

CAUSE NO. D-1-GN-18-001835

NEIL HESLIN
Plaintiff

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IN DISTRICT COURT OF

VS.

TRAVIS COUNTY, TEXAS

ALEX E. JONES, INFOWARS, LLC,
FREE SPEECH SYSTEMS, LLC, and
OWEN SHROYER,
Defendants

261st DISTRICT COURT

**PLAINTIFF’S MOTION FOR SANCTIONS
FOR INTENTIONAL DESTRUCTION OF EVIDENCE**

Plaintiff moves for sanctions against Defendants for the willful destruction of relevant evidence. While in the midst of researching evidence to respond to Defendants’ TCPA motion, Plaintiff’s counsel discovered that on August 9, 2018, InfoWars intentionally deleted a variety of social media pages and video content relating to the Sandy Hook shooting. These materials were unquestionably relevant to Plaintiff’s claim, and InfoWars had written notice of the obligation to preserve this evidence. InfoWars’ willful deletion of evidence merits punitive and remedial sanctions, including an adverse inference by the fact-finder regarding the content of the deleted materials.

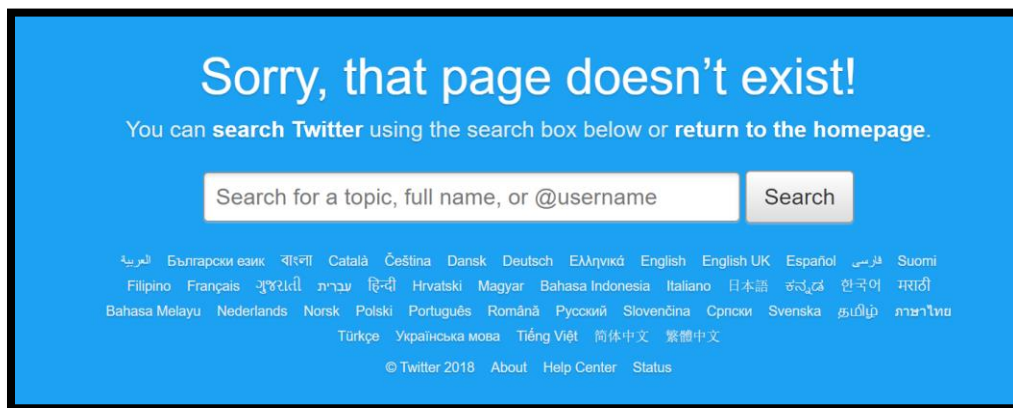
I. FACTUAL BACKGROUND

On August 9, 2010, CNN published an article discussing the decision by Twitter to allow Alex Jones to remain on its platform.¹ Twitter had originally claimed that unlike Mr. Jones’ conduct on YouTube and Facebook, he had not posted offending content to its website. However, CNN journalist Oliver Darcy discovered extensive content and commentary that violated Twitter’s rules, including social media messages and “hundreds of hours of video available on the accounts

¹ <https://money.cnn.com/2018/08/09/media/twitter-infowars-alex-jones/index.html>

that Jones and InfoWars maintain on Twitter and Periscope, a livestreaming video service that Twitter owns.”²

According to the CNN article, the offending materials included content about the Sandy Hook and Parkland school shootings. CNN did not fully quote or reproduce the content in its article, but provided links to “examples of some of the content CNN has found.”³ However, the links direct to the following error message:



The following day, Mr. Jones appeared on his news show, and he admitted that he instructed his staff to delete the materials. Mr. Jones stated that “CNN...was doing reports on things I said out of context about David Hogg, about Parkland, and about other events, and I just said ‘Delete that stuff.’”⁴ A few moments later in the video, Mr. Jones repeated his admission that he instructed his staff to “delete it.”⁵

Plaintiff has submitted the declaration of online researcher and journalist Brooke Binkowski, who was able to confirm that specific InfoWars messages cited by CNN have been

