UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In Re: CLARE CREEK (LEDUFF) KELSEY,
Debtor,

Chapter 7 Case
 # 94-10415

CLARE CREEK (LEDUFF) KELSEY,
Plaintiff,

v.

Adversary Proceeding
#00-1034

GREAT LAKES HIGHER EDUCATION CORPORATION; A.M. MILLER; USA GROUP GUARANTEE SERVICES, INC.; STUDENT SERVICES, INC.; GRADUATE LOAN CENTER; ZWICKER AND ASSOCIATES, P.C; NEVADA DEPARTMENT OF EDUCATION; VAN RU CREDIT CORP.; NCO FINANCIAL SYSTEMS, INC.; DIVERSIFIED COLLECTION SERVICES, INC.; CITIBANK (SOUTH DAKOTA), N.A.; AMAN COLLECTION SERVICE, INC.; THE ED FUND/CALIFORNIA STUDENT AID COMMISSION; AMERITRUST OF CLEVELAND; CITIBANK NY STATE; MELLON BANK MARYLAND; MELLON BANK NA; PHILADELPHIA HIGHER EDUCATION ASSISTANCE ADMINISTRATION; STUDENT LOAN MARKETING ASSOC. and KEYBANK USA
Defendants/Respondents.

Appearances: *John Thrasher, Esq.*
Montpelier, VT
Attorney for Plaintiff

Gregory A. Weimer, Esq.
Little, Cicchetti & Conrad
Burlington, VT
Attorney for TERI

Gary L. Franklin,Esq.
Eggleston & Cramer
Burlington, VT
Attorney for ECMC

MEMORANDUM OF DECISION
GRANTING IN PART
DEFENDANTS' MOTION FOR SANCTIONS AND COSTS
DUE TO SPOLIATION OF EVIDENCE

The matter before the Court is the Joint Motion for Sanctions and Costs Due to Spoliation of Evidence [Dkt. #147-1], dated March 7, 2001, filed by the defendants, Educational Credit

Management Corporation ("ECMC") and The Educational Resources Institute ("TERI"). The plaintiff, Clare Creek (LeDuff) Kelsey, filed an Objection to Defendants' Motion for Sanctions dated March 12, 2001 and a Supplemental Objections to Defendants' Motion for Sanctions dated March 21, 2001. On March 29, 2001, this Court entered an Order deferring a hearing and a ruling on the motion for sanctions until the conclusion of the trial. Based upon the matters filed of record and presented at the trial, and for the following reasons, the defendants' motion for sanctions is granted in part and denied in part.

1. Background

On or about December 12, 2000, the plaintiff produced a file box of documents to defendants in response to a document production request. Upon inspection and review of the materials provided by plaintiff's counsel, the defendants reportedly photocopied two documents. The photocopied documents include two pages of handwritten notes, created by the plaintiff, which appeared to the defendants to reflect a chronology of the events underlying the plaintiff's request for - - and perhaps a strategy for obtaining - - an undue hardship discharge of her student loans, and related legal research. *See* Defendant's Joint Trial Exhibits, Exh. 6.

These notes became a source of controversy shortly after the plaintiff's counsel realized he had disclosed them. On December 13, 2000, the plaintiff's counsel faxed a letter to defense counsel stating that he had released the subject papers inadvertently, that the notes were exempt from disclosure on the basis of attorney client privilege and that the defendants' counsel should return any copies they made immediately. Defense counsel declined the invitation to return their photocopies of the notes and this Court ultimately ruled that the plaintiff had waived the evidentiary privilege, if any, under the circumstances of the disclosure. *See* Order, dated March 12, 2001. In the interim, the defendants filed a Joint Motion to Further Reopen Discovery and Compel Production

of Handwritten Document for Forensic Testing on February 9, 2001. Based upon the content of the handwritten notes, the defendants asserted the need for a forensic dating and analysis because:

> Plaintiff asserts that her handwritten notes are the product of a meeting that occurred between her and her counsel in June of 2000. As Defendants have previously stated to this Court, Plaintiff's handwritten notes are written in the present tense and appear to prospectively outline various future work and living arrangements that strongly suggest that the document was prepared at or near the time Plaintiff was working as an associate at VanDorn & Cullenberg in 1995/ 1996. Establishing the date of Plaintiff's handwritten notes would clearly provide material evidence about their purpose and intent. If Defendants are able to establish that Plaintiff's handwritten notes were prepared before the time Plaintiff claims they were made, Plaintiff's credibility and ability to meet the 3-prong Bruner test would be diminished. Indeed, it would be difficult to imagine a scenario where Plaintiff could succeed regardless of her psychiatrist's testimony if it were established that her handwritten notes were, for example, several years old.

