposed transactions, and takes live testimony, even if staff may recommend closing an investigation. These steps are essential for preserving the Commission's option to pursue an enforcement action, should the Commission ultimately decide that such an action is appropriate. None of them is evidence of likely or foreseeable litigation.

6. In merger investigations, it is common practice for the merging parties to provide information and documents to staff on an ongoing basis to assist with the investigatory process and facilitate staff's analysis. Far less commonplace is what occurred here. As is their right, Respondents chose not to engage in a meaningful substantive dialog with staff about the transaction and elected not to produce documents on a rolling basis, instead opting for a "document dump" from October 7 to October 14, 2011, nearly seven months after they received the Second Requests. In that one week, Respondents produced millions of pages of documents and certified compliance with their respective Second Requests. By agreement, the parties could close the proposed transaction after 11:59 pm on November 21, 2011, meaning that the Commission had until then to file a complaint and seek injunctive relief to prevent the transaction from closing.

7. Respondents' decision to withhold their documents, rather than produce them on a rolling basis, had the effect of delaying and compressing a significant portion of staff's investigation and evaluation of the evidence into a matter of days. To allow Bureau of Competition management sufficient time to evaluate the evidence and make a recommendation to the Commission, staff needed to forward its recommendation memorandum to the Bureau front office by October 31, 2011. So, in all of 24 days, staff had to load millions of pages of documents into an electronic document review database and go to extraordinary lengths to review, analyze, and digest an immense amount of new information to prepare its recommendation to the Bureau front office. In that short period, staff uncovered key evidence of the Rockford-area hospitals' history of sharing competitively sensitive information and Respondents' understanding that health plans, employers, and patients would view the combined entity as a virtual must have. While staff's investigation and evaluation of the evidence always continues after staff makes its recommendation, the somewhat unique circumstances surrounding Respondents' document productions here required a particularly detailed, ongoing dialog with the front office as staff continued to review and analyze new and highly relevant facts for weeks after Respondents' document productions, well into November 2011.

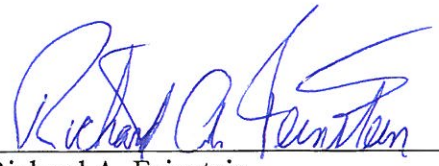
8. The Bureau of Competition has a clear and well-established litigation hold policy that was appropriately applied in this investigation. Under that policy, a litigation hold is put in place no later than the date staff makes a complaint recommendation to the Bureau front office. Among other things, that policy ensures that responsive and relevant materials are preserved when staff reasonably anticipates potential litigation, while avoiding the untenable and unreasonable position of imposing litigation holds on hundreds, if not thousands, of investigations that are highly unlikely to ever lead to Second Requests, let alone litigation recommendations or actual litigation.

9. In this case, it is my understanding that on the day staff made its recommendation to the front office, staff was informed that a litigation hold was in place and that relevant and potentially responsive documents should not be destroyed. The next morning, on November 1, 2011, staff and the Commission's information technology department implemented a detailed and thorough preservation and archiving process for all relevant documents.

10. Even without a litigation hold, staff retained documents, testimony, and information received during the course of its investigation from third parties through CIDs and subpoenas, well before Respondents responded to the Second Requests. It is my understanding that those relevant and responsive materials – as well as other responsive materials in staff's possession that are not subject to privilege or attorney work product protection – have been produced to Respondents.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge.

Executed on March 22, 2012.



Richard A. Feinstein

EXHIBIT 2

FDIC v. Van Dellen, No. CV 10-4915 DSF (SHx), slip op. at 5 (C.D. Cal. Feb. 6, 2012)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No.	CV 10-4915 DSF (SHx)	Date	2/6/12
Title	Federal Deposit Insurance Corp. v. Scott Van Dellen, et al.		

