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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GYPSUM RESOURCES, LLC, a Nevada limited liability company; Plaintiff/Counterdefendant, v. CLARK COUNTY, a political subdivision of the State of Nevada; and CLARK COUNTY BOARD OF COMMISSIONERS, Defendants/Counterclaimants.	CASE NO.: 2:19-cv-00850-GMN-EJY **GYPSUM RESOURCES, LLC'S MOTION TO CONVENE EVIDENTIARY HEARING FOR IMPOSITION OF SANCTIONS FOR DESTRUCTION OF EVIDENCE**

I. INTRODUCTION

Plaintiff Gypsum Resources, LLC's ("Gypsum") moves this Court to convene an evidentiary hearing for the assessment of sanctions against Clark County, the Clark County Board of Commissioners (collectively the "County") and Commissioner Justin Jones ("Jones"). Jones and the County have multiplied these proceedings attempting to conceal the knowing destruction of evidence in this case. After months of delays, false representations, motion practice and hearings, the Bankruptcy Court's finally ordered imaging of Jones' cellular telephone and iCloud accounts,

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which has exposed another series of shameful and deceptive acts. The ordered forensic image revealed a startling occurrence on the evening of April 17, 2019, a significant date. After all, April 17, 2019 is the date of the hearing where Jones, as a county commissioner and former opponent to Gypsum, led the charge in denying Gypsum's land use applications. Jones and the County knew full well that there would be litigation from the vote on that day.

And that is why the revelations from the Bankruptcy Court's ordered imaging of Jones' phone proves so outrageous. What the imaging reveals is that on the evening of April 17, 2019, just a few short hours after Jones and the other commissioners voted to deny Gypsum's applications, ***all*** of Jones' text messages magically disappeared from his phone. Indeed, the imaging reveals that the earliest text message contained on the phone is from 6:09 pm on April 17, 2019, meaning that shortly before that time, every text message disappeared. And, make no mistake, Jones texted extensively, including about Gypsum and its land use applications. Multiple other parties have produced text message communications with Jones confirming this fact. Yet, trying to throw Gypsum off the trail of what he had actually done, Jones swore under oath that he had not deleted any text messages. He then tried to convince the Bankruptcy Court that imaging of his phone and iCloud accounts would reveal nothing **and were an unwarranted intrusion** into his role as a public official as well as an attorney. His representations necessitated multiple hearings and motion practice to unravel the web of deception.

In the face of the revelation prompted by the Bankruptcy Court's order, Gypsum sought an explanation from both the County and Jones concerning the rather obvious destruction of evidence. Specifically, Gypsum informed both the County and Jones that absent an explanation for what happened on the evening of April 17, 2019, it was readily obvious that there had been an attempt to defraud the court with false representations in order to conceal the destruction of evidence. Giving Jones and the County opportunity to avoid this matter, Gypsum requested that if they disputed the destruction of evidence had been anything but intentional, that they provide an explanation by close of business on January 25, 2022. Confessing the obvious, neither the County nor Jones provided any explanation disputing what the Court-ordered imaging of Jones' cellphone

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and iCloud had revealed: Jones destroyed all text messages shortly after the public vote on Gypsum's land use applications.

While Jones' conduct is outrageous by itself, his disregard for the judicial process is not isolated. It is a pattern with the County as well. As discovery in this case has shown, the County took few steps to preserve evidence, or even ask witness to preserve. The other County Commissioner's repeatedly testified that they had been provided no notice and had not preserved their communications, including text messages concerning this matter. At best, the County can claim that the loss of all this evidence stems from its own inaction, as opposed to the intentional destruction as executed by Jones. The conduct of the County wants the imposition of sanctions in this action, including the striking of its answer as to liability. It bears responsibility for the destruction of evidence, including its lack of any action regarding Jones. At the same time Jones, has personally multiplied these proceedings in his attempt to cover up the destruction of evidence. Accordingly, this Court should convene an evidentiary hearing regarding the assessment of the appropriate sanctions.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. Gypsum Seeks to Develop Its Property.

This case arises from longstanding efforts by county officials to interfere with Gypsum's development of its property, efforts which came to a head on April 17, 2019. Gypsum is the owner of approximately 2,400 acres of land, much of which is located on what is commonly referred to as Blue Diamond Hill. (Ex. 1, GYPSUM0002521, at 2.) A majority of the property largely consists of land that has been the subject of open pit gypsum mining beginning in the early 1900s. Yet, from nearly the inception of Gypsum's ownership, government officials at both the State and County levels have undertaken steps to interfere with Gypsum's redevelopment, including enacting state statutes and copycat county ordinances to preclude Gypsum from developing its property. Gypsum, therefore, filed lawsuits against both Clark County and the State of Nevada in 2005, challenging their efforts to obstruct Gypsum's property rights. (*Id.* at 2.) Gypsum prevailed on its

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claims that both the County's ordinance and the State's statute restricting Gypsum's rights concerning density were unconstitutional. (*Id.* at 3.)