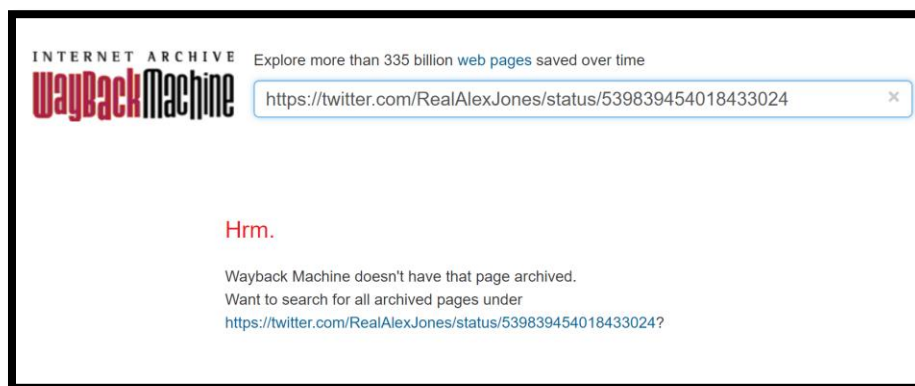
² *Id.*

³ *Id.*

⁴ Video at: <https://www.infowars.com/msm-spreads-more-spin-stories-about-infowars-twitter-account/>

⁵ *Id.*

deleted. Ms. Binkowski checked a variety of links from the CNN article.⁶ She found they are no longer functioning, and the links she reviewed were not indexed on the Internet Archive:



On August 12, 2018, Plaintiff’s counsel wrote to InfoWars’ counsel asking him “to confirm whether these [news] reports are accurate and these items have indeed been destroyed.”⁷ InfoWars’ counsel did not respond. Plaintiff’s counsel wrote again on August 14, and again InfoWars’ counsel did not respond.⁸

Despite counsel’s silence, it is clear from Mr. Jones’ own admissions that relevant evidence has been lost. As pressure mounted from pending defamation lawsuits and growing public indignation, Mr. Jones chose to destroy the evidence of his actual malice and defamatory conduct uncovered by Mr. Darcy. InfoWars deleted critical evidence at the precise moment Plaintiff and his experts were attempting to marshal that evidence. At this stage, it is unknown exactly how

⁶ Exhibit 1, Declaration of Brooke Binkowski.

⁷ Exhibit 2, Plaintiff counsel’s August 12 email.

⁸ Exhibit 3, Plaintiff counsel’s August 14 email.

In addition to deletions discovered by CNN, Plaintiff’s counsel suspects that Mr. Jones also deleted YouTube content. On August 3, 2018, Plaintiff’s counsel attempted to visit the YouTube page where the challenged video was published. However, the video had been deleted. Plaintiff’s counsel initially thought the video was deleted by YouTube, but subsequent news reports confirmed that YouTube did not remove any of Mr. Jones’s videos until August 6, 2018. *See* <https://www.theguardian.com/technology/2018/aug/06/apple-removes-podcasts-infowars-alex-jones>

Based on these reports, the August 14 email also requested InfoWars’ counsel to “confirm whether the June 26 and July 20 YouTube videos relevant to this litigation were deleted by YouTube or your clients.”

much content has been deleted, though it includes extensive social media materials and reportedly hundreds of hours of video.