Present: The Honorable	DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order DENYING Defendants Shellem and Koon's Motion for Sanctions for Spoliation of Evidence (Docket No. 82) and DENYING as Moot Plaintiff's Motion to Strike Portions of Defendants' Reply and Declarations Filed in Support Thereof (Docket Nos. 106, 108, 109, 110)

Plaintiff Federal Deposit Insurance Corporation (FDIC), as receiver for IndyMac Bank, F.S.B. (IndyMac), brought suit pursuant to 12 U.S.C. § 1821(d)(2) against Defendants Scott Van Dellen, Richard Koon, Kenneth Shellem, and William Rothman, former officers of IndyMac. The FDIC claims that Defendants were negligent and breached fiduciary duties by approving loans made by IndyMac's Homebuilder Division (HBD), and by pressing to expand HBD's loan volume despite knowledge of the sharp economic downturn in real estate. Defendants Shellem and Koon (moving Defendants)[1] seek sanctions against the FDIC, claiming that it failed to preserve evidence relevant to their defense.

I. FACTUAL AND PROCEDURAL BACKGROUND

HBD provided land acquisition and construction loans to homebuilders. (Compl. ¶ 4.) In July 2008, HBD employed 100 individuals in seventeen offices in eleven states.

[1] Moving Defendants assert in their Reply that Defendants Van Dellen and Rothman's electronic documents were collected by the FDIC, and therefore "they are in a different posture" from moving Defendants regarding the motion for sanctions. (Defs.' Reply at 1 n.2.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

(Behre Decl. Exs. 3-4.) HBD's California offices included the Lake building, Foothills building, and the Pasadena headquarters, where moving Defendants had their offices. (Shamalian Dep. at 16-17.) Within HBD, potential loans were first considered by loan officers who prepared detailed credit approval memoranda (CAMs) regarding the creditworthiness of the client. (Marquardt Dep., Farkas Decl. Ex. 4 at 86.) These CAMs were eventually submitted to the Junior and Senior Loan Committees for approval. (Id.) CAMs were intended to be "stand-alone" documents containing all of the information required for the loan committee to make its decision.[2] (Id.; Beck Dep., Farkas Decl. Ex. 5 at 59; Shellem Dep., Farkas Decl. Ex. 6 at 45; Shamalian Dep. at 10.) After a CAM was prepared, it was submitted to the credit department of review. (Shellem Dep. at 36; Koon Dep., Farkas Decl. Ex. 7 at 62.) A credit officer would verify the details of the CAM, require any necessary changes, and prepare a credit review memorandum. (Shellem Dep. at 36; Koon Dep. at 62.) The loan would then be submitted to committee for approval. Defendant Koon was HBD's chief lending officer (CLO) from 2001 until July 15, 2006. (Compl. ¶ 14.) He was a member of the Junior Loan Committee from 2001 until 2008. (Id.) Defendant Shellem was HBD's chief credit officer (CCO) from 2002 until November 15, 2006. (Id. ¶ 15.) Shellem was a member of the Junior Loan Committee during this time. (Id.) Moving Defendants were involved in the approval of more than 40 of the loans that are the subject of the FDIC's action. (Id. ¶¶ 14-15.)

IndyMac was closed by federal regulators on July 11, 2008 and placed into a conservatorship.[3] (Hall Dep., Farkas Decl. Ex. 1 at 8.) The FDIC commenced an investigation to determine whether it should pursue litigation. (Id. at 8-9, 86; Bovenzi Dep., Behre Decl. Ex. 2 at 43 (stating that the FDIC "always does investigation of a failed bank to see if there is a basis for lawsuits").) The investigation, headed by Stephen Hall, included the collection of both hard-copy and electronic documents.[4] (Hall Dep. at

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[2] CAMs were prepared based on documents such as an appraisal, cost review, environmental report, and borrower financials. (Beck Dep. at 38, 42.)

[3] At the time IndyMac was seized, the outstanding balance on HBD's portfolio was $898,573,743. (Compl. ¶ 5.) The FDIC alleges losses in excess of $5 million. (Id.)

[4] Hall testified that he believed individuals involved in the closing were given the chapter of the FDIC's Investigation Procedures Manual (IPM) dealing with closing procedures. (Hall Dep. at 19.) The IPM was a "guideline" that indicated the types of information investigators should look for. (Id. at 20, 118.) The IPM directed investigators to perform searches for hard-copy and electronic documents. (Farkas Decl. Ex. 3.) Examples of relevant documents were "loan documentation or any other data which should be located in the credit or collateral files," such as copies of notes, titles, financial statements, checks, and legal documents, (id. at 81), board and committee minutes, officer and director insurance polices, loan and operating

MEMORANDUM

7.) Hall and a team of sixteen to eighteen others were in charge of gathering documents from all IndyMac divisions, including HBD. (Id. at 28-29.) Hall searched the Lake building, Foothills building, and main Pasadena headquarters – having determined that these locations were the most likely to contain documents critical to the investigation. (Id. at 108-09.) Approximately 700 boxes of documents were seized.[5] (Id. at 124.) No documents were collected from offices outside California. (Id. at 109.)