Joint Motion to Further Reopen Discovery and Compel Production of Handwritten Document for Forensic Testing, at pp. 2-3.

The plaintiff filed opposition to the requested relief on the same date contending that the motion was premature until after her pending suppression motion was decided. There was no suggestion that the original document was not available at a hearing held on February 13, 2001. The Court denied the plaintiff's motion to suppress and granted the defendants' motion to compel production of the original handwritten notes for forensic testing. Three days later, on February 16, 2001, the plaintiff filed a Motion for Extension of Time to Produce indicating for the first time that the original document was missing and that additional time was needed for a search. The plaintiff's counsel asserted that the last time he had seen the original document was December 12, 2000, that the last time the plaintiff recalled seeing the original document was January 10, 2001, and that the plaintiff had inadvertently misplaced the document while duplicating it on January 10, 2001.

In response to the plaintiff's loss of original documentary evidence, the defendants seek sanctions and costs on a theory of spoliation of evidence by the plaintiff. The plaintiff filed an

Objection to Defendants' Motion for Sanctions and Costs Due to Spoliation of Evidence stating, *inter alia*, that "Plaintiff objects to an inference that the lost document was created prior to 1996 while she worked at VanDorn & Cullenberg on the grounds that any questions directed to her based on such an inference would seek to elicit perjury." Plaintiff's response also included the argument that any defense costs or expenses attributed to the lost document should be offset by the defense's savings in not having to have an expert examine the subject document and testify at trial.

The plaintiff filed a supplemental objection to the defendants' sanctions motion on March 21, 2001, wherein she reiterated her perjury concern and further stated that any adverse evidentiary inference being sought would not serve the purpose of punishing and deterring the proscribed conduct because:

> a) the Plaintiff will never practice law and will, therefore, not be handling evidence again.
>
> b) any lesson to be learned from sanctions has already been imparted by the loss of the document, in that the Plaintiff has lost the opportunity to have the document tested and establish her credibility;
>
> c) the Plaintiff has been prejudiced by the loss of the document to the same extent and in the same way as the Defendants, because she cannot establish conclusively when she created the document. This fact evens the contest between the parties; any sanctions would unfairly imbalance it.

Plaintiff's Supplemental Objections to Defendants' Motion for Sanctions and Costs Due to Spoliation of Evidence, at p.2. However, it should be noted that the record does not reflect that the plaintiff has surrendered her license to practice law nor that she sought to have the subject document examined by a forensic expert at any time.

2. Discussion

A remedy for a party's spoliation of evidence is recognized in the Second Circuit, *see* West v. Goodyear Tire & Rubber Co., 167 F.3d 776 (2nd Cir. 1999); Kronisch v. United States, 150 F.3d

112 (2nd Cir. 1998), and has been described as follows:

> Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation... Even without a discovery order, a district court may impose sanctions for spoliation, exercising its inherent power to control litigation... Although a district court has broad discretion in crafting a proper sanction for spoliation, we have explained that the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine. [cite omitted] The sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the part who wrongfully created the risk; and (3) restore 'the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by opposing party'."

West v. Goodyear Tire & Rubber Co., 167 F.3d at 779. There is no question that the facts of this situation constitute spoliation of evidence under this definition.

Although no duty to preserve evidence arises unless the party possessing the evidence has notice of its relevance, *see* Danna v. New York Telephone Co., 752 F. Supp. 594, 616 (S.D.N.Y. 1990), the obligation to preserve evidence may arise even prior to filing of a complaint where a party is on notice that litigation is likely to be commenced. *See* Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 73 (S.D.N.Y. 1991). A party is on notice once it has received a discovery request. Id. Moreover, the obligation to preserve evidence runs first to a party's legal counsel who has a duty to advise his or her client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction. Id.