To stave off Gypsum's further claim for equal protection violations and damages against the County, the County entered into a stipulation and settlement agreement (the "Settlement Agreement") dated April 21, 2010. (*Id.*) Under the terms of the Settlement Agreement, Clark County bound itself to a duty of good faith in processing what is known as a major projects application under the major projects process. (*Id.* at 7.) Consistent with the County's historical major projects process and the Settlement Agreement, Gypsum submitted its Concept Plan, the first application step in the major projects process. Clark County ultimately approved an increase in density for the Concept Plan with a cap of 5,026 residential units. (Ex. 2, GYPSUM0004125.) At the same time, the County imposed certain conditions upon that Concept Plan approval, including two requirements regarding future access to the planned development. (*Id.*)

B. Jones' Personal Involvement to thwart Gypsum's Development Plans.

One of the reasons Jones had such extensive communications concerning Gypsum's development was that he was actively involved in trying to halt the development long before he ever became a county commissioner or even a candidate for that office. Indeed, he has served as legal counsel for an environmental group seeking to preclude Gypsum from developing its property. Jones's role as counsel spanned from 2016 until shortly before the November 2018 general election.[1] While Jones was a candidate for the County Commission in the very district in which Gypsum's property was located, he made a number of representations about how he would stop Gypsum from developing its property, including asserting that "within his first 100 days he would oppose [Gypsum's] application and try to stop the project from proceeding." (Ex. 4, April Corbin Girnus, *Proposed development near Red Rock looms over commission race*, https://www.nevadacurrent.com/2018/10/17/proposed-development-near-red-rock-looms-over-commission-race/, Oct. 17, 2018.)

[1] Jones would later use the dismissal of this litigation as part of his illegal quid pro quo to exchange campaign support for a delay of Gypsum's property rights. (Ex. 3, SRR00030.)

PISANELLI BICE
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But the lengths to which Jones would have to go to execute on that first 100-day promise were as shocking as they were unlawful. After years of improper delays,[2] Gypsum finally received the green light to proceed with its applications by then-controlling-Commissioner Susan Brager. As the commissioner of the district, Brager could effectively control when Gypsum's applications could be heard since she would be the party making the motion on approval or disapproval. (Ex. 5, Dep. Tr. of J. Brown, 170:20-171:3.) As Gypsum has outlined in its pending summary judgment motion, Brager had compelled Gypsum to delay its applications for a host of reasons, the last being the campaign considerations of her friend then-Commissioner Sisolak who was running for Governor. Brager sought to assure Gypsum's concerns about delay by insisting that as the Commissioner of the district she would vote in support and for approval and thus directed Gypsum that the applications should be submitted so as to be voted on after the November 2018 general election. At Brager's direction, the County's staff determined the timing of when Gypsum should file the necessary paperwork in order to meet Commissioner Brager's directions for December 2018 approvals. (*Id.*) As the planning Staff would later confirm, each of Gypsum's plans and applications were in order, vetted, recommended for approval. (Ex. 6; Ex. 7.)

As Jones' first 100-day promise revealed, he was aware of Gypsum's applications. But since he was then a candidate who would not take office until after January 1, 2019, he would not be in power to fulfill his 100-day promise unless he could find a way to delay the County's vote upon Gypsum's applications. To do that, he would have to give the then chairman of the County Commission – Sisolak – something of "value" so as to secure a delay of the vote. And that is exactly what Jones has admitted doing.

As Jones first outlined – in a Sunday-afternoon email (October 21, 2018) he offered Sisolak's long-standing campaign advisor, Jim Ferrence ("Ferrence") a "Resolution" to Sisolak's campaign (Ex. 8, JUSTINJONES_SDT0001655.) Jones noted his role as legal counsel for the

[2] The County's conduct and associated delays are detailed more fully in Gypsum's Motion for Partial Summary Judgment Limited to One Aspect of Plaintiff's Due Process Claim (ECF No. 38), Gypsum's Opposition to Clark County and the Clark County Board of Commissioners' Motion for Summary Judgment (ECF No. 42), and Gypsum's Response to Defendants' Statement of Undisputed Facts in Support of Their Motion for Summary Judgment (ECF No. 43).

organization calling itself "Save Red Rock" ("SRR") in litigation with Clark County as well as Gypsum. (*Id.*) Jones went on to note that if that case were to go to trial, it would "likely be uncomfortable for Commissioner Sisolak . . . ." *Id.* But, if Sisolak would commit to denying Gypsum's applications, Jones' clients "will send the information to its large email list, publish it on social media, and if requested, appear with Commissioner Sisolak to express support publicly." (*Id.*) Plus, Jones claimed to have SRR's "authorization to stipulate to dismiss" the so-called "uncomfortable" lawsuit for Sisolak, provided that he would "immediately" commit to vote against Gypsum. (*Id.*)

The offer was as simple as it was brazen: Jones would trade campaign support from the environmental groups and the dismissal for Sisolak's immediate commitment to vote "no" on Gypsum. Emphasizing how this was tied to Sisolak receiving campaign support, Jones warned Ferrence that "time is, of course, of the essence on this," even though Gypsum's applications were not due for consideration by the County for nearly six weeks. (*Id.*) But Jones' opening offer was just the start.

Jones blind-copied his illicit deal to Andy Maggi, the head of the Nevada Conservation League. (*Id.*) Maggi also worked diligently to force Sisolak to accept the deal. Indeed, the flurry of text messages, phone calls, and emails that ensued over the next 48 to 72 hours demonstrate the lengths to which Maggi, Jones, and others were willing to go. As Maggi lamented, he did not trust Sisolak. (Ex. 9, SDT_RESP000007.) With Maggi's involvement, the League of Conservation Voters had invested over $2.8 million in the gubernatorial campaign, and Maggi wanted a "commitment" on the vote. (*Id.*) So when Ferrence failed to respond to Jones' offer with sufficient promptness, Jones escalated the matter directly to Sisolak just three hours later. (Ex. 10, Sisolak00000158.) Over the course of that Sunday, the pressure to make the deal grew.

