

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

CONSUMER FINANCIAL PROTECTION  
BUREAU AND THE PEOPLE OF THE STATE OF  
NEW YORK, BY LETITIA JAMES, ATTORNEY  
GENERAL FOR THE STATE OF NEW YORK,

Plaintiffs,

v.

DOUGLAS MACKINNON, AMY MACKINNON,  
MARY-KATE MACKINNON, AND MATTHEW  
MACKINNON,

Defendants.

**NOTICE OF MOTION**

No. 1:21-CV-00537

**MOTION MADE BY:**

Plaintiffs Consumer Financial Protection  
Bureau and the People of the State of New  
York, by Letitia James, Attorney General for  
the State of New York

**RETURN DATE:**

As specified in W.D.N.Y. L. R. Civ. P.  
7(b)(2)

**SUPPORTING PAPERS:**

Memorandum in Support and Declaration of  
Jacob A. Schunk

**RELIEF REQUESTED:**

An Order pursuant to the Court's inherent  
authority and Fed. R. Civ. P. 37, imposing  
appropriate sanctions on Defendant Douglas  
MacKinnon for spoliating evidence, including  
drawing an adverse inference that, with  
fraudulent intent, he transferred his home and  
further had his wife encumber it with an  
intrafamily mortgage

Under Local Rule 7(a)(1), notice is hereby given that Plaintiffs intend to file reply papers.  
Under Local Rule 7(b), any opposing papers must be served within 14 days unless otherwise  
ordered by the Court.

Dated: October 13, 2023

/s/ Jacob Schunk  
 JACOB SCHUNK  
 Senior Litigation Counsel  
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STEPHANIE DUFF-O'BRYAN  
 Senior Litigation Counsel  
 P: (202) 288-7033  
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/s/ Christopher L. Boyd  
 CHRISTOPHER L. BOYD  
 Assistant Attorney General  
 350 Main Street, Suite 300A  
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*Counsel for Plaintiff State of New York*

1700 G Street, NW  
 Washington, DC 20552

*Counsel for Plaintiff Consumer Financial  
 Protection Bureau*

**CERTIFICATE OF SERVICE**

I certify that on October 14, 2023, a true and correct copy of the Notice of Motion, Memorandum in Support, and the Declaration in Support of the Motion were filed electronically and sent by USPS to all individuals identified below:

Counsel for Defendant Douglas MacKinnon	JOSEPH G. MAKOWSKI, LLC Joseph Makowski 448 Delaware Avenue Buffalo, New York 14202 E: jmakowski@aol.com P: (716) 881-1890
Counsel for Defendant Matthew MacKinnon	CERULLI MASSARE & LEMBKE Matthew R. Lembke 45 Exchange Blvd., Suite 925 Rochester, NY 14614 E: matt.lembke@cmlawfirm.com P: 585-454-3323
	Amy MacKinnon 6575 Meghan Rose Way East Amherst, NY 14081
	Mary-Kate MacKinnon 97 Whitfield Ave.

	Buffalo, NY 14220
	James Ostrowski 63 Newport Ave Buffalo, NY 14216

/s/ Jacob A. Schunk

---

Jacob A. Schunk

*Counsel for Plaintiff Consumer Financial  
Protection Bureau*

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

CONSUMER FINANCIAL PROTECTION  
BUREAU AND THE PEOPLE OF THE  
STATE OF NEW YORK, BY LETITIA  
JAMES, ATTORNEY GENERAL FOR THE  
STATE OF NEW YORK,

Plaintiffs,

v.

DOUGLAS MACKINNON, AMY  
MACKINNON, MARY-KATE  
MACKINNON, AND MATTHEW  
MACKINNON,

Defendants,

No. 1:21-CV-00537

**DECLARATION IN SUPPORT OF MOTION FOR SANCTIONS  
BASED ON SPOILIATION OF EVIDENCE**

I, Jacob Schunk, an attorney appearing in this Court on behalf of the Consumer Financial Protection Bureau (Bureau), an agency of the United States, declare under penalty of perjury that the following is true and correct, in accordance with 28 U.S.C. § 1746:

1. This case centers on the Bureau and the State of New York's allegations that, in violation of federal and state law, Defendant Douglas MacKinnon fraudulently transferred a high-value residence out of his name in the middle of an active investigation into his illegal debt collection practices by the Consumer Financial Protection Bureau and the State of New York (New York) (together, Plaintiffs), and in order to avoid the residence eventually being seized by the federal and state governments at the conclusion of their investigation. Compl. ¶1, ECF No. 1.

2. That investigation resulted in a \$60 million judgment against Douglas MacKinnon in August of 2019. *Id.*

3. Since obtaining the judgment, the Bureau and New York have been engaged in collections efforts, which have included serving Douglas MacKinnon and multiple non-parties with discovery requests, as well as the filing of the instant lawsuit alleging the fraudulent transfer of Douglas's residence.

4. This Declaration accompanies Plaintiffs' Motion for Sanctions Based on Douglas MacKinnon's Spoliation of Evidence, following Douglas MacKinnon's destruction of evidence at the height of Plaintiffs' attempts to obtain that evidence during discovery.

5. The facts set forth in the section of the Memorandum in Support titled "Factual Background" and filed contemporaneously with this Declaration are incorporated into this Declaration.

6. The document attached as Exhibit A to this Declaration is a true and correct copy of pages from the transcript of Douglas MacKinnon's deposition taken by Plaintiffs on June 14, 2023.

7. The document attached as Exhibit B to this Declaration is a true and correct copy of pages from the transcript of Douglas MacKinnon's in-court testimony taken by Plaintiffs on January 10, 2022.

8. The document attached as Exhibit C to this Declaration is a true and correct copy of pages from the transcript of Douglas MacKinnon's deposition taken by Plaintiffs on October 20, 2022.

/s/ Jacob A. Schunk  
Jacob Schunk

# **EXHIBIT A**

VIDEO DEPOSITION  
DOUGLAS MacKINNON  
VOLUME 2

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

-----  
CONSUMER FINANCIAL PROTECTION BUREAU and  
THE PEOPLE OF THE STATE OF NEW YORK,  
BY LETITIA JAMES, ATTORNEY GENERAL FOR  
THE STATE OF NEW YORK,

Plaintiffs,

- vs - Case No.  
1:21-cv-00537

DOUGLAS MACKINNON, AMY MACKINNON,  
MARY-KATE MACKINNON, and  
MATTHEW MACKINNON,

Defendants.  
-----

Continued video recorded deposition of  
DOUGLAS MacKINNON, Defendant, taken pursuant to the  
Federal Rules of Civil Procedure, at the Office of  
the Attorney General of the State of New York, Main  
Place Tower, 350 Main Street, Suite 300A, Buffalo,  
New York, on June 14, 2023, commencing at  
10:43 a.m., before LORI K. BECK, CSR, CM, Notary

Public.