II. LEGAL STANDARD

Under Texas law, a party who establishes that spoliation has occurred may be entitled to a presumption that the destroyed evidence would not have been favorable to the destroyer. *Rico v. L-3 Commc'ns Corp.*, 420 S.W.3d 431, 437 (Tex.App.–Dallas 2014, no pet.). This evidentiary a presumption is appropriate when a party has deliberately destroyed evidence or has failed to either produce or explain the evidence’s nonproduction. *Id.* In determining whether a spoliation presumption is justified, a trial court considers whether (1) there was a legal duty to preserve the evidence; (2) the alleged spoliator breached this duty; and (3) the spoliation prejudiced the non-spoliator's ability to present its case or defense. *Id.*

III. ARGUMENT

A. InfoWars had a Duty to Preserve this Evidence.

First, there is no dispute that InfoWars understood it was an under a duty to preserve this evidence. In a letter delivered on April 11, 2018, Plaintiff instructed InfoWars and its counsel to ensure the preservation of all documents and communications “relating to my client, the [challenged statements], or the Sandy Hook shooting.”⁹ Mr. Jones was specifically “notified that the destruction or loss of these items may constitute spoliation of evidence under Texas law.”¹⁰ Nonetheless, InfoWars willfully deleted the evidence.

⁹ Exhibit 4, Plaintiffs’ April 11, 2018 Demand Letter

¹⁰ *Id.*

B. Plaintiff has Suffered Prejudice from InfoWars Breaching its Duty.

The loss of this evidence prejudices Plaintiff's case because InfoWars deleted social media and video evidence relating to the Sandy Hook shooting. This evidence could have established key elements of Plaintiffs' defamation claim. First, these materials could have provided evidence of actual malice, since "actual malice may be inferred...from the defendant's words or acts before, at, or after the time of the communication." *Warner Bros. Entm't, Inc. v. Jones*, 538 S.W.3d 781, 805 (Tex. App.—Austin 2017, pet. filed). The evidence could have also established defamatory meaning by "connect[ing] the words published with sic or explanatory circumstances alleged." *Billington v. Hous. Fire & Cas. Ins.*, 226 S.W.2d 494, 497 (Tex. Civ. App.- Fort Worth 1950, no writ). The evidence could have also established whether InfoWars' defamation was germane to Plaintiff's public acts.

While the CNN article discusses some of the Sandy Hook content in broad strokes, it is unknown how many messages or videos were deleted. Moreover, the CNN article reported that InfoWars deleted content from Twitter's live-streaming service Periscope, and it is believed this evidence is likewise lost forever. Finally, it appears that InfoWars was also deleting YouTube videos relating to this case. All of these materials are fruitful sources of evidence.

Furthermore, Ms. Binkowski's declaration explains that given the nature of social media, "pages and content become interrelated in a complex web. Social media posts become interactive discussions in which conversations develop through user comments and in which content becomes linked to other content."¹¹ Ms. Binkowski noted that "even if a copy of a particular post is saved locally, its meaning is often inscrutable when isolated from the web of context."¹² Additionally, that web of context, discussion, and linked content can lead to further evidence. The same holds

¹¹ Exhibit 1, Declaration of Brooke Binkowski.

¹² *Id.*

true of online video content. According to Ms. Binkowski, “[e]ven if a local copy of a video is saved, the social media page on which it was hosted contains information and discussion, including descriptive text and commentary authored by InfoWars which accompany its video content.”¹³ In short, Plaintiff has been denied the wealth of relevant evidence uncovered by Mr. Darcy, as well as avenues to find even more relevant evidence.¹⁴

InfoWars might dishonestly claim that the social media materials and videos they deleted were not relevant. However, in light of the Sandy Hook-related content reported by CNN, much of this material was facially relevant. Moreover, as this Court is acutely aware, Mr. Jones meanders from topic to topic in his videos, and a title or description of a video is not indicative of its full content. It is therefore likely that relevant evidence was present in other deleted materials not explicitly identified with Sandy Hook. Moreover, CNN reported that some of the content related to InfoWars’ commentary about other mass shootings, which is also relevant evidence in this lawsuit.

In any case, the Court need not make any relevance determination on the other deleted materials, as the Supreme Court held that a party’s intentional destruction of evidence can be “sufficient by itself to support a finding that the spoliated evidence is both relevant and harmful to the spoliating party.” *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 22 (Tex. 2014); *see also Thompson v. U.S. Dept. of Hous. & Urban Dev.*, 219 F.R.D. 93, 101 (D. Md. 2003) (“When evidence is destroyed in bad faith (*i.e.* intentionally or willfully), that fact alone is sufficient to demonstrate relevance.”).