Hall also oversaw the collection of electronic data by contractor Deloitte. (Id. at 34.) Based on IndyMac's organizational chart,[6] Hall generated a list of approximately 120 individuals who might have information relevant to IndyMac's losses. (Id. at 36, 44.) Information was taken from the hard drives of these individuals' desktops and laptops. (Id. at 36-37.) It appears that only four of these individuals were HBD employees.[7] (Defs.' Mot. at 7 & n.8.)

Electronic data was also collected from the T-drive, HBD's shared hard drive. (Hall Dep. at 37-38.) Three HBD employees (including two credit officers and a workout officer in Asset Management) testified that there was a standing policy of saving all relevant loan documents on the T-drive.[8] (Camp Dep., Farkas Decl. Ex. 8 at 131; Boggs

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polices, (id. at 82), and information that "might prove critical to an investigation arising out of a financial institution (FI) failure," (id. at 77). Hall's collection efforts targeted IndyMac divisions that had experienced significant loss; also, based on an IndyMac organizational chart, Hall's team selected employees (such as executives) who likely would have information relating to the causes of the bank's failure. (Hall Dep. at 15, 44-45, 94.)

[5] The documents collected include minutes of loan committee meetings and 160 boxes of loan files. (Hall Dep. at 28-29; Farkas Decl. Ex. 19; Pl.'s Opp'n at 1.)

[6] Moving Defendants claim these organizational charts were "undated and incomplete." (Defs.' Mot. at 5.) One of the charts produced to Defendants is dated. (Behre Decl. ¶ 5, Ex. 3.) Defendants do not explain how the charts are incomplete.

[7] Moving Defendants provide a "list of individuals from whom the FDIC collected electronic documents, produced to Defendants Shellem and Koon by the FDIC on October 6, 2009." (Behre Decl. ¶ 11, Ex. 9.) Four of these individuals (including Defendants Van Dellen and Rothman) are HBD employees, as indicated in one of IndyMac's contact lists. (Behre Decl. Ex. 5.)

[8] Moving Defendants claim that no such policy existed. (Defs.' Mot. at 7 n.8.) With their Reply, moving Defendants filed declarations of two HBD employees stating that they did not save all *email correspondence* and *items received electronically* to the T-drive. (Boggs Decl. ¶ 7; Kazanchyan Decl. ¶ 7.) One of these employees, David Boggs, stated in his deposition that "[e]verything was stored on the T-drive." (Boggs Dep. at 61.) Boggs' declaration states

Dep., Farkas Decl. Ex. 10 at 61; Kanani Dep., Farkas Decl. Ex. 11 at 37-38, 62.) The FDIC claims that the T-drive contains the CAMs for every loan that is a subject of the action. (Pl.'s Opp'n at 1.)

In November 2008, while Hall's investigation was ongoing, the FDIC issued a litigation hold to its corporate employees instructing them to preserve "all hard-copy and electronic materials relating to the IndyMac Entities." (Gill Decl. Ex. 1 at 4.) In March 2009, the bank was sold to One West. (Farkas Decl. Ex. 21.) Pursuant to the Master Purchase Agreement, One West was obligated to preserve the bank's records for ten years.[9] (Id. § 10.02.)

II. LEGAL STANDARD

"Spoliation is the destruction or material alteration of evidence, or the failure to otherwise preserve evidence, for another's use in litigation." Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 2d 997, 1005 (D. Ariz. 2011). Sanctions for the spoliation of evidence may be imposed under the court's inherent power to manage its own affairs. Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006). "A party seeking sanctions for spoliation of evidence must prove the following elements: (1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a 'culpable state of mind;' and (3) the evidence that was destroyed or altered was 'relevant' to the claims or defenses of the party that sought the discovery of the spoliated evidence." Surowiec, 790 F. Supp. 2d at 1005 (citation omitted). The court's sanctioning power derives from "the need to preserve the integrity of the judicial process." Silvestri v. GMC, 271 F.3d 583, 590 (4th Cir. 2001).