The circumstances surrounding the loss of the subject original notes is indeed troubling. While the plaintiff may be excused from underestimating the significance of, and need to preserve, the subject document prior to the time her counsel released it and defense counsel retained a copy of it (on or about December 12, 2000), it is hard to believe that she was not aware of its significance after that time. Its importance was evident from her attorney's immediate written facsimile demand for its return and his undeniable discussion with the plaintiff regarding the notes photocopied by

defense counsel, which counsel referred to in his response. This Court finds that it is not credible that the debtor was unaware of the importance of this original document after December 12, 2000. Moreover, it is inexcusable that both plaintiff's trial counsel and the plaintiff herself failed to safeguard the integrity of the document, especially in light of plaintiff's subsequent contention that she too wanted to test the original document (to refute any claim of its 1995/ 1996 origination). The Court is equally concerned that plaintiff's counsel did not raise the issue of the document being lost either on February 9, 2001 in his response to the defendants' motion to compel, or in the plaintiff's original or supplemental motions to suppress, or at the February 12th hearing. It was only after the plaintiff's motion to suppress was denied and the defendants' motion to compel the original document was granted that the plaintiff's counsel elected to disclose his client's spoliation of evidence; plaintiff's counsel did not make the disclosure that the document was missing until February 16, 2001, when he filed a motion for an extension of time to locate the document, on the very date this Court had ordered the original document to be produced.

This Court expects candor from counsel and parties that appear before it and will not countenance attempts to conceal or camouflage material facts or law pertinent to pending matters. Attorneys appearing before a federal court are its officers and owe the court and the public duties of good faith and complete candor in dealing with the judiciary. *See* In re Dinova, 212 B.R. 437, 447 (BAP 2nd Cir. 1997). The conduct of both the plaintiff and her counsel in failing to recognize the need to locate the original document is unacceptable - it is equally unacceptable that plaintiff's counsel failed to notify the Court and opposing counsel of the disappearance of the original document promptly upon receipt of the defendants' motion to compel its production on or about February 9, 2001. The plaintiff has offered no explanation, either directly or through counsel, for her failure to disclose the loss until after the hearing. The plaintiff's characterization of her handling of

the subject document as "stupidly" overlooks the legal and professional responsibility that she had when handling this evidence, since she was handling it in her capacity as an associate of, or assistant to, her counsel. *See* Plaintiff's Motion for an Extension of Time, dated February 16, 2001, at para. 7. Unable to effectively retrace the last whereabouts of the missing document, the efforts the plaintiff and her counsel undertook after the motion to compel were either too little or too late, or both.

The plaintiff's assertion that any monetary sanction imposed against the plaintiff based upon her misconduct or the misconduct of her counsel in mishandling this key piece of evidence should be off-set by the savings realized by defense counsel in no longer needing the services of a forensic examination of the lost document is offensive. This Court will not reward a party for engaging in conduct that results in the spoliation of potentially critical evidence.

We will never know whether a forensic examination of the original handwritten notes would have had the profound impact on the outcome of this case claimed by the defendants. Certainly the harm was adroitly mitigated by defense counsels' retention of a photocopy of the notes, notwithstanding the plaintiff's demand for their immediate return. Since the defendants had a copy of the notorious notes, they were able to examine the plaintiff concerning the content of her notes and the circumstances of their origin, to attack the trustworthiness of her responses and to question her irresponsible handling of the original document. However, with the loss of the original notes, the defendants lost the possibility of introducing what might have been conclusive evidence as to the debtor's alleged fraudulent intent.

This Court has discretion to fashion an equitable remedy for the spoliation of evidence, appropriate to the facts of the case, including the dismissal of a cause of action, the exclusion of evidence, the use of an adverse evidentiary inference, and the imposition of a monetary sanction.

See West v. Goodyear Tire & Rubber Co., 167 F.3d at 780. The formulation of the remedy depends on (1) the circumstances surrounding the loss of the evidence, (2) a showing of willfulness, bad faith, or fault on the part of the sanctioned party, and (3) the ability of any sanctioned party to vindicate the tri-fold aims of deterrence, risk allocation and equity. Id. This Court has determined that the appropriate response and remedy in this proceeding is the imposition of an adverse inference against the plaintiff combined with an award of monetary sanctions.