We know much of what happened because others, unlike Jones, failed to destroy their text messages of this scheme. In response to Gypsum's subpoena duces tecum, the Nevada Conservation League produced Maggi's text messages involving Jones and others. Not only did Jones talk of "hitting" Sisolak hard, Maggi also "unrelatedly" mentioned to Jones how LCV was coordinating

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field operations to benefit the campaign of "Steve" and wanted to coordinate with Jones' campaign as well. (Ex. 11, SDT_RESP000226.) Jones agreed to have Matthew "coordinate" with Maggi's team. By 5:58 p.m. that day, Maggi bemoaned yet another call he had received from "Rich," who he characterized as a large donor, about Sisolak's need to commit against Gypsum. As Jones noted, "Well[], I'm doing my part. If Sisolak ***doesn't want to play***, then it's going to blow up in his face tomorrow." (*Id*. (emphasis added).) With this pressure, by October 23, 2018, the deal had been completed, with Sisolak releasing a statement committing to vote against Gypsum's applications and, proclaiming that he did not believe a vote by the current "lame duck" Commission on Gypsum's application would be appropriate. (Ex. 12, FerrenceSubp0018.)

Maggi was not the only person that Jones texted about the Gypsum's application and his effort to secure this deal. Jones almost immediately forwarded Kami Dempsey, who was involved in Sisolak's campaign, the email he sent to Ferrence. (Ex. 13, DEMPSEY_SDT000025.) Dempsey later updated Jones via text about the fallout from the statement Sisolak released: "Brager has clearly lost her mind. She did not like the 'statement' because of the use of the term lame duck. Ferrence beside himself cause he can't make anyone happy." (Ex. 14, DEMPSEY_SDT0000041.) Days later, Jones would fulfill the last installment of the bargain, voluntarily dismissing the "uncomfortable" litigation that he said Sisolak could avoid by making the deal. (Ex. 15, CC-IT00000386.)

For his part, Jones was not shy in bragging about what he had negotiated. The same day the County Attorney signed the stipulation of dismissal – apparently without any vote or authorization from commissioners other than Sisolak – Jones posted a picture of himself as a superhero on social media, touting his successful efforts against his arch nemesis, "Jim the Sprawl Developer" Rhodes, the manager of Gypsum. (Ex. 16, GYPSUM0028442.) And as Jones conceded at his deposition, the offer and deal he had negotiated was of "value" to Jones' campaign, his clients, and Sisolak's campaign. (Ex. 17, J. Jones Dep. Tr., 258:22-23 (Jones thought the deal "was important for Red Rock and also for Mr. Sisolak's campaign."); *Id.* at 185:18-20 ("Q. You considered it, at the time that you offered it, to be of value? A. Yes."); *Id.* at 186:17-20

(acknowledging the bargained-for exchange, Jones conceded: "Q. And he had done what you wanted him to do, correct? A. He has done what Save Red Rock had asked and yes, what I wanted to happen.").) And just as Jones had planned, he was able to secure a delay of the vote on Gypsum's applications through his "valuable" deal with then-Chairman Sisolak. (Ex. 12.) No wonder Jones would later delete all his texts about this dirty deal.

C. Jones Works to Fulfill his First 100-Day Promise.

As previously noted, before Jones made the illicit deal so as to secure a delay of Gypsum's plans, the County's staff had already thoroughly reviewed an analyzed each, concluding that they were in proper order and staff concluded and recommended that all four of the applications should be approved. (Ex. 6 at CC001621, CC001625, CC001630; Ex. 7, CC001937 at CC001941, CC001945, CC001951.) But after Jones got into office, something magical happened: the Staff reports were made to change.

Just one telling example are the activities of Planning Manager Sami Real ("Real"). As Real testified in her deposition, as Planning Manager, she had to review and sign off on all of Gypsum's applications in advance of the previously scheduled December 5, 2018 meeting. (Ex. 18, S. Real Dep. Tr., 155:9-156:1.) She had completed her review, provided Gypsum with comments, and signed off on the department's approvals. (*Id.* at 120:14-122:19.) But, in the middle of the night – literally 2:00 a.m. on Friday, January 18, 2019, just days before Gypsum's applications were rescheduled to be considered – she was in the County offices crafting an email purporting to find a litany of problems/issues with Gypsum's applications. (Ex. 19, CC-IT00176150.) Real could not cite any facts for these actions other than the fact that Jones was now in office. (Ex. 18, S. Real Dep. Tr., 160:13-20.) The same day, following a meeting with Gypsum's counsel, Jones notified Staff that Gypsum would be asking to delay the applications to address newly raised issues. (Ex. 20.)

And by the time Gypsum's plans were put back on the agenda for April 17, 2019, the Staff reports were changed, and Staff was now recommending "denial" of one of the critical waivers. (Ex. 21, CC-IT00189108.) Staff's recommendations of approval for the Specific Plan and PFNA

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LAS VEGAS, NEVADA 89101

were likewise withdrawn and Staff was no longer making any recommendations at all. (*Id.*) As one of the County's Staff members noted, the people making some of these changes had no jurisdiction to do so. (Ex. 22, Dep. Tr. of R. Kaminski, 141:7-13.)