1 APPEARANCES: CONSUMER FINANCIAL  
2 PROTECTION BUREAU,  
3 By JACOB SCHUNK, ESQ.,  
4 jacob.schunk@cfpb.gov, and  
5 STEPHANIE DUFF-O'BRYAN, ESQ.,  
6 stephanie.duff-obryan@cfpb.gov,  
7 via telephone,  
8 1700 G Street, NW,  
9 Washington, DC 20552,  
10 (212) 328-7009,  
11 Appearing for the Plaintiff,  
12 Consumer Financial Protection Bureau.

13  
14 LETITIA JAMES, ESQ.,  
15 Attorney General of  
16 the State of New York,  
17 By CHRISTOPHER L. BOYD, ESQ.,  
18 Assistant Attorney General,  
19 Main Place Tower,  
20 350 Main Street, Suite 300A,  
21 (716) 853-8400,  
22 christopher.boyd@ag.ny.gov,  
23 Buffalo, New York 14202-3750,  
24 Appearing for the Plaintiff,  
25 New York State Attorney General.

14 MAKOWSKI LAW OFFICE, PLLC,  
15 By JOSEPH G. MAKOWSKI, ESQ.,  
16 448 Delaware Avenue,  
17 Buffalo, New York 14202,  
18 (716) 235-9046,  
19 jmakowski@aol.com,  
20 Appearing for the Defendant,  
21 Douglas MacKinnon.

18 CERULLI MASSARE & LEMBKE,  
19 By MATTHEW R. LEMBKE, ESQ.,  
20 45 Exchange Boulevard, Suite 925,  
21 Rochester, New York 14614,  
22 (585) 454-3323,  
23 matt.lemcke@cmlfirm.com,  
24 Appearing for the Defendant,  
25 Matthew MacKinnon,  
via telephone.



1       PRESENT:               SCOTT BARNES, investigator,  
                                  New York State Attorney General

2

                                  JEFFREY J. LOFTUS, Videographer

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4               (STIPULATIONS: Waive filing of the  
5               transcript, waive Oath of the Referee,  
6               reserve all objections until trial, with  
7               exception of objections as to form.)

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1 A. No.

2 Q. And whose idea was it to transfer the  
3 house?

4 A. It was a conversation between myself  
5 and my attorneys and financial planners.

6 Q. Anyone else?

7 A. My brother and Amy and Mary-Kate.

8 MR. LEMBKE: I object to the form of these  
9 questions again. I mean, I thought you were going  
10 to get to some more pointed questions. These are  
11 all ground we've already covered. I object.

12 BY MR. BOYD:

13 Q. Anyone else?

14 MR. MAKOWSKI: I join. I join.

15 THE WITNESS: I think I mentioned everybody.

16 BY MR. BOYD:

17 Q. So when you say your brother, do you  
18 mean Matthew MacKinnon?

19 A. Yes.

20 Q. So the people who were involved in the  
21 decision to transfer the house were Matthew  
22 MacKinnon, Amy MacKinnon, financial advisors, and  
23 lawyers?

24 A. Yes.

25 Q. What financial advisors?

1 A. Keith Condemi, Mark Bohn.

2 Q. Was Mark Bohn your financial advisor?

3 A. He was one of them.

4 Q. Does he have any credentials as a  
5 financial advisor?

6 MR. LEMBKE: Same -- same objection. Same  
7 objection.

8 THE WITNESS: I -- I -- he does not have  
9 credentials. He was a close friend of mine, and I  
10 referred to him on financial matters as well as  
11 Keith Condemi, who was a good friend of Mark's.

12 MR. MAKOWSKI: Do you know how to spell  
13 Keith's last name, for the stenographer?

14 THE REPORTER: No. Do you know how to --  
15 can you give me the spelling?

16 THE WITNESS: C-O-N-D-E-M-I.

17 BY MR. BOYD:

18 Q. And when you say your lawyers, what  
19 lawyers are you referring to?

20 A. Rodney Giove, Carl Steinbrenner.

21 Q. Anyone else?

22 A. Not that I recall.

23 Q. And at the time the transfer was done,  
24 did you have any health concerns?

25 A. I was concerned just because my father

1 you had agreed to pay Matthew MacKinnon?

2 A. I don't recall what that was.

3 Q. So other than lowering the interest  
4 rate, were there any other reasons?

5 A. No.

6 Q. Is there a reason you didn't go to a  
7 credit union or some other bank?

8 A. No.

9 Q. Was Matthew MacKinnon giving you a  
10 favorable interest rate because he's your brother?

11 A. I believe he would have gave a  
12 favorable rate because some of his investments in  
13 previous projects he got good returns on.

14 Q. So in consideration for the success of  
15 some of his other investments, he would have given  
16 you a below-market interest rate?

17 A. Yes.

18 Q. Are there any written documents about  
19 what that interest rate was?

20 A. Not that I'm aware of or have seen.

21 Q. And when we talked earlier about the  
22 will, you mentioned that you had sent Carl  
23 Steinbrenner a text message, correct?

24 A. Yes.

25 Q. Did you routinely talk to Carl

1 Steinbrenner via text message?

2 A. Yes.

3 Q. Do you routinely use text messages to  
4 communicate generally speaking?

5 A. Yes.

6 Q. Is that your preferred method of  
7 communication, or do you prefer email or phone  
8 call?

9 A. Text message.

10 Q. Did you ever have any text messages  
11 about the transfer of the Meghan Rose Way property?

12 A. I don't recall.

13 Q. Did you ever have any text messages  
14 about the mortgage on the property?

15 A. I don't recall.

16 Q. Did you ever have any text messages  
17 with Matthew MacKinnon about his investments?

18 A. Yes.

19 Q. Did you ever have any text messages  
20 with Matthew MacKinnon about how much money he was  
21 still owed on the mortgage?

22 A. No.

23 Q. Did you ever have any text messages  
24 with Matthew MacKinnon about how much he was owed  
25 generally?

1 A. Yes.

2 Q. Did you have text message  
3 communications with your wife?

4 A. Yes.

5 Q. And did you ever text with your wife  
6 about the transfer of the house or the mortgage?

7 A. I don't believe so.

8 Q. Did you ever have text message  
9 communications with Mary-Kate about the house or  
10 the mortgage?

11 A. No.

12 Q. Did you ever have text message  
13 communications with Carl Steinbrenner about the  
14 house or the mortgage?

15 A. I would say yes. I don't specifically  
16 recall.

17 Q. How about with Mark Bohn?

18 A. Yes.

19 Q. How about with Rodney Giove?

20 A. Yes.

21 Q. So you believe that you likely had text  
22 message communications with Rodney Giove, Carl  
23 Steinbrenner, and Mark Bohn about the house and the  
24 mortgage, correct?

25 A. Yes.

1 Q. Anyone else you can think of that you  
2 would have had text message communications with  
3 about that subject?

4 A. Maybe Keith Condemi.

5 Q. Anyone else?

6 A. Not that I recall.

7 Q. And did you do anything to search for  
8 responsive text messages? In -- in regards to our  
9 document requests in this case.