The result of imposing an adverse inference is that this Court evaluated the evidence related to the plaintiff's handwritten notes based upon the premise that the plaintiff probably created the notes in 1995 or 1996 as part of a strategy to avoid repayment, as asserted by the defendants, and specifically drew inferences against the plaintiff, since the plaintiff bears the responsibility for the loss of the original notes. The defendants, as the party bearing the burden of proof regarding their defense of fraud, presented evidence as to the existence of the original documents in the hands of the plaintiff on or about December 12, 2000. The plaintiff did not dispute that the original documents existed in December of 2000, and acknowledged that the original documents were last in the possession of the plaintiff herself on or about January 10, 2001, but she insists that the notes were first created in the summer of 2000. This Court has considered the extensive testimony of the plaintiff on this point. The plaintiff set forth the method she used to create the notes, described the wording that she used and why, explained when and why the notes were created and expounded upon the reason for the frequent use of the future tense. She testified that the notes were created during a meeting or conversation between herself and her attorney, John Thrasher, at their home in June or July, 2000, and that the notes were intended to assist them in re-creating a chronology of key events.

The plaintiff also testified at length regarding the circumstances surrounding her loss of the original handwritten notes in January, 2001. She asserted that the loss was accidental, and not wilful

or intentional. She was subjected to comprehensive cross examination by defense counsel on this topic. Throughout her testimony, this Court closely observed the plaintiff's demeanor and manner of response, as well as attending to the substance of her testimony, in an effort to evaluate whether the plaintiff was being truthful with the Court and counsel. Indeed, the issues of when these notes were created and how they were lost are close questions, especially when the plaintiff is subject to the adverse evidentiary inference that the lost original notes may have been created in 1995 or 1996. This Court finds that based upon the plaintiff's testimony and her demeanor during extensive questioning by her counsel and zealous cross-examination by defense counsel, the inference has been overcome and that the handwritten notes were more likely than not created sometime in June or July, 2000. Furthermore, the Court finds that it is more likely than not that the loss of the original document by the plaintiff was due to negligence or even recklessness, but was not intentional.

While clearly prevented from utilizing a forensic examination of these handwritten notes in their defense, it should be noted that the defense failed to present any other evidence to contravene the testimony of the plaintiff as to the date and circumstances of the creation of these notes, other than confronting the debtor with, and questioning the debtor about, the content of the handwritten notes.

Regarding the monetary sanction, the Court finds that the defendants are entitled to an award of reasonable legal fees and costs incurred as a result of the spoliation of the subject handwritten notes. The monetary sanction shall be an award of reasonable attorneys' fees and costs attributable to (1) investigating, researching, preparing, and arguing evidentiary motions as to the notes and motions for sanctions based upon the loss of the original notes; (2) discovery, such as depositions, interrogatories and supplemental discovery demands, directly associated with the circumstances of the lost evidence; and (3) any other time and effort required of counsel because of the plaintiff's loss

of the subject documents and her failure to notify the Court and counsel of the loss in a timely manner. The defendants shall have ten (10) days from the date hereof to submit an affidavit of fees and costs incurred as a result of the spoliation of evidence by the plaintiff. Plaintiff shall have twenty (20) days from the date of this order to file a reply concerning any objection to the amounts being requested. The Court will reserve jurisdiction in its final judgment to assess an award of attorneys fees and costs in favor of the defendants.

The Court has also determined that the plaintiff, Clare Kelsey, and her legal counsel, John Thrasher, Esquire, shall be jointly and severally liable for the payment of any fees and costs awarded in favor of the defendants. Ms. Kelsey's responsibility for the actual loss of the document is not in dispute. Mr. Thrasher bears responsibility as well for his failure to advise his client of the necessity of preventing the loss or destruction of this evidence, and for his failure to maintain the original document in his custody after receipt of the document production request. Mr. Thrasher is also culpable for his handing over of an important original document to his client, who he has repeatedly represented to this Court is unstable and operating under severe mental and emotional disability and who had the most to gain by the loss of this document. Mr. Thrasher knew or certainly should have known when he corresponded to defense counsel demanding the return of their photocopies of the importance of the circumstances surrounding the creation of that document, and yet he allowed Ms. Kelsey to take responsibility for the safeguarding of it. Lastly, Mr. Thrasher also had a duty to investigate the whereabouts of the original document immediately upon receipt of the defendant's motion to compel the production of the original document and to notify this Court and opposing counsel of its loss promptly.

Accordingly, the defendants' motion for sanctions is granted to the extent set forth herein, but all other prayers for relief are denied.

October 23, 2001
Rutland, Vermont

/s/ Colleen A. Brown
Colleen A. Brown
United States Bankruptcy Judge