D. The April 17, 2019 Vote

Through Jones' efforts, Gypsum's four applications were delayed until April 17, 2019. As Gypsum has laid out in previous court filings, Jones used that time to not only compromise the staff's approval processes but to also make representations to the Nevada Commission on Ethics ("NCOE"), to claim that he had no prior involvement in opposing Gypsum's applications so that he was not conflicted and should be allowed to vote upon them.[3] With that, Jones then led the charge as the controlling-Commissioner – the Commissioner in who's district the project is located – to have the commissioners vote down the critical access waiver concerning the Bureau of Land Management which then had the effect of also defeating Gypsum's application for specific plans and PFNA approvals. (Ex. 23, CC-IT0019885.) With that, at approximately noon, Jones plan to thwart Gypsum's development was complete.[4]

E. Discovery Raises Red Flags.

As the evidence confirms, Jones actively uses text messages as a means of communication. There can be little doubt that a number of the text messages were about Gypsum as well as celebratory text messages after the vote that day of April 17, 2019. The complete elimination of any such communications from Jones prior to 6:09 pm on that day is no accident. Jones has been a litigator for nearly 20 years. (Ex. 17, Dep. Tr. of Jones, 23:1-7.) He knows his obligation to preserve documents. (*Id.* at 23:8-10.) During his deposition, Jones stated that, as far as he knew, all of his personal documents were preserved. (*Id.* at 28:7-12.) When asked specifically about the text messages he has in his possession, he stated "I assume that I have text messages. I'm not aware of whether they are preserved or not." (*Id.* at 28:20-21.) Elsewhere, Jones stated that he had text

[3] Jones' representations to the NCOE are discussed more fully in Gypsum's Motion for Partial Summary Judgment. (ECF No. 38-1, 13-16.)

[4] Jones missed his 100-day promise to defeat Gypsum's plans by a mere three days. He had been in office 103 days by the time of the April 17, 2019 vote.

messages dating back until November 2019, when he stated that he had a new phone.[5] (*Id*. at 16:2-9.) Jones represented that he had searched for text messages at the direction of counsel six weeks prior to his deposition, and did not find any relevant texts. (*Id*. at 16:2-9.)

After Jones' deposition on April 27, 2021, Gypsum served subpoenas duces tecum on both Jones individually and his firm Jones Lovelock. (Ex. 24; Ex. 25.) Jones initial subpoena response, dated June 8, 2021, included six text messages that were responsive to the subpoena duces tecum and relevant to the case. These texts are dated April 23, 2019, May 20, 2019, May 21, 2019, May 22, 2019, August 2, 2019, and August 22, 2019. (Ex. 26.) Each of these text messages occurred prior to November 2019, which betrayed Jones' efforts to suggest that his obtaining a new phone was why he no longer had text messages about Gypsum.[6]

Based on these inconsistencies, as well as numerous communications involving Jones being produced by others (but not him), Gypsum engaged in a series of meet and confers about Jones and Jones Lovelock's subpoena responses. When Gypsum raised the issue that there were text messages going back to April 2019, not November 2019, Jones stated that he only had text messages from April 2019 forward, neglecting to address why he had no prior messages. (Ex. 28, N. Lovelock to E. Buchwald, July 26, 2021.) Indeed, Jones cavalierly asserted that "Mr. Jones cannot recreate messages that do not exist on his current iPhone or iCloud accounts." (*Id*.)

Further highlighting his significant role in this action, Jones retained separate counsel and opposed Gypsum's Motion to Compel Production of Documents from the County. In moving to continue the hearing on Gypsum's Motion to Compel and the County's Counter Motion for a Protective Order and in Limine to Limit Discovery and Admissibility of Legislative Privileged Statements and Testimony, the County explained that: "the nature of the arguments and allegations

PISANELLI BICE
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[5] Separate and apart from the deletion that was later uncovered, Jones statements that only had text messages since November 2019 indicated a failure to preserve evidence as this action was filed in May 2019. But, as discussed further below, the County failed to take any steps to ensure that relevant evidence was preserved.

[6] As it turns out, Jones got another phone after November 2019. (*See* Ex. 27, Order Granting Motion to Compel at 12 n. 27 ("Debtor argues, however, that the iPhone 12 model was not released until a year later, which raises a question concerning the adequacy of the search conducted by Commissioner Jones.").)

that Gypsum has directed at Clark County Commissioner Justin Jones merits a response from him through independent counsel. He had no notice of the allegations until after the weekend and seeks an opportunity to be heard on this matter." (Ex. 29.) The Bankruptcy Court allowed Jones to respond. (Ex. 30.) In a wide-ranging response full of personal attacks on Jim Rhodes, Gypsum and its counsel, Jones argues that discovery should be limited. (*Id*. at 19.) He further complained that Gypsum has "subpoenae[d] Jones for his personal and campaign emails, his current law firm and his former law firm, seeking more than a decade of emails, text messages, social media posts, and other documents." (*Id*. at 4.) Jones further interjected himself in this action when he asked the Bankruptcy Court for relief.

Eventually, after the Bankruptcy Court rejected the County and Jones' requests to limit discovery, Gypsum was forced to move for an order compelling Jones and Jones Lovelock to produce all full and complete responses to Gypsum's subpoena duces tecum, as well as a forensic image of Jones' cell phone and iCloud account. (*See* Ex. 31.) In response, Jones sought to distract with a story about how he acquired a new replacement phone as supposed justification for why he had no remaining text messages: "[a]s stated in my deposition, I purchased my current iPhone 12 at the Verizon store located at Rainbow Blvd. and Badura Ave. in or about October 2019. I traded in my prior iPhone at that time and did not retain it." (Ex. 32, Decl. of J. Jones, ¶ 3.)