10 A. Yes, but they were numbers that I  
11 hadn't used in a while.

12 Q. What do you mean by numbers you hadn't  
13 used in a while?

14 A. Cell -- cell -- I had changed my cell  
15 phone numbers.

16 Q. So you never -- you no longer had that  
17 phone.

18 A. Correct.

19 Q. So you were unable to search for any  
20 responsive text messages.

21 A. Yes.

22 Q. Do you know what a litigation hold  
23 letter is?

24 A. No.

25 Q. Is that a no?

# **EXHIBIT B**



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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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CONSUMER FINANCIAL PROTECTION  
BUREAU, AND PEOPLE OF THE  
STATE OF NEW YORK,  
Plaintiffs

16-CV-880(G)

vs.

DOUGLAS MACKINNON, MARK GRAY,  
NORTHERN RESOLUTION GROUP, LLC,  
ENCHANCED ACQUISTIONS, LLC,  
DELRAY CAPITAL, LLC, KRISTI  
FIUTKO,

Buffalo, New York  
January 10, 2022  
11:00 a.m.

Defendants.

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TRANSCRIPT OF TESTIMONY OF DOUGLAS MACKINNON  
BEFORE THE HONORABLE FRANK P. GERACI, JR.  
UNITED STATES DISTRICT JUDGE

COURT REPORTER: Christi A. Macri, FAPR-RMR-CRR-CSR(NY/CA)  
Christimacri50@gmail.com  
Kenneth B. Keating Federal Building  
100 State Street, Room 2120  
Rochester, New York 14614

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A P P E A R A N C E S

NYS ATTORNEY GENERAL'S OFFICE  
BY: CHRISTOPHER L. BOYD, ESQ.  
Main Place Tower  
Suite 300A  
350 Main Street  
Buffalo, New York 14202  
Appearing on behalf of the People of the State of New York

CONSUMER FINANCIAL PROTECTION BUREAU  
BY: STEFANIE ISSER GOLDBLATT, ESQ. (Via Zoom)  
1700 G Street, NW  
Washington, DC 20552  
Appearing on behalf of Consumer Financial Protection Bureau

JOSEPH G. MAKOWSKI, ESQ.  
448 Delaware Avenue  
Buffalo, New York 14202  
Appearing on behalf of Douglas MacKinnon, Resolution Group,  
LLC and Enhanced Acquisitions, LLC, Ryan MacKinnon, Connor  
MacKinnon, CMAC Properties, LLC and RMFSG, LLC

1 A. Yes.

2 Q. Did he sign that paperwork?

3 A. No, he did not.

4 Q. Did he receive a copy of that paperwork?

03:33:06PM 5 A. No. His position on that was that's between you and your  
6 brother, and if you want to assign -- assign that to Matt,  
7 that's between you and your brother.

8 Q. Did you have any e-mail communications with Mr. Bohn about  
9 those transactions?

03:33:23PM 10 A. No, I did not.

11 Q. Did you have any text message communications with Mr. Bohn  
12 about those transactions?

13 A. No -- excuse me. I may have, but that would be in --  
14 that would have been in my other phone number, which was

03:33:41PM 15 316-3077. That was my number before my new number.

16 Q. Could you state that full phone number?

17 A. Yes, the number was 716-316-3077.

18 Q. And during what timeframe did you have that phone number?

19 A. Roughly ten years.

03:33:59PM 20 Q. And when did that ten year period end?

21 A. Almost a year ago.

22 Q. A year ago?

23 A. About roughly 13, 14 months ago.

24 Q. What happened to that phone?

03:34:16PM 25 A. I no longer -- I no longer kept it.

1 Q. What happened to it?

2 A. I don't even know where it is. I'm sorry, are you  
3 asking --

4 Q. Has it been destroyed, sold, exchanged for a new iPhone?

03:34:31PM 5 A. It was traded in on my current phone.

6 Q. So you traded it in, so the phone has been given back to  
7 the phone company?

8 A. Yes.

9 Q. Did you save the data from that phone?

03:34:43PM 10 A. No, I did not.

11 Q. And you said that was a year ago?

12 A. A little over a year.

13 Q. You understand that you were served with these documents  
14 requests back in May of 2020, correct?

03:34:55PM 15 A. I do.

16 Q. That was before you destroyed that phone?

17 A. Yes.

18 **MR. MAKOWSKI:** Objection, characterization of  
19 destroyed, Judge.

03:35:01PM 20 **BY MR. BOYD:**

21 Q. Sorry. Before you traded in that phone?

22 **THE COURT:** Sustained. You can answer the new  
23 question.

24 **THE WITNESS:** Can you repeat the question, please?

03:35:11PM 25 **BY MR. BOYD:**

1 Q. And so that phone was traded-in after the May 2020  
2 document requests were served on you, correct?

3 A. Correct.

4 Q. And what is Northern Resolution Group, LLC?

03:35:30PM 5 A. It was a debt buying entity.

6 Q. And you were the 100% member owner of Northern Resolution  
7 Group; is that correct?

8 A. Yes, I was.

9 Q. Have you been the 100% member over the entirety of that  
03:35:54PM 10 entity's existence?

11 A. Yes, I was.

12 Q. Did you receive any income or distributions from Northern  
13 Resolution Group?

14 A. No. I did receive payroll from Northern Resolution Group,  
03:36:06PM 15 but that was before 2015.

16 Q. So you received no payroll from Northern Resolution Group  
17 from 2015 onward?

18 A. No.

19 Q. What's the current status of Northern Resolution Group?

03:36:19PM 20 A. It's no longer active.

21 Q. And what is Enhanced Acquisitions, LLC?

22 A. That was another entity that was used for buying debt  
23 portfolios and placing out debt portfolios.

24 Q. And have you always been the 100% member owner of Enhanced  
03:36:41PM 25 Acquisitions, LLC?

# **EXHIBIT C**

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VIDEO DEPOSITION  
DOUGLAS MacKINNON  
VOLUME 1

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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CONSUMER FINANCIAL PROTECTION BUREAU and  
THE PEOPLE OF THE STATE OF NEW YORK,  
BY LETITIA JAMES, ATTORNEY GENERAL FOR  
THE STATE OF NEW YORK,

Plaintiffs,

- vs - Case No.  
1:21-CV-00537

DOUGLAS MACKINNON, AMY MACKINNON,  
MARY-KATE MACKINNON, and  
MATTHEW MACKINNON,

Defendants.  
-----

Video deposition of DOUGLAS MacKINNON,  
Defendant, taken pursuant to the Federal Rules of  
Civil Procedure, in the Office of the Attorney  
General of the State of New York, Main Place Tower,  
350 Main Street, Suite 300A, Buffalo, New York, on  
October 20, 2022, commencing at 10:47 a.m., before  
LORI K. BECK, CSR, CM, Notary Public.

Job No. 218604

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APPEARANCES: Consumer Financial  
Protection Bureau  
By: Stephanie Duff-O'Bryan, Esq.  
Jacob Schunk, Esq.  
1700 G Street, NW  
Washington, DC 20552  
Appearing for the Plaintiff,  
Consumer Financial Protection Bureau.