III. DISCUSSION

Moving Defendants claim that the FDIC's duty to preserve documents arose on the date of IndyMac's closure, if not before. They argue that, due to the FDIC's inadequate preservation efforts, Defendants have been deprived of evidence relevant to their defense.

For the reasons described below, the Court need not decide precisely when the FDIC's duty to preserve was triggered; however, it is not likely that IndyMac's closure

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that he typically saved all *official* documents on the T-drive. (Boggs Decl. ¶ 7.)

[9] Moving Defendants note that the FDIC sold only some of IndyMac's loans to One West, and therefore only some of IndyMac's records are subject to the preservation requirement. (Defs.' Reply at 10-11.)

on July 11, 2008 was the triggering event. A party's duty to preserve "arises when a party knows or should know that certain evidence is relevant to pending or future litigation." Surowiec, 790 F. Supp. 2d at 1005 (citation omitted). This duty is triggered "not only during litigation, but also extends to the period before litigation when a party should reasonably know that evidence may be relevant to anticipated litigation." Id. (citation omitted); see also Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (finding that the duty to preserve was triggered when the plaintiff's fellow employees believed it was likely that the plaintiff would sue); Henkel Corp. v. Polyglass USA, Inc., 194 F.R.D. 454, 456 (E.D.N.Y. 2000) (finding that the duty to preserve was triggered when the plaintiff knew the identity of a product involved in a fire and "knew that it was likely to commence litigation against [the product's] manufacturer"). Contrary to Defendants' claim, (Defs.' Mot. at 12), the FDIC's investigation and collection of data immediately following IndyMac's closure does not indicate that the FDIC believed litigation against IndyMac was likely. Rather, the evidence shows that the purpose of the investigation was to determine whether a basis for litigation existed. Hall testified that the purpose of the investigation was to "determine if there are any professional liability claims," and that the collection of data occurred prior to "making a decision whether litigation would be filed."[10] (Hall Dep. at 9; see also Bovenzi Dep. at 43.) Moreover, the IPM specifically directs investigators to use the investigation to determine "what potential liability claims exist." (Farkas Decl. Ex. 3 at 75.)

However, even if the FDIC's preservation duty arose in July 2008, and even if its preservation efforts were deficient,[11] the Court declines to impose sanctions because moving Defendants have not shown that they were deprived of relevant evidence.[12] See

[10] As the FDIC points out, moving Defendants blatantly mischaracterize this testimony, (see Defs.' Mot. at 11 (claiming that Hall "admitted that they anticipated litigation prior to the closing of IndyMac")), as well as the testimony of FDIC officer John Bovenzi. (Pl.'s Opp'n at 14.)

[11] The Court notes that FDIC investigators actively pursued preserving hard-copy and electronic documents over the course of six to eight months, and the FDIC issued to its employees a litigation hold on "all hard-copy and electronic materials relating to the IndyMac Entities" in November 2008. (Gill Decl. Ex. 1 at 4.)

[12] As the FDIC points out, (Pl.'s Opp'n at 9), moving Defendants present no evidence that any documents were destroyed or that any electronic data was deleted. See Surowiec, 790 F. Supp. 2d at 1005 (stating that suspension of a document retention/destruction policy is part of the duty to preserve). FDIC counsel stated at oral argument that he did not believe that there was "any policy of routinely destroying documents," and defense counsel did not suggest

MEMORANDUM

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010) ("[O]ur cases make clear that 'relevant' in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence." (quoting Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002))). However, in bringing a motion for sanctions for spoliation of evidence, "[t]he innocent party must . . . show that the evidence would have been helpful in proving its claims or defenses – i.e., that the innocent party is prejudiced without that evidence." Id.