¹³ *Id.*

¹⁴ To help the court understand the “needle-in-a-haystack” challenge which Plaintiff has faced, Mr. Jones’ twitter account contains 49,142 posts as of August 17, 2018. The InfoWars account contains 51,597 posts. Owen Shroyer’s account contains an additional 6,950 posts. *See* <https://twitter.com/RealAlexJones>; <https://twitter.com/infowars>; <https://twitter.com/allidoisowen>.

C. A Remedial Sanction is Necessary.

A remedial sanction should be given when “the spoliating party acted with intent to conceal discoverable evidence.” *Petroleum Sols., Inc. v. Head*, 454 S.W.3d 482, 489 (Tex. 2014). The most severe of sanctions is needed because InfoWars “intentionally destroyed relevant and material evidence with the purpose of concealing relevant evidence.” *Smith v. Williams*, 2015 WL 3526089, at *7 (Tex. App.—Texarkana May 29, 2015, no pet.). Courts have typically addressed the spoliation of social media materials with an adverse inference, in which the fact-finder assumes the destroyed evidence would have been unfavorable. This evidentiary presumption is appropriate when a party acts with the “purpose of concealing or destroying discoverable evidence.” *Brookshire Bros.*, 438 S.W.3d at 24. For example, in a discrimination case, it would be appropriate for a fact-finder to be “instructed that it may infer that the contents of the Facebook Post indicated discriminatory animus.” *Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona*, 138 F. Supp. 3d 352, 393 (S.D.N.Y. 2015).

A week ago, a California federal court issued an opinion under strikingly similar facts. A defendant in a false advertising suit deleted social media posts relating to the marketing of its product. Although the plaintiff found some social media posts, it could not obtain the posts that had been deleted. The court explained that:

Contrary to Defendants’ contention that “Plaintiff complains about ‘social media documents’ not produced (but which Plaintiff already has),” Plaintiff only has some Facebook and Twitter posts regarding the challenged products which it obtained during its pre-lawsuit investigation. Plaintiff does not have all of the posts and cannot obtain them because all relevant social media posts including the “advertisements, photos, marketing and misleading statements at issue in this action” have been destroyed by Defendants.

Nutrition Distribution, LLC v. Pep Research, LLC, 2018 WL 3769162, at *16 (S.D. Cal. Aug. 9, 2018) (recommendation adopted). The court noted that the deletion of evidence “threatened to

interfere with the rightful decision of the case, or forced the non-spoiling party to rely on incomplete and spotty evidence.” *Id.* For this reason, the court entered an adverse inference:

Because the Court finds that Defendants destroyed relevant social media evidence...the Court recommends that the adverse inference instruction requested by Plaintiff that “the social media posts deleted were false advertising of products that compete with Plaintiff,” be given.

Id. at *18; *see also Gatto v. United Air Lines, Inc.*, 2013 WL 1285285, at *3 (D.N.J. Mar. 25, 2013) (Adverse inference instruction against plaintiff who deactivated his social media accounts). Here, a similar inference is justified in which the fact-finder presumes that the deleted messages and videos were either defamatory in their own right or otherwise established the defamatory meaning and actual malice underlying the June 26, 2017 and July 20, 2017 defamations described in Plaintiff’s petition.