Attorney General of  
the State of New York  
By: Christopher Boyd, Esq.  
350 Main Street  
Buffalo, NY 14202  
Appearing for the Plaintiff,  
New York State Attorney General.

Law Office of Joseph G. Makowski  
By: Joseph Makowski, Esq.  
448 Delaware Avenue  
Buffalo, NY 14202  
Appearing for the Defendant,  
Douglas MacKinnon.

Bond, Schoeneck & King  
By: Mitchell Banas, Jr., Esq.  
200 Delaware Avenue  
Buffalo, NY 14202  
Appearing for the Defendants,  
Amy MacKinnon and  
Mary-Kate MacKinnon



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Cerulli, Massare & Lembke  
By: Matt Lembke, Esq.  
45 Exchange Boulevard  
Rochester, NY 14614  
Appearing for the Defendant,  
Matthew MacKinnon.

PRESENT:

KAREN DAVIS,  
Senior Consumer Fraud Representative,  
NYS Attorney General

JEFFREY J. LOFTUS, Videographer  
LETITIA JAMES, ESQ.

1 Douglas MacKinnon

2 A. And so --

3 Q. You did that after the transfer of the  
4 house.

5 A. I don't -- I don't recall the date.

6 Q. Okay.

7 A. But I know that I was having some chest  
8 pains, and I was paranoid, because my dad died  
9 young.

10 Q. Did you go to the doctor for those  
11 chest pains?

12 A. Of course.

13 Q. And you had gone before April 22nd of  
14 2015?

15 A. I don't know the date.

16 Q. You don't know the first time you went  
17 to a doctor for those chest pains?

18 A. I could probably find out.

19 Q. Okay.

20 A. It was definitely before this, because  
21 I wouldn't have done this until -- unless I was  
22 paranoid about some stuff. It was done for estate  
23 planning purposes.

24 Q. So was this your idea? Like this --  
25 did you -- you were the one who presented this idea

1 Douglas MacKinnon

2 to others to transfer the house.

3 A. It was Rodney Giove's idea.

4 Q. Okay. In response to your worry about  
5 your health.

6 A. Yes.

7 Q. Okay.

8 A. Attorney-client?

9 MR. MAKOWSKI: We'll leave it alone.

10 THE WITNESS: I --

11 MR. MAKOWSKI: We'll leave it alone.

12 BY MS. DUFF-O'BRYAN:

13 Q. And Rodney Giove did -- does -- is he a  
14 trusts and estates attorney?

15 A. No, but he was my personal attorney,  
16 personal friend, and I took his advice very  
17 seriously.

18 Q. Do you know if he had given similar --  
19 any trusts and estates advice to anyone else  
20 before?

21 A. I wouldn't know that.

22 Q. All right. But you didn't contact any  
23 other trusts and estates attorneys.

24 A. Yes, I did.

25 Q. You did? Can I ask the name of those?

1 Douglas MacKinnon

2 MR. MAKOWSKI: Disclose the name but not the  
3 conversation.

4 THE WITNESS: Carl Steinbrenner, Keith  
5 Condemi.

6 BY MS. DUFF-O'BRYAN:

7 Q. What was that name?

8 A. Keith Condemi, C-O-N-D-E-M-I.

9 MR. MAKOWSKI: He's an attorney?

10 THE WITNESS: He's -- he's a --

11 BY MS. DUFF-O'BRYAN:

12 Q. How do we spell the name?

13 A. C-O-N-D-E-M-I. He's disclosed in our  
14 paperwork, I believe.

15 MR. MAKOWSKI: I know, but she asked any  
16 other attorneys.

17 THE WITNESS: Oh.

18 BY MS. DUFF-O'BRYAN:

19 Q. So is Keith Condemi?

20 A. He's a financial advisor, and he put me  
21 with another attorney. I don't remember the other  
22 attorney's name, but that was to set up a will and  
23 a trust account for my daughter Summer.

24 Q. And this was all before April 22nd.

25 A. I don't have the exact dates. Keith

1 Douglas MacKinnon

2 that transferring the house to Amy and Mary-Kate  
3 would protect them in the case of your --

4 MR. MAKOWSKI: Asked and answered --

5 BY MS. DUFF-O'BRYAN:

6 Q. -- demise?

7 MR. MAKOWSKI: -- and calls for a legal  
8 conclusion.

9 MS. DUFF-O'BRYAN: Okay. I'll just go ahead  
10 and -- because you're done.

11 BY MS. DUFF-O'BRYAN:

12 Q. Who did you talk to for this advice?

13 MR. MAKOWSKI: Asked and answered.

14 MS. DUFF-O'BRYAN: Okay.

15 MR. MAKOWSKI: I think he told you.

16 MS. DUFF-O'BRYAN: Okay. He spoke with --

17 MR. MAKOWSKI: Respectfully, I think he did  
18 tell you.

19 BY MS. DUFF-O'BRYAN:

20 Q. Okay. So that was Rodney Giove?

21 MR. MAKOWSKI: You can say who you talked to  
22 again just so we can --

23 (Technical difficulty.)

24 THE WITNESS: So estate planning, Rodney  
25 Giove, Carl Steinbrenner, Mark Bohn, and my wife.

1 Douglas MacKinnon

2 BY MS. DUFF-O'BRYAN:

3 Q. You talked to Mark Bohn about estate  
4 planning?

5 A. Always.

6 Q. Okay. What did you and he talk about.

7 A. It might have been his idea.

8 Q. This was Mark Bohn's idea.

9 A. It's either him and Rodney. I didn't  
10 do anything without consulting Mark Bohn and Carl  
11 Steinbrenner.

12 Q. Okay. What was his rationale?

13 MR. MAKOWSKI: Well, I think she's asking  
14 what did he say to you.

15 THE WITNESS: Mark Bohn.

16 BY MS. DUFF-O'BRYAN:

17 Q. Yes.

18 A. He said that -- he was helping me put  
19 together a will and a trust. The trust was for my  
20 daughter Summer, who's had some health issues,  
21 okay, and then he was directly involved with Rodney  
22 Giove putting the paperwork together.

23 I didn't see any paperwork until after it  
24 was -- well, during the course of signing it. I  
25 didn't put any particulars in place.