Trying to dissuade the court from ordering a forensic image of his phone – knowing what such an image would actually reveal – Jones protested how he had "spent more than 30 hours conducting searches of and collecting email correspondence from three separate email accounts, text messages from two separate devices, my iCloud account, and six different social media accounts." (*Id*. at ¶ 9.) Despite Gypsum's motion discussing the discrepancies in the text message date, Jones fails to address why his text messages date back only to April 2019, which was the same month of the vote on Gypsum's applications. Once again trying to bluster his way out of the situation, Jones protested how he takes "great offense at the continued attacks by Gypsum's counsel on my character and the baseless allegations that I have engaged in a 'pattern of delay, obfuscation and concealment.'" (*Id*. at ¶ 10.) To continue his façade of pretend outrage, Jones claimed that the

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LAS VEGAS, NEVADA 89101

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LAS VEGAS, NEVADA 89101

Bankruptcy Court should sanction Gypsum, awarding his attorneys' fees, for daring to question his actions. (Ex. 31 at 14.)

F. The Bankruptcy Court Orders a Forensic Image.

Jones' bluster did not work. After reviewing Gypsum and Jones' briefing, as well as hearing oral argument, the Bankruptcy Court ordered a forensic audit of Jones' cell phone.[7] "The record before the court adequately establishes, however, that additional relevant information may be available that has yet to be accessed and produced by both Commissioner Jones and the Law Firm." (Ex. 27 at 14.) The Bankruptcy Court further recognized that a forensic audit of Jones' cell phone and iCloud account "may limit or entirely eliminate any further suggestion that Commissioner Jones and the Law Firm somehow have intentionally concealed relevant electronically stored information that is reasonably accessible." (*Id*. at 17.)

The Bankruptcy Court ordered that a third-party independent forensic auditor be appointed, which the parties agreed would be Holo Discovery ("Holo"). (Ex. 34; Ex. 35, Decl. of T. Bice, ¶¶ 3-4.) Pursuant to the Bankruptcy Court's order, Holo was then given a set of relevant search terms to determine what information was on Jones' phone as well as his iCloud account. (Ex. 36.) But it is what Holo discovered was missing from Jones' phone that became most revealing. From Holo's report, Gypsum learned for the first time the exact date and time in April of 2019 in which all of Jones' prior text messages disappeared: just six hours after the public vote on Gypsum's applications at 6:09 p.m. on April 17, 2019. (Ex. 37; Ex. 38.) Every single text message before the vote and for six hours after the vote were now gone. Nothing related to his representation of Save Red Rock. Nothing related to his quid pro quo with Sisolak. Nothing about the changes to the Staff recommendations. Nothing about Jones' vote to deny Gypsum's application for waiver of conditions. As a follow up, Gypsum inquired of Holo whether there were any other text messages whatsoever on the phone that predated 6:09 pm on April 17, 2019. Holo confirmed that all text

[7] The Bankruptcy Court later confirmed that it intended to include a forensic audit of Jones' iCloud account. (Ex. 33.)

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

messages of any nature prior to 6:09 pm on April 17, 2019, were gone and could not be recovered. (Ex. 38.)

Jones' efforts to avoid this revelation had failed. He had necessitated motion practice, including with blusterous representations about how it was offensive that he could not be trusted to disclose what had actually transpired. Accordingly, on January 19, 2022, Gypsum sent a letter to Jones and the County giving them an opportunity to avoid this motion if they had any legitimate explanation: "If Commissioner Jones claims that there is some explanation for how all of his text messages conveniently disappeared – other than his deletion of all the data after his vote on April 17, 2019 – then we request that you provide that explanation no later than close of business January 25, 2022. Otherwise, as we believe that there has been a fraud upon Gypsum, the Court and the public, we intend to bring this matter to the Court's attention and obtain relief." (Ex. 39, T. Bice to Counsel, Jan. 19, 2022.) Confessing that there is no explanation other than the intentional destruction of damning evidence, neither Jones nor the County responded. (Ex. 35, ¶ 14.)

G. Jones did not Act in Isolation.

Jones' actions are not an isolated event for the County. It is the culmination of a pattern. Gypsum filed its initial Complaint on May 17, 2019. It was not until over a year later, on July 8, 2020, the County first sent the Security Investigation Form asking County IT to investigate the files of Commissioners Susan Brager, Chris Giunchigliani, Justin Jones, and Steve Sisolak. (Ex. 40, CC-IT00331058.) The County only sent out its Litigation Information Preservation Notice on August 17, 2020, after Gypsum filed its Second Amended Complaint; even then, the County only asked the Departments of Comprehensive Planning and Public Works to preserve documents and information. (Ex. 41, CC-IT00260018.)

During depositions, the County's deficiencies became readily apparent. The County's witnesses repeatedly stated that they were not asked to search for responsive documents until the eve of their depositions, if ever. (Ex. 42, Dep. Tr. of M. Holzer, 274:18-21 ("Q. No one had ever contacted you about collecting documents or preserving documents because of this lawsuit before about a month or so ago? A. Correct."); Ex. 43, Dep. Tr. of J. Gibson, 163:15-17 ("Q. Have you

PISANELLI BICE
400 SOUTH 7TH STREET, SUITE 300
LAS VEGAS, NEVADA 89101

ever been asked to search for documents in this case, responsive to documents? A. No. Well – no, I haven't."); Ex. 44, Dep. Tr. of M. Kirkpatrick, 29:14-16 ("In this case were you asked to search for any documents that pertained to the litigation? A. I was not."); Ex. 45, Dep. Tr. of M. Naft, 156:18-21 ("Q. But do you recall whether you were ever asked to search for documents in response to a discovery request, for example? A. I don't recall that, no."); Ex. 18, Dep. Tr. of S. Real, 20:4-10 ("So were you asked in this - - for this litigation, were you asked to search for documents? A. Yes. Q. And when were you asked that, do you remember? A. I think it was about the time that I was asked for available times for being deposed."); Ex. 46, Dep. Tr. of R. Segerblom, 140:7-14 ("Q. Before yesterday, did you ever go through your cell phone to see if you had any text messages related to this case? A. No. . . . My - - my Blackberry blows up every year. And when it does it's - - it's gone. So whatever happened in 2019 is - - is in the garbage can.").) The County did not take reasonable steps to ensure that electronically stored information was preserved.