D. A Punitive Sanction is Necessary.

Finally, courts also take severe punitive steps when social media content is spoliated. For example, in *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013), the court approved sanctions of \$542,000 against a lawyer and \$180,000 against his client for spoliation when the client, at the lawyer’s direction, deleted photographs from client’s social media page. In the disciplinary context, at least one lawyer has been suspended for five years for advising a client to clean up his Facebook page, causing the removal of photographs and other material. *In the Matter of Matthew B. Murray*, 2013 WL 5630414, VSB Docket Nos. 11-070-088405 and 11-070-088422 (Virginia State Bar Disciplinary Board July 17, 2013); *see also Florida Bar News*, Bar Ethics Opinion on “Cleaning Up” Social Media Pages Before Litigation, 2/15/2015 FLBN 24. Here, InfoWars’ conduct was likewise egregious, and a severe punitive sanction is necessary to deter future misconduct in this litigation. In addition, Plaintiff requests fees and costs to address the time spent

on this matter, which was especially burdensome in the midst of responding to an anti-SLAPP motion.

CONCLUSION

Due to the intentional destruction of evidence by InfoWars, Plaintiff prays that this Court grants his Motion, enters an adverse inference in favor of the Plaintiff, assesses punitive sanctions, and takes whatever other actions necessary to address this flagrant misconduct.

Respectfully submitted,

KASTER LYNCH FARRAR & BALL, LLP



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713.221.8300 Telephone

713.221.8301 Fax

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2018 the forgoing document was served upon the following in accordance to Rule 21 of the Texas Rules of Civil Procedure:

Via E-Service: fly63rc@verizon.net

Mark C. Enoch
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Ste. 500
Dallas, Texas 75254

DECLARATION OF BROOKE BINKOWSKI

STATE OF CALIFORNIA §
 §
SAN DIEGO COUNTY §

I, Brooke Binkowski, declare under penalty of perjury the following is true and correct.

1. My name is Brooke Binkowski. I am over the age of 21 and competent to make this declaration. I reside in San Diego County, California. Given the nature of my work and the history of InfoWars publicizing personal information to its audience, I prefer not to provide my date of birth or address. I have been informed that substantial compliance with Texas law does not require me to provide this information, and I wish to exercise that right.
2. I have over twenty years of experience as a multimedia journalist and professional researcher.
3. I possess a Bachelor of Arts from the University of California in International Studies – Linguistics – Anthropology, and I am currently completing my Master’s thesis. I am also a Fellow in Global Journalism at the Munk School of Global Affairs.
4. Over my career, I have worked in reporting, editing, and producing roles for CNN, CBS Radio, National Public Radio, Southern California Public Radio, Foreign Policy, Latino USA, and others as a freelance reporter. I also served as the Managing Editor of Snopes.com from 2015 to 2018.
5. I possess expertise in online research and the infrastructure of social media.
6. I reviewed an August 9, 2018 article from CNN available at: <https://money.cnn.com/2018/08/09/media/twitter-infowars-alex-jones/index.html>
7. I visited a variety of links provided in the CNN article, which related to both written and video content published by InfoWars. I also searched the web addresses for these links in the Internet Archive.
8. The links and web archive pages I checked included:
 - <https://twitter.com/RealAlexJones/status/514913471972925440>
 - https://web.archive.org/web/*/https://twitter.com/RealAlexJones/status/514913471972925440
 - <https://twitter.com/RealAlexJones/status/281595030966267905>
 - https://web.archive.org/web/*/https://twitter.com/RealAlexJones/status/281595030966267905

- <https://twitter.com/RealAlexJones/status/539839454018433024>
- https://web.archive.org/web/*/https://twitter.com/RealAlexJones/status/539839454018433024
- <https://twitter.com/RealAlexJones/status/618570610143203328>
- https://web.archive.org/web/*/https://twitter.com/RealAlexJones/status/618570610143203328
- <https://twitter.com/infowars/status/920461933806882816>
- https://web.archive.org/web/*/https://twitter.com/infowars/status/920461933806882816
- <https://twitter.com/infowars/status/1021870547964026882>
- https://web.archive.org/web/*/https://twitter.com/infowars/status/1021870547964026882
- <https://twitter.com/infowars/status/1004479505115766785>
- https://web.archive.org/web/*/https://twitter.com/infowars/status/1004479505115766785
- <https://twitter.com/infowars/status/991399355813957632>
- https://web.archive.org/web/*/https://twitter.com/infowars/status/991399355813957632