1 Douglas MacKinnon

2 Q. Did Mark Bohn initiate this  
3 conversation with you about estate planning?

4 A. He did.

5 Q. Okay. Did you -- you didn't go to him  
6 first?

7 A. Him and Keith Condemi.

8 Q. Okay. Remind me who Keith Condemi is.

9 A. He's a financial planner in Rochester,  
10 New York.

11 Q. Okay. Did Keith and Mark communicate  
12 about this?

13 A. Yes.

14 Q. Why would they be communicating about  
15 you?

16 A. Because at one point, I was his best  
17 friend, like a brother.

18 Q. Who?

19 A. Mark Bohn.

20 Q. Okay. When's the last time you spoke  
21 with him?

22 A. Years.

23 Q. Okay. You don't know exactly when?

24 A. No.

25 Q. Okay.

1 Douglas MacKinnon

2 A. At least two years ago.

3 Q. Okay.

4 A. Chris -- Chris probably knows.

5 Q. And Keith Condemi was your financial  
6 advisor?

7 A. Keith Condemi was Mark's financial  
8 advisor, and Mark turned him on to me.

9 Q. So he was also yours at one point?

10 A. Yes.

11 Q. So he was both of your financial --

12 A. Still is.

13 Q. Okay. And he had permission to talk to  
14 Mark about you.

15 A. Yes.

16 Q. Okay.

17 A. And so did Carl Steinbrenner.

18 Q. Okay.

19 A. And Rodney Giove.

20 Q. Okay. So Mark presented this idea to  
21 you.

22 A. Well, I had been complaining -- there's  
23 a paranoia because I lost my father young, so --  
24 and I had ten children, so I was like, "Man,  
25 whatever I got to do to make it as -- as less



1 Douglas MacKinnon

2 complicated as possible. If something happens to  
3 you and me, Aim, Mary-Kate will take care of our  
4 kids. No doubt about it."

5 So that's why I did it.

6 Q. Okay.

7 A. If me and Amy went down in a plane --

8 Q. Why did you need to transfer it out of  
9 your name and not just add Mary-Kate to the deed?

10 A. I have no idea. That's what -- that's  
11 what I was advised.

12 Q. By?

13 A. Counsel.

14 Q. Okay. And did you run this by more  
15 than one attorney?

16 A. Yes.

17 Q. Okay.

18 A. The attorneys that we've talked about  
19 all day.

20 Q. Okay. And -- all right. And then you  
21 communicated this to Mary-Kate as well, the reason  
22 for this?

23 A. Mary-Kate was -- it was communicated to  
24 Mary-Kate kind of a week before we did it, and it  
25 was also communicated to all my other children.

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

CONSUMER FINANCIAL PROTECTION  
BUREAU AND THE PEOPLE OF THE  
STATE OF NEW YORK, BY LETITIA  
JAMES, ATTORNEY GENERAL FOR THE  
STATE OF NEW YORK,

Plaintiffs,

v.

DOUGLAS MACKINNON, AMY  
MACKINNON, MARY-KATE  
MACKINNON, AND MATTHEW  
MACKINNON,

Defendants,

No. 1:21-CV-00537

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS  
BASED ON DOUGLAS MACKINNON'S SPOILIATION OF EVIDENCE**

The Consumer Financial Protection Bureau (Bureau) and the People of the State of New York, by Letitia James, Attorney General of the State of New York (New York), move for sanctions against Douglas MacKinnon following his spoliation of evidence—specifically, his cell phone and its contents. Douglas traded in his cell phone and permanently lost access to its contents despite knowing that it contained responsive information that had been requested by Plaintiffs. As relief, the Bureau and New York ask that the Court draw an adverse inference against Douglas MacKinnon that (1) his intent behind transferring his house to his wife and daughter for \$1 and having his wife grant a mortgage on the house to his brother was to hinder, delay or defraud a creditor, and (2) he believed at the time of the transfer and mortgage that he would incur debts beyond his ability to pay.

## Factual Background

### A. Douglas MacKinnon spoliated evidence while the Bureau and New York were actively attempting to collect on their judgment against him.

The instant action brought under the Federal Debt Collection Procedures Act and New York Debtor and Creditor Law to void Douglas MacKinnon's May 2015 fraudulent transfer of his house is part of the Bureau's and New York's larger effort to collect on the \$60 million judgment entered against Douglas by this court in August 2019.<sup>1</sup> This lawsuit alleges that Douglas fraudulently transferred his house and granted a mortgage to his brother to protect the house from government seizure.<sup>2</sup>

Since obtaining the judgment in 2019, the Bureau and New York have been actively engaging in post-judgment collection efforts. They first sent post-judgment discovery requests to Douglas and seven LLCs and six persons associated with him, including Amy MacKinnon, Mary-Kate MacKinnon, and Matthew MacKinnon on May 12, 2020.<sup>3</sup> Plaintiffs' document requests to Douglas specifically asked for "[c]opies of all communications concerning the transfer of your assets to your children, spouse, or any other nominee from 2015 to present."<sup>4</sup> After Douglas failed to respond, on November 3, 2020, Plaintiffs filed a motion to compel his response to their post-judgment discovery requests.<sup>5</sup> Immediately after the Bureau and New

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<sup>1</sup> *CFPB et al. v. Northern Resolution Group et al.*, 1:16-CV-0880, Stipulated Final J. and Order, dated August 22, 2019, ECF No. 87.

<sup>2</sup> *CFPB et al. v. Douglas MacKinnon et al.*, 1:21-CV-0537, Compl., ECF No. 1.

<sup>3</sup> See 1:16-CV-0880, Decl. of Christopher L. Boyd in Supp. of Pls.' Mot. to Compel Resp. to Post-Judgment Disc. Information Subpoenas at ¶¶ 5 – 6, ECF No. 89-2.

<sup>4</sup> 1:16-CV-0880, Judgment Creditors' Req. for Produc. of Doc. to J. Debtor Douglas MacKinnon, dated May 12, 2020 at Req. No. 18, Ex. A to ECF No. 89-2.

<sup>5</sup> 1:16-CV-0880, Pls.' Mot. to Compel Resp. to Post-Judgment Disc. Information Subpoenas, ECF No. 89.

York filed the motion to compel, Defendant spoliated his cell phone and all of its contents—including all text messages sent and received while in his possession—by trading it in for a new one.<sup>6</sup>

It is beyond dispute that, at the time when Douglas traded in his phone, the phone contained relevant evidence to Plaintiffs’ fraudulent transfer claims. A necessary element for one of the Bureau and New York’s claims is “actual intent”—i.e., showing that Douglas transferred the house with the actual intent to evade seizure. 28 U.S.C. §§ 3304(b)(1)(A), 3304(b)(1)(B).<sup>7</sup> Douglas’s defense is that, based on the “advice of counsel”—namely, Rodney Giove and Carl Steinbrenner—and the counsel of two other advisors—specifically, Mark Bohn and Keith Condeemi—he transferred the house for estate planning purposes only.<sup>8</sup> Douglas has admitted that text was his preferred form of communicating with these four individuals.<sup>9</sup> Douglas also separately testified that all four witnesses had advised him with respect to the house transfer and some with respect to the mortgage.<sup>10</sup>

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<sup>6</sup> January 10, 2022 Douglas MacKinnon Hr’g Test. at 20:11 – 22:3, Ex. B to Schunk Decl. (“Has it been destroyed, sold, exchanged for a new iPhone? A. It was traded in on my current phone. Q. So you traded it in, so the phone has been given back to the phone company? A. Yes. Q. Did you save the data from that phone? A. No, I did not. Q. And you said that was a year ago? A. A little over a year. Q. You understand that you were served with these documents requests back in May of 2020, correct? A. I do. . . . Q. And so that phone was traded-in after the May 2020 document requests were served on you, correct? A. Correct.”).

<sup>7</sup> See also Mem. Supp. Pls.’ Mot. for Summ. J, at 10, ECF No. 75-3.

