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OF THE
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November 2, 2026

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RE: *US INFRA SVCS Buyer, LLC, et al. v. JDB Capital Partners, LLC, et al.*
C.A. No. 2024-0097-LWW

Dear Counsel:

I have reviewed the plaintiffs' motion for sanctions due to alleged spoliation of evidence (the "Motion"), filed on October 16, 2026.[1] With trial six weeks away, the plaintiffs ask that I convene a pretrial hearing to impose adverse inferences.[2] That request is denied. The Motion will be resolved after trial.

[1] Pls.' Mot. for Adverse Inferences Due to Spoliation of Evidence (Dkt. 351) ("Mot.").

[2] *Id.*

Over the past year, this court has seen a growing influx of motions seeking merits-based spoliation sanctions. These motions ask the court to draw adverse inferences or shift evidentiary burdens before hearing the evidence on the underlying claims. Resolving such requests in advance of trial risks allowing a dispute over lost evidence to displace adjudication of the merits on the available record.

Under Court of Chancery Rule 37(e)(2), an adverse inference requires a finding that the party acted "recklessly or with the intent to deprive another party of the information's use in the litigation."[3] Making that state of mind assessment is typically done after hearing the evidence at trial. Here, the plaintiffs assert that a defendant's trustee failed to disable cell phone auto-delete settings and to preserve data during phone upgrades, and deleted text messages.[4] I cannot resolve whether this conduct reflects negligence, recklessness, or intentional spoliation on the existing paper record.[5]

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[3] Ct. Ch. R. 37(e)(2); *see also Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1191 (Del. Ch. 2009) ("[T]he negligent destruction of evidence does not warrant drawing an adverse inference; rather, the drawing of an adverse inference requires as a predicate a 'preliminary finding of intentional or reckless destruction of evidence.'" (quoting *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 550 (Del. 2006))).

[4] Mot. ¶¶ 15, 21, 35, 41.

[5] *See Fortis Advisors, LLC v. Johnson & Johnson*, C.A. No. 2020-0881-LWW, at 132 (Del. Ch. June 5, 2023) (TRANSCRIPT) (explaining that the court could not "possibly make credibility determinations" or assess the alleged spoliator's "state of mind" pretrial).

The complete trial record will also allow me to evaluate any resulting prejudice and, if appropriate, tailor a proportionate remedy.[6] In a bench trial, the court need not issue preliminary evidentiary instructions to itself. It can determine whether an adverse inference or burden shift is warranted while deciding the merits.[7]

For these reasons, the Motion will be resolved in my post-trial decision. The parties may complete their stipulated pretrial briefing. But they should plan to present evidence concerning the alleged spoliation at trial and address the requested relief in their post-trial briefing.

Sincerely,

Lori W. Will

Lori W. Will
Vice Chancellor

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[6] *See Goldstein v. Denner*, 310 A.3d 548, 571 (Del. Ch. 2024) ("If the motion turns on evidentiary issues that the court will evaluate at trial, then it will make sense to defer the motion until trial."); *see also Gener8, LLC v. Castanon*, 2023 WL 6381635, at *12-17 (Del. Ch. Sept. 29, 2023) (resolving a Rule 37(e) motion and drawing tailored adverse inferences in post-trial opinion after evaluating witness credibility live at trial).

[7] *See Gener8*, 2023 WL 6381635, at *16-17; *Beard Rsch.*, 981 A.2d at 1189-90, 1194 (noting that spoliation remedies must be tailored to the degree of culpability and prejudice, and deferring consideration of additional adverse inferences until post-trial briefing and argument).