In addition to its obligations under the Federal Rules of Civil Procedure, the County knew that Gypsum sought documents from Jones and others. Indeed, the County effectively stayed discovery and delayed any preservation by moving to stay discovery because "Plaintiff directed specific requests for production to [ ] eleven (11) current and former members of the BCC: . . ." (Ex. 47 at 4.) Their motion to stop Gypsum from obtaining discovery was filed six months before the County took any steps to preserve documents; the County did nothing to ensure that documents, including text messages, from members of the County Commission were preserved. Indeed, Jones has used this as one of his excuses for not preserving messages – before it was uncovered how he had deleted all text messages just hours after the April 17 vote – claiming that one of the reasons he had not preserved evidence was because he "wasn't asked to." (Ex. 17, Dep. Tr. of J. Jones, 29:2-21.) Because of the County's dereliction, discoverable information has been permanently lost.

The County and each of the Commissioners, as government officials, have a separate obligation to retain communications, including Commissioners' text messages, under NRS 239.010. *See also*, *Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. 142, 414 P.3d 218

(2018). By failing to ensure that Commissioner Jones - and others - adequately preserved their text communications, the County also violated NRS 239.020.

III. ARGUMENT

A. The Court has the Authority to Sanction the County and Jones.

"Under its inherent power to control litigation, a district court may levy sanctions, including dismissal of the action, for spoliation of evidence." *United States v. $40,955.00 in U.S. Currency*, 554 F.3d 752, 758 (9th Cir. 2009) (citing *Leon v. IDX Sys. Corp.,* 464 F.3d 951, 958 (9th Cir.2006)). "District courts may impose sanctions as part of their inherent power 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1066–67 (N.D. Cal. 2006) (citing *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43, 111 S. Ct. 2123 (1991)). The Court's inherent authority to issue sanctions in response to spoliation of evidence is in addition to its authority under Federal Rule of Civil Procedure 37, including FRCP 37(e). Under that rule, the Court can issue sanctions "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, . . ."

The Court's sanction must address and seek to alleviate the harm for the destruction of evidence. As discussed in the seminal case, *In re Napster, Inc. Copyright Litigation*, sanctions may be imposed for spoliation of evidence in three ways: first, the court may instruct the trier of fact that it may draw an adverse inference to the party or witness responsible for destroying the evidence. 462 F. Supp.2d at 1066 (N.D. Cal. 2006). Next, a court can exclude witness testimony proffered by the party responsible for destroying the evidence. *Id*. The most severe sanction is striking complaints or answers for destroying the evidence. *Id*. Additionally, the court may impose monetary sanctions to compensate the aggrieved party for the attorneys' fees necessitated in uncovering and proving up the destruction. " *Brown v. Albertsons, LLC*, 2:16-CV-01991-JADPAL, 2017 WL 1957571, at *8 (D. Nev. May 11, 2017) (citing *Leon*, 464 F.3d at 961).

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In cases where severe sanctions are sought, such as the striking of a pleading, the Ninth Circuit has endorsed the convening of an evidentiary hearing as "that method best determines the appropriate sanctions while protecting a parties' due process rights." *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F. 2d 585, 592 (9th Cir. 1983). In the course of such hearing, the court can make appropriate inferences and credibility determinations, including that evidence was intentionally destroyed so as to undermine the litigation. *Id*. Although the destruction of evidence does not to be in "bad faith" for the imposition of certain sanctions, "a party's motive or degree of fault in destroying evidence is relevant to what sanction, if any, is imposed." *In re Napster* at 1066-67 (citing *Baliotis v. McNeil*, 870 F.Supp. 1285, 1291 (M.D. Pa. 1994)). For terminating sanctions to be proper, "the conduct to be sanctioned must be due to willfulness, fault, or bad faith." *Anheuser Busch, Inc. v. Nat. Beverage Distribs*., 69 F.3d 337, 348 (9th Cir. 1995).

B. The Evidence Has Been Intentionally Destroyed.

1. Text communications were relevant to the litigation.

An evidentiary hearing will establish the intentional destruction of evidence, including because Jones and others in the County wanted to conceal their actions against Gypsum, including the illegal quid pro quo to deprive Gypsum of a vote. A party may rely on circumstantial evidence to suggest the content of the destroyed evidence. *In re Black Diamond Min. Co., LLC*, 514 B.R. 230, 241 (E.D. Ky. 2014) (relying on *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 553 (6th Cir. 2010). "[B]ecause 'the relevance of . . . [destroyed] documents cannot be clearly ascertained because the documents no longer exist,' a party 'can hardly assert any presumption of irrelevance as to the destroyed documents.' Leon, 464 F.3d at 959 (quoting *Alexander v. Nat'l Farmers Org.,* 687 F.2d 1173, 1205 (8th Cir.1982)).

Here, however, there can be no doubt that Jones' text messages prior to April 17, 2019 were relevant to the claims and defenses in this action. A review of the Gypsum's Second Amended Complaint highlights the extent Jones' involvement, in his role as counsel for Save Red Rock and as a County Commissioner. (Ex. 8, ¶¶ 49-63.) Jones himself recognized that Gypsum's Complaint

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was focused on his activities, and he anticipated that he would be a witness in this case. (Ex. 17, Dep. Tr. of J. Jones, 29:22-30:5.)