<sup>8</sup> See 1:21-CV-0537, Statement of Material Facts as to which there is No Genuine Issue to be Tried at ¶ 71, ECF No. 75-2; see also June 14, 2023 Douglas MacKinnon Test. at 237:20–238:3, 238:18 – 22, attached as Exhibit A to Decl. of Jacob A. Schunk in Supp. of Pls.’ Mot. for Sanctions Based on Douglas MacKinnon’s Spoliation of Evidence.

<sup>9</sup> June 14, 2023 Douglas MacKinnon Testimony at 251:21 – 252:9, 253:21 – 254:6, Ex. A to Schunk Decl.

<sup>10</sup> October 20, 2022 Douglas MacKinnon Test. at 151:24 – 154:12; 160:12 – 164:5, Ex. C to Schunk Decl.; June 14, 2023 Douglas MacKinnon Test. at 237:20 –238:3, 238:18 – 22, Ex. A to Schunk Decl.

Specifically, Douglas testified:

Q. So the people who were involved in the decision to transfer the house were Matthew MacKinnon, Amy MacKinnon, financial advisors, and lawyers?

A. Yes.

Q. What financial advisors?

A. Keith Condemi, Mark Bohn.

Q. Was Mark Bohn your financial advisor?

A. He was one of them.

....

Q. And when you say your lawyers, what lawyers are you referring to?

A. Rodney Giove, Carl Steinbrenner.

Q. Anyone else?

A. Not that I recall.<sup>11</sup>

And he also testified that text was his preferred method of communication:

Q. And when we talked earlier about the will, you mentioned that you had sent Carl Steinbrenner a text message, correct?

A. Yes.

Q. Did you routinely talk to Carl Steinbrenner via text message?

A. Yes.

Q. Do you routinely use text messages to communicate generally speaking?

A. Yes.

Q. Is that your preferred method of communication, or do you prefer email or phone call?

A. Text message.<sup>12</sup>

....

Q. So you believe that you likely had text message communications with Rodney Giove, Carl Steinbrenner, and Mark Bohn about the house and the mortgage, correct?

A. Yes.

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<sup>11</sup> June 14, 2023 Douglas MacKinnon Test. at 237:20 –238:3, 238:18 – 22, Ex. A to Schunk Decl.

<sup>12</sup> *Id.* at 251:21 – 252:9.

Q. Anyone else you can think of that you would have had text message communications with about that subject?

A. Maybe Keith Condemni.

Q. Anyone else?

A. Not that I recall.<sup>13</sup>

In sum, text was Douglas's primary form of communicating with four witnesses in this matter about the subject to which it relates: the transfer of the house on Meghan Rose Way to Amy and Mary-Kate for \$1, and Amy's issuance of a \$900,000 mortgage on the house to Matthew MacKinnon.<sup>14</sup> The centrality of Douglas's text messages to the current case is beyond any legitimate dispute. Text communications between Douglas and witnesses around May of 2015 discussing the house transfer and mortgage would be evidence of Douglas's actual intent at the time. But because Douglas traded in his phone, he can no longer access those communications.

Unaware in late 2020 that Douglas had destroyed key evidence, the Bureau and New York diligently continued in their discovery pursuits. The Court granted the Bureau and New York's motion to compel on January 11, 2021.<sup>15</sup> After Douglas disregarded the Court's January 11 order, Plaintiffs filed a motion for sanctions and contempt on February 2, 2021.<sup>16</sup> The Bureau and New York then filed the instant fraudulent transfer lawsuit a few months later, on April 4, 2021, which pertains only to the house, and Plaintiffs continue to pursue other assets in the

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<sup>13</sup> *Id.* at 253:21 – 254:6.

<sup>14</sup> *Id.* at 237:20 – 238:3, 238:18 – 238:22, 251:21 – 252:9, 253:21 – 254:6.

<sup>15</sup> However, discovery in the original proceeding only meaningfully progressed following a subsequent motion for contempt and an in-court hearing in January 2022 to address Douglas's failure to respond to Plaintiffs' outstanding discovery requests. *See* Decision and Order, ECF No. 99.

<sup>16</sup> 1:16-CV-0880, Mot. for Sanctions and Contempt, ECF No. 98.

original proceeding.<sup>17</sup> After eight more months of Douglas MacKinnon ignoring the Court's January 11 order and the Bureau's and New York's discovery requests, the Court set a hearing on the motion for sanctions and contempt, which took place on January 10 and 11, 2022.<sup>18</sup> At the January 2022 hearing, the Bureau and New York first learned that Douglas destroyed his cell phone in about November 2020, in the middle of Plaintiffs' nearly two-year long effort to obtain that evidence.<sup>19</sup>

### Argument

Recent Second Circuit precedent prescribes a negligence test for determining whether Defendant's spoliation of his cell phone warrants an adverse inference sanction. As described below, applying this test, Defendant's spoliation should be sanctioned via an adverse inference with respect to his intent behind transferring and mortgaging his house. But even under the heightened Rule 37(e) test that applies to electronically stored evidence (ESI) (which does not apply here because Defendant spoliated his entire physical cell phone), this Court should equally draw an adverse inference against Douglas as a sanction for his spoliation.

**A. The Court should exercise its inherent power to draw an adverse inference as a sanction against Douglas MacKinnon for spoliating evidence.**

"A federal district court may impose sanctions under [Federal Rule of Civil Procedure] 37(b) when a party spoliates evidence in violation of a court order." *West v. Goodyear Tire & Rubber Co.*, 167 F3d 776, 779 (2d Cir. 1999). "Even without a discovery order, a district court may impose sanctions for spoliation, exercising its inherent power to control litigation." *Id.* The Second Circuit has found that a court may use its inherent authority to impose an adverse

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<sup>17</sup> See *CFPB et al. v. Douglas MacKinnon et al.*, 1:21-CV-0537, filed April 4, 2021.

<sup>18</sup> 1:16-CV-0880, Minute Entries for Proceedings held on January 10 and 11, ECF Nos. 114, 115.

<sup>19</sup> January 10, 2022 Douglas MacKinnon Hearing Test. at 20:11 – 22:3, Ex. B to Schunk Decl.

inference as a sanction where “(1) ‘the party having control over the evidence had an obligation to preserve it at the time it was destroyed’; (2) ‘the records were destroyed with a culpable state of mind’; and (3) ‘the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.’” *Rossbach v. Montefiore Med. Ctr.*, 81 F.4th 124, 139 (2d Cir. Aug. 28, 2023) (quoting *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) (holding that these three elements must be met for an adverse inference instruction). “[T]he ‘culpable state of mind’ for a spoliation claim need not be intentional or willful, and may be found where the spoliation occurred due to negligence.” *Rossbach*, 81 F.4th at 140 (citing *Residential Funding Corp.*, 306 F.3d at 108).

All three prongs of the negligence spoliation standard are satisfied here.

**1. Douglas MacKinnon had a duty to preserve text messages relating to his transfer of assets to his family members for \$1.**

Douglas had an obligation to preserve the evidence at the time it was destroyed. “‘The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.’” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (quoting *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).