Moving Defendants' prejudice claim is based on broad statements that the FDIC failed to gather documents from hundreds of loan officers and credit officers who were intimately involved in making the loans that are the subject of the Complaint. (Defs.' Mot. at 13-17, 20-21.) Defendants claim that the FDIC failed to preserve records of the correspondence engaged in by HBD loan officers during the preparation of loans for Defendants' approval. (Id. at 21.) They also cite the deposition of one HBD loan officer who claimed that his "documents for day-to-day management of the loans" were not collected by FDIC investigators.[13] (Id. at 15 (citing Shamalian Dep.).) However, contrary to moving Defendants' contention, (id. at 21), evidence of the due care of loan officers would not assist Defendants in defending against claims that they negligently approved risky loans. The record shows that Defendants based their approval decisions on the CAMs submitted to the loan committee – not on materials or correspondence relied on by loan officers in preparing the CAMs for submission.

In their motion, moving Defendants make the unsupported assertion that they have

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otherwise. (Transcript 1/30/12 at 14:11-12.) Hall and Sheehan testified that they were not aware of any documents being destroyed. (Hall Dep. at 111; Sheehan Dep., Farkas Decl. Ex. 2 at 111.)

Further, moving Defendants filed their motion prior to receiving a response to the subpoena served on One West and determining whether relevant documents are in its possession.

[13] With their Reply, moving Defendants filed additional declarations of four HBD employees who state that the FDIC failed to collect documents the employees used in preparing, drafting, and revising CAMs, and in monitoring loans following their approval by the committee. (See Kazanchyan Decl.; Boggs Decl.; Cruzan Decl.; Kanani Decl.) The FDIC moves to strike these declarations as improper because they should have been filed with the motion for sanctions, and do not constitute rebuttal evidence, under Local Rules 7-5 and 7-9. (Docket No. 108.) However, as the Court explains, the declarations do not establish that the FDIC failed to preserve relevant evidence. Because the Court would deny the motion for sanctions even if it considered the employee declarations filed with the Reply, the motion to strike is DENIED as moot.

been deprived of communications "between HBD employees and Defendants." (Id.) The only evidence to support this assertion are declarations filed in conjunction with the Reply.[14] Loan officer Cruzan states that she communicated by email with Defendants Shellem and Koon regarding loans, and that she saved relevant emails to a personal working file. (Cruzan Decl. ¶¶ 6-7.) Credit officer Boggs states that he corresponded by email with Defendant Shellem regarding "a [stress test] model to predict loan losses if the market were to decline," and that these emails were not saved to the T-drive. (Boggs Decl. ¶ 8.) Finally, Defendant Koon's former executive assistant, Liz (Boerjan) Lujan stated that she maintained an electronic file of Koon's work product (e.g., scanned copies of handwritten notes on drafts of CAMs) and important email correspondence with loan officers, credit officers, and HBD management, and that this data was not saved to the T-drive. (Lujan Decl. ¶¶ 5-7.) Unlike the other statements in the Reply declarations, these statements directly related to moving Defendants' claim that they have been deprived of relevant evidence. Thus, the declarations clearly should have been filed with the motion for sanctions, and the FDIC seeks to strike them on that basis. However, even if the declarations are considered, moving Defendants have failed to show prejudice. In the case of Lujan, who worked for HBD until March 2009, the evidence may be in possession of One West. Second, although moving Defendants claim that they have been deprived of Cruzan's emails to them regarding loans, this does not detract from the evidence that all information relevant to a given loan's approval was included in the CAM. Although Cruzan's emails might relate to a relevant loan, this does not mean that they contained information that was absent from the CAM. Indeed, this would not stand to reason, as the CAM was provided to all members of the loan committee, some of whom may not have corresponded with Cruzan. Thus, moving Defendants have not shown that the loss of Cruzan's emails (if they have been lost) would impair an analysis of whether moving Defendants exercised due care. Finally, as for Boggs's correspondence regarding the stress test model, moving Defendants fail to indicate how they might be prejudiced by the loss of this narrow set of emails.

IV. CONCLUSION

The motion for dismissal and monetary sanctions is DENIED. The motions to strike portions of the Reply and declarations filed in support thereof are DENIED as moot. The motion for a jury instruction and request for an evidentiary hearing are DENIED as premature.

[14] Each of the relevant declarations was signed before the FDIC filed its Opposition on December 19, 2011.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

IT IS SO ORDERED.