In addition to the allegations in Gypsum's complaint, discovery has uncovered additional acts and communications by Jones regarding Gypsum's application for waiver of condition that Jones ultimately voted to deny on April 17, 2019. Jones' communications regarding his quid pro quo with Sisolak, wherein they exchanged campaign support and dismissal of a potentially embarrassing lawsuit for Sisolak's public commitment that he would not support Gypsum's application, are directly relevant to the claims and defenses in this action. We know from other text messages that have been produced by third parties that Jones engaged in extensive communications regarding his illicit deal with Sisolak. (*See, e.g*, Ex. 14; Ex. 11.) Jones further admitted that he exchanged text messages with Ferrence, his point of contact for Sisolak's campaign for governor prior to November 2019. (Ex. 17, Dep. Tr. of J. Jones, 18:3-5.) He also conceded that it was "possible" that he had text message communication with Sisolak in 2018. (*Id*. at 21:19-23.) All of these relevant text messages are gone, as are all of his communications regarding the April 17, 2019 vote.

2. Litigation was reasonably foreseeable.

The "duty to preserve evidence begins when litigation is 'pending or reasonably foreseeable.'" *Small v. Univ. Med. Ctr.*, 2:13-CV-0298-APG-PAL, 2018 WL 3795238, at *58 (D. Nev. Aug. 9, 2018) (citing *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011)); *see also, In re Napster*, 462 F.Supp.2d at 1068 ("The duty to preserve documents attaches when a party should have known that the evidence ***may*** be relevant to future litigation." (internal quotation omitted) (emphasis added))."The mere existence of a potential claim or the distant possibility of litigation is not sufficient to trigger the duty to preserve" but "the duty to preserve also extends to the period before litigation when a party should reasonably know that evidence may be relevant to anticipated litigation." *Small*, 2018 WL 3795238, at *58.

"When litigation is 'reasonably foreseeable' is a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent

in the spoliation inquiry." *Micron Tech., Inc.*, 645 F.3d at 1320 (citing *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 426, 436 (2d Cir. 2001)). Although Gypsum had not filed its case when Jones deleted his texts on April 17, 2019, litigation was reasonably foreseeable. Jones had been involved in prior litigation involving the County and Gypsum about the development of Gypsum's property. Jones engaged in an improper quid pro quo with Sisolak to ensure that Gypsum's applications were denied, not on the merits, but because Jones did not want them to be granted. Jones actively campaigned on his position against development on Gypsum's property, misleading the Nevada Commission on Ethics in order to vote on Gypsum's application, and worked with the County's Staff to try to rig the vote against Gypsum. In light of Jones' extraordinary actions which deprived Gypsum of its rights, litigation about the vote was plainly foreseeable.

But the most telling indication that Jones thought that litigation was reasonably foreseeable is that he took the unprecedented step to delete all of his text messages. In doing so, he deleted all his personal text messages as well as numerous communications with his clients. (Ex. 32, Decl. of J. Jones, ¶ 4.) Both his deposition testimony and the forensic image of his cell phone show that he has not mass deleted text messages since April 17, 2019, such a mass delete is not Jones' normal practice. (Ex. 17, Dep. Tr. of J. Jones (stating he does not have auto delete turned on his phone); Ex. 36, (showing more than 5,000 text messages since April 17, 2019 that include specific search terms)). The timing of Jones' conduct to destroy his prior communication – just hours after the vote on Gypsum's applications – is not a coincidence. Instead, it shows a consciousness of guilt, and an awareness that the text messages were damning. *See*, *State v. Hibbert*, 14 S.W.3d 249, 253 (Mo. Ct. App. 2000) ("The spoliation of evidence bespeaks of a consciousness of guilt from which a permissible inference of guilty may be drawn."); *In re Paramalat Sec. Litig.*, 472 F.Supp.2d 285, 585 (S.D.NY 2007) ("The destruction of evidence by the Parmalat insiders is evidence of consciousness of guilt, . . .").

Further, Jones experience as a litigator when he deleted his text messages means that he knew of his obligation to preserve evidence, yet destroyed them anyway. Jones, after all, has been a practicing litigation attorney for nearly 20 years. He is familiar with the obligation to preserve

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evidence. Indeed, just days after the County initiated its litigation against Save Red Rock (his client) and Gypsum in December 2016, Jones sent a letter detailing the 24 categories of information he thought must be preserved. (Ex. 49, CC-IT00291714.) Further, Jones sought to ensure that members of the County Commission preserved their communications for the litigation involving the County: "In order to assure that these obligations to preserve documents and things will be met, please forward a copy of this letter to all members of the BCC and their staff, . . ." (*Id*. at 7.) Jones also specifically identified text messages as communications that should not be destroyed. (*Id*. at 4.) More than others, Jones knew of his obligation to preserve text messages when litigation was reasonably foreseeable.