When Douglas traded in his cell phone and thereby destroyed its contents, the Bureau and New York not only had outstanding discovery requests addressed to him, but they had just filed a motion to compel responses to those requests.<sup>20</sup> Those document requests specifically asked for “[c]opies of all communications concerning the transfer of your assets to your children, spouse,

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<sup>20</sup> 1:16-CV-0880, Pls.’ Mot. to Compel Resp. to Post-Judgment Disc. Information Subpoenas, ECF No. 89.



or any other nominee from 2015 to present.”<sup>21</sup> Douglas was therefore on “notice” that the Bureau and New York were seeking his text communications as evidence “relevant to litigation,” and he was under a clear obligation to preserve that evidence.

Despite this, not only did Douglas fail to take steps to preserve key evidence, but he also permanently divested himself of that evidence by trading in his cell phone for another one and taking no measures to save its contents before doing so.

**2. Douglas MacKinnon, negligently and in bad faith destroyed key irreplaceable evidence.**

The Bureau and New York need not prove willfulness on Douglas’s part to prevail on a spoliation claim—they need only prove that the Douglas spoliated the relevant evidence through negligence. Applying the negligence standard, the *Rossbach* court found that a plaintiff who had refused to provide the correct password to her iPhone 5 and also disposed of her iPhone X during litigation had spoliated evidence. *Rossbach*, 81 F.4th at 140. The court further clarified that spoliation would have been found even had the plaintiff not done so intentionally, but only negligently: the plaintiff’s failure to preserve her “iPhones and their data” in itself “demonstrated a disregard of [her] discovery obligations.” *Id.*

Douglas similarly spoliated his physical cell phone by trading it in immediately following the Plaintiffs’ motion for sanctions for his failure to comply with discovery requests—requests that sought the text messages contained on his phone. This alone was an act that demonstrated, in the very least, a “disregard of [his] discovery obligations” and satisfies the state-of-mind requirement for spoliation under the Second Circuit’s three-prong test.

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<sup>21</sup> 1:16-CV-0880, J. Creditors’ Req. for Produc. of Doc. to J. Debtor Douglas MacKinnon, dated May 12, 2020 at Req. No. 18, Ex. A to ECF No. 89-2.

But Douglas did more than disregard his obligations—Douglas intentionally and in bad faith traded in his cell phone to avoid turning it over to the Bureau and New York in this litigation. After eighteen months of delaying his discovery responses, a court order forcing him to turn over his communications (which he ignored), and finally the threat of contempt of court, Douglas destroyed the evidence that the Bureau and New York sought for well over a year. The timing and circumstances of Douglas’s spoliation—i.e., immediately after the Bureau and New York filed a motion for contempt following more than a year and a half of Douglas refusing to respond to discovery requests—is evidence of Douglas’s intent at the time of the spoliation to deprive Plaintiffs of his text communications.

**3. A reasonable trier of fact could find that the destroyed texts would have supported the Bureau’s and New York’s claim.**

In the instant action, Plaintiffs allege both that (a) Douglas’s transfer of his house to his wife and daughter for \$1 was fraudulent and (b) the mortgage granted to his brother was fraudulent. To prevail on an actual fraud claim, the Bureau and New York must show that Douglas made the transfer with “actual intent to hinder, delay or defraud a creditor[.]” 28 U.S.C. § 3304(b)(1)(A). The Bureau and New York also plead a constructive fraud claim based on Douglas making the house transfer “without receiving a reasonably equivalent value in exchange for the transfer or obligation [while he] . . . believed or reasonably should have believed that he would incur[] debts beyond his ability to pay as they became due.” *Id.* § 3304(b)(1)(B)(ii).

Douglas has admitted that Carl Steinbrenner, Mark Bohn, Rodney Giove, and Keith Condemmi all advised him on the house transfer, that his primary form of communication with them was text messages, and that he no longer has those texts due to having traded in his own cell phone without making a back-up copy of that phone or the text messages. These texts were likely to reveal Douglas’s “actual intent” underlying the transfer. And given the fact that Douglas

spoliated his cell phone in the midst of Plaintiffs seeking sanctions for him having failed to produce those texts, a reasonable trier of fact could deduce that those texts would have supported Plaintiffs' claims. *See Residential Funding Corp.*, 306 F.3d at 109 (“[W]here a party seeking an adverse inference adduces evidence that its opponent destroyed potential evidence (or otherwise rendered it unavailable) in bad faith or through gross negligence (satisfying the ‘culpable state of mind’ factor), that same evidence of the opponent’s state of mind will frequently also be sufficient to permit a jury to conclude that the missing evidence is favorable to the party (satisfying the ‘relevance’ factor).”). Similarly, on the constructive fraud claim, the texts would plausibly have shown that, at time of the house transfer, MacKinnon “believed or reasonably should have believed that he would incur[] debts beyond his ability to pay as they became due.” 28 U.S.C. § 3304(b)(1)(B)(ii).

**B. Federal Rule of Civil Procedure 37(e) likewise warrants an adverse inference against Defendant for spoliating key evidence.**

In 2015, a heightened spoliation test was introduced to Rule 37(e) for the destruction of “electronically stored information” (ESI). For an adverse-inference sanction to be warranted for spoliation of ESI, Rule 37(e) now requires a finding that the spoliating party acted with intent. Fed. R. Civ. P. 37(e)(2)(A). The Second Circuit has continued to apply a negligence standard where a party manages a physical cell phone in a way that deprives the other party of “access to electronically stored information,” and it has elected not to treat the deprivation as an intentional destruction of ESI under Rule 37(e). *See, e.g., Rossbach*, 81 F. 4th at 139-40; *Charles v. City of New York*, 120CV-6180-SLTS-MG, 2017 WL 530460, at \*25-26 (E.D.N.Y. Feb. 8, 2017) (applying negligence standard to a lost cell phone containing relevant video footage). But even if this Court were to apply the requirements of Rule 37(e) to Douglas’s destruction of his cell phone, spoliation sanctions would still be warranted because the circumstances surrounding

Douglas’s spoliation of his cell phone show that he acted with the intent to deprive the Bureau and New York of relevant information.

Courts within the Second Circuit have distilled the Rule 37(e) test for an adverse-inference sanction into a three-part inquiry: (a) whether the “party failed to take ‘reasonable steps’ to preserve electronic evidence ‘that should have been preserved in the anticipation or conduct of litigation’”; (b) whether the loss of ESI imposes “prejudice” on the opposing party such that “the Court ‘may order measures no greater than necessary to cure the prejudice’”; and (c) “whether the destroying party ‘acted with the intent to deprive another party of the information’s use in the litigation.’” *See Charlestown Cap. Advisors, LLC v. Acero Junction, Inc.*, 337 F.R.D. 47, 59 (S.D.N.Y. 2020) (quoting Fed. R. Civ. P. 37(e)). Where intent is present, the court may impose the most severe sanction of either an adverse inference—i.e., itself “presum[ing] that the lost information was unfavorable to the party” or instructing a jury to presume the information to be unfavorable to the party—or a default judgment. Fed. R. Civ. P. 37(e)(2). All three prongs of the inquiry are satisfied here, and the adverse inference sought by the Bureau and New York is warranted.

**1. Douglas MacKinnon failed to take reasonable steps to preserve evidence.**

Courts apply “roughly a negligence standard” when determining whether a party took reasonable steps to preserve evidence that should have been preserved in the conduct of litigation. *Leidig v. Buzzfeed, Inc.*, No. 16-CV-542 (VM) (GWG), 2017 WL 6512353, at \*10 (S.D.N.Y. Dec. 19, 2017). Moreover, “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” *Zubulake*, 220 F.R.D. at 218.

Here, the Bureau and New York not only had outstanding discovery requests to Douglas, but they had just filed a motion to compel Douglas's response to those requests when he traded in his cell phone that contained information directly relevant to the requests. Given this, Douglas was at minimum negligent in his failure to take reasonable steps to preserve the phone and its contents, if not intentional in his failure to take those steps. At the very minimum, a reasonable step to preserve those messages would have included making a back-up copy during the more than a year and a half that the Bureau's and New York's document requests were pending.

**2. Douglas MacKinnon's destruction of key, irreplaceable evidence imposes an undue prejudice on the Bureau and New York.**

Douglas MacKinnon's destruction of his communications with Carl Steinbrenner, Mark Bohn, Rodney Giove, and Keith Condemi discussing the house transfer during April and May of 2015 will have deprived Plaintiffs of significant potential evidence and unduly prejudiced the Bureau and New York.

In evaluating whether sanctions are permitted, the court must find "prejudice to another party from loss of the information." Fed. R. Civ. P. 37(e)(1). "An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation." Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment. In showing the information's importance, Plaintiffs need not fully prove the contents of the evidence lost. As the Second Circuit has recognized, "holding the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence would subvert the prophylactic and punitive purposes of the adverse inference, and would allow parties who have intentionally destroyed evidence to profit from that destruction." *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998). Accordingly, "[i]n order to obtain curative sanctions . . . [a party] need not establish that a smoking gun . . . was irretrievably destroyed . . . . It is sufficient if the existing

evidence plausibly suggests that the spoliated ESI could support the moving party's case.”

*Karsch v. Blink Health Ltd.*, 2019 WL 2708125, at \*21 (S.D.N.Y. June 20, 2019) (quoting *Coan v. Dunne*, 602 B.R. 429, 439 (D. Conn. 2019) (internal quotation marks omitted)).

Again, the Bureau and New York must either show that Douglas acted with actual intent to shield his house from eventual government seizure when he transferred his interest to his wife and daughter or that he did so for less than reasonably equivalent value while believing, or having reason to believe, that he might owe the government a debt that he could not otherwise satisfy. Douglas has admitted that he communicated with four witnesses, he claims that these witnesses advised him to transfer his property for purported “estate planning purposes,” and that his communications with these witnesses mainly occurred through text messaging on his cell phone. This “plausibly suggests that the spoliated [texts] could support” the Plaintiffs’ case with respect to showing Douglas’s “actual intent” underlying the house transfer at issue. In addition, the evidence also suggests that the spoliated evidence could have supported a constructive fraud claim, insofar as the text messages might have shown that, at the time of the transfer, Douglas MacKinnon “believed or reasonably should have believed that he would incur[] debts beyond his ability to pay as they became due.” 28 U.S.C. § 3304(b)(1)(B)(ii).

**3. Douglas intended to deprive the Bureau and New York of evidence through his act of spoliation.**

In order to impose the most severe of sanctions available under Rule 37(e) for spoliating ESI, such as the sanction of an adverse inference, the Court must find that the spoliating party “acted with the intent to deprive another party of the information’s use in litigation.” Fed. R. Civ. P. 37(e)(2). The Court may infer that a party acted with an intent to deprive on the basis of circumstantial evidence. *See, e.g., Moody v. CSX Transportation, Inc.*, 271 F. Supp. 3d 410, 432 (W.D.N.Y. 2017) (finding intent where defendants’ failure to preserve evidence over a period of

years was “so stunningly derelict as to evince intentionality”). Courts have found such intent where the “affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator.” *Id.* at 431 (quoting *Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 746 (N.D. Ala. 2017)). Moreover, courts within the Second Circuit have held that a party has acted with intent to deprive despite having a credible explanation for the spoliation when they knowingly allowed data to be destroyed, while simultaneously knowing they had a duty to preserve it, and “without ever confirming that the data had been preserved in another repository.” *Moody*, 217 F. Supp. 3d at 431; *see also Ottoson v. SMBC Leasing & Fin. Corp.*, 268 F. Supp. 3d 570, 582-84 (S.D.N.Y. 2017) (holding that where a party has significantly failed in its obligation to preserve and collect documents, it is appropriate to infer intent to deprive); *Charlestown Cap. Advisors, LLC*, 337 F.R.D. at 67 (applying *Moody* factors, but concluding they did not uphold a finding of intent by the spoliating under the particular facts of the case).

For the reasons explained above in Section A, Douglas intentionally spoliated his cell phone in order to avoid having to produce inculpatory texts to the Bureau and New York in this action.

### **C. Adverse Inference Remedy**

Douglas destroyed the only communications that openly discussed (a) the reason for transferring his 1.6 million home to his wife and daughter for \$1, and (b) the reason for the then immediate grant of a \$900,000 mortgage on that same house to his brother, all at the height of the Bureau and New York’s investigation into his illegal debt-collection enterprise. Pursuant to the Court’s inherent authority, and applying a negligence standard or, in the alternative, under the heightened Rule 37(e) standard, the Court should draw an adverse inference against

Defendant with respect to his intent behind transferring his house to his wife and daughter for \$1 and his intent behind having his wife grant a mortgage to Matthew MacKinnon.

Accordingly, the Bureau and New York request that the fact finder be instructed that it may infer from the very fact that Douglas destroyed the phone that the phone, if available, would have been favorable to the Bureau and New York and harmful to Douglas. *See Zubulake*, 220 F.R.D. at 219-21. More specifically, Plaintiffs request an adverse inference from the phone's destruction that:

- (a) The phone contained evidence showing both the transfer and mortgage were executed with the actual intent to hinder, delay or defraud a creditor; and
- (b) The phone contained evidence demonstrating that Douglas believed or reasonably should have believed at the time of the transfer and mortgage that he would incur debts beyond his ability to pay as they became due.

### CONCLUSION

For the foregoing reasons, the Bureau and New York respectfully request that the Court impose an adverse inference sanction against Douglas MacKinnon.

Dated: October 13, 2023

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**CERTIFICATE OF SERVICE**

I certify that on October 14, 2023, a true and correct copy of the Notice of Motion, Declaration in Support of Motion, and Memorandum in Support were filed electronically. All of these documents, along with paper copies of all unpublished cases cited in the Memorandum in Support, were also sent by USPS or UPS to all individuals identified below:

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