In addition to his obligations to preserve evidence based on pending litigation, Jones also destroyed public records when he deleted all of his text messages on April 17, 2019. Meggan Holzer, Jones' County liaison to the rural communities in his district, testified that she communicated with him via text "fairly regularly." (Ex. 42, Dep. Tr. of M. Holzer, 220:21-25.) Based on the forensic image of Jones phone, he and Holzer exchanged 1028 text messages since May 2, 2019. But Holzer also produced texts from March 17, 2019 and April 11, 2019 about County business (and even mention the Gypsum project). (Ex. 50.) Based even on these brief snippets, these communications relate to Jones' duties as a county commissioner.[8]

In 2018, the Nevada Supreme Court determined that commissioner's communications on private cell phones and email accounts constitute public records if they concern the provision of a public service. *Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. 142, 146, 414 P.3d 318, 321 (2018). Because Jones' texts with Holzer, as well as others, relate to his official duties, these communications constitute public records under NRS 239.010, and therefore must be preserved. His destruction of those records also violated Nevada's criminal laws. *See* NRS 239.320. ("An officer who mutilates, destroys, conceals, erases, obliterates or falsifies any record or paper appertaining to his or her office, is guilty of a category C felony . . . .") Jones' calculated decision

[8] In objecting to Gypsum's Motion to Compel, Jones' declaration states that he uses his cell phone for work and personal purposes. (Ex. 32, ¶ 4.) As the Bankruptcy Court's order highlighted, Jones' decision to use his cell phone for multiple purposes brings with it risks. (Ex. 27 at 7 n13.)

to take the dramatic step of deleting all of his texts only highlights how damaging those communications were.

3. Rather than preserve evidence, Jones took affirmative steps to destroy text messages related to Gypsum.

Sanctions are appropriate if a party fails to take "reasonable steps" to preserve the relevant evidence. *Fernandez v. Centric*, 2014 WL 2042148, at *4 (D. Nev. May 16, 2014). Jones admitted that he did not preserve his information, including information on his phone. (Ex. 17, Dep. Tr. of J. Jones, 29:15-21.) There can be no dispute that Jones had relevant text messages that were not preserved as required.

But Jones went far beyond that, actively deleting untold information in an effort to hide his unlawful scheme. Since then, Jones has personally intervened in this action, asking courts to limit discovery so that his true actions would not be uncovered. (*See* Ex. 30.) He failed to respond fully to Gypsum's subpoena duces tecum, feigning outrage that Gypsum would express concern about the sufficiency of his document production. (Ex. 32, Decl. of J. Jones, ¶ 10.) Jones misled Gypsum in his deposition, stating that he only had text messages since November 2019 and claiming that he had not deleted any text messages. (Ex. 17, Dep. Tr. of J. Jones, 20:25-21:3 ("Q. And those have all since been deleted, correct? A. Like I said, Mr. Bice, all I know is that I - - my phone currently has my texts from November 2019. I don't know whether they have been deleted or not.").) Only after the Bankruptcy Court ordered a forensic image of a sitting County Commission has the magnitude of Jones' deception come to light.

Gypsum gave Jones and the County an opportunity to deny the intentional destruction and warned them of this motion should they fail to respond. The fact that they could provide no legitimate explanation is a confession that sever sanctions are warranted. *See Matter of in re Skanska USA Civil Southeast Inc.* 2021 WL 5226547 at *7 (N.D. Fla., Sept. 23, 2021) (Court held that the lack of any "cogent explanation" for the failures to preserve evidence points to one answer: "bad faith"). (*See* Ex. 39; Ex. 35, ¶ 14.)

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C. The County is Responsible for the Non-Preservation.

Nor is this case where the County can escape culpability by pretending that Jones' conduct is an isolated event. The County knows what Jones has done, and has taken no action against him. The County is more than happy to let evidence disappear because the County benefits from its disappearance. Indeed, as numerous County employees and Commissioners testified, there was no genuine effort to preserve evidence. They were not even notified of any preservation obligation until over a year after the lawsuit was filed. (*See supra* II.G (discussing the County's failure to collect information.)

The County and the County Commissioners were also on notice that litigation was reasonably foreseeable. The County was previously sued by Gypsum in 2005 about the property, a lawsuit that resulted in the Settlement Agreement that the parties were obligated to act in accordance with. (Ex. 1.) The County also filed suit against Gypsum and Save Red Rock in 2016. (Ex. 49, J. Jones Letter to County re Preservation of Evidence.) And the County was aware of the irregular handling of Gypsum's applications for waivers of conditions, including Sisolak's public statement and the unprecedented changes to Staff recommendations.

At the time of the April 17 vote, the County was on notice that litigation was reasonably foreseeable. Yet, the County took no prompt steps for preservation, just as it has taken no actions concerning Jones' destruction of public records. The County seeks to be the beneficiary of this destruction and loss of evidence. Gypsum was forced into bankruptcy as a result of unlawful scheme by the County and its Commissioners. In an effort to conceal that scheme and further deprive Gypsum of its rights, public records, including text messages, were intentionally destroyed just hours after a vote to deprive Gypsum of its valuable legal rights.

IV. CONCLUSION

As set forth in this motion, Gypsum will prove at an evidentiary hearing that this destruction was intentional, prejudicial and designed to interfere with this Court's lawful adjudication of Gypsum's rights. At that evidentiary hearing, Gypsum will ask this Court to strike the County's answer and enter a finding of liability as well as imposing significant monetary sanctions, including

upon Commissioner Jones personally for his multiplication of the proceeding in an attempt to conceal the destruction of evidence.

RESPECTFULLY SUBMITTED this 7th day of February, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 7th day of February, 2022, I caused to be served via the Court's CM/ECF program true and correct copies of the above and foregoing **GYPSUM RESOURCES, LLC'S MOTION TO CONVENE EVIDENTIARY HEARING FOR IMPOSITION OF SANCTIONS FOR DESTRUCTION OF EVIDENCE** to all counsel registered for e-service in this matter.

/s/ Shannon Dinkel
An employee of Pisanelli Bice PLLC