9. In each case, the original content had been deleted, and there was no copy available on the Internet Archive.
10. Not only is the primary content inaccessible, but also the related discussion, commentary, or hyperlinks to other content.
11. One feature of social media is that pages and content become interrelated in a complex web. Social media posts become interactive discussions in which conversations develop through user comments and in which content becomes linked to other content.
12. Even if a copy of a particular social media message is saved locally, its meaning is often inscrutable when isolated from the web of context.
13. The CNN article also discusses video content deleted by InfoWars. InfoWars distributes video content on social media networks. When a social media video is deleted, additional information is also lost.
14. Even if a local copy of a video is saved, the social media page on which it was hosted contains information and discussion, including descriptive text and commentary authored by InfoWars which accompany its video content.

Executed by Brooke Binkowski in San Diego County, California on August 17, 2018.



Brooke Binkowski

Eric Tellez

From: Mark Bankston
Sent: Sunday, August 12, 2018 4:42 PM
To: Mark Enoch
Cc: Bill Ogden
Subject: Deletion of InfoWars content

Mr. Enoch:

An August 10th report from *The Hill*, as well as Mr. Jones' statements on the August 10th episode of *The Alex Jones Show*, indicate that Mr. Jones instructed his employees to delete certain InfoWars content available on Twitter and its livestreaming service Periscope. An August 9th report from CNN indicates that the deleted materials include social media messages and video content relating to the Sandy Hook and Parkland school shootings.

My clients in the *Fontaine*, *Pozner*, and *Heslin* matters would like you to confirm whether these reports are accurate and these items have indeed been destroyed.

Mark Bankston
Kaster Lynch Farrar & Ball
1010 Lamar, Suite 1600
Houston, TX 77002
713-221-8300

Eric Tellez

From: Mark Bankston
Sent: Tuesday, August 14, 2018 1:33 PM
To: fly63rc@verizon.net
Cc: Bill Ogden
Subject: Follow up on InfoWars

Mr. Enoch:

Following up on my prior emails, please produce a copy of the August 10, 2018 episode of The Alex Jones Show.

Please also confirm whether the June 26 and July 20 YouTube videos relevant to this litigation were deleted by YouTube or your clients.

Mark Bankston
Kaster Lynch Farrar & Ball
1010 Lamar, Suite 1600
Houston, TX 77002
713-221-8300

April 11, 2018

Via Electronic Mail: Eric.Taube@wallerlaw.com

Alex Jones
Free Speech Systems, LLC
InfoWars, LLC
c/o Eric Taube
100 Congress Avenue, 18th Floor
Austin, TX 78701

Re: Defamatory Publications

To Whom It May Concern:

I write to inform you that our office represents Neil Heslin in a claim for damages against Alex Jones, Free Speech Systems LLC, InfoWars LLC, and Owen Shroyer arising from defamatory statements. Mr. Heslin is the father of Jesse Lewis, a victim of the Sandy Hook massacre.

On June 26, 2017, InfoWars' broadcast featured a segment hosted by reporter Owen Shroyer in which Shroyer claimed to have reviewed evidence showing it was impossible for Mr. Heslin to have held his son's body and see his injury. This broadcast was meant to reinforce and support the underlying lie that the Sandy Hook parents are fakes. This assertion was manifestly false.

Over the past four years, InfoWars has also made statements -- far too numerous to effectively discover and catalog -- which are consistent with Mr. Shroyer's statements in 2017, including repeated references to the alleged faked "blue-screen" interview, references to a sinister re-opening of the school, references to individuals found in the woods with SWAT gear, allegations casting doubt on the death of certain victims, as well as general allegations that nobody died. The gist of these statements is that my client is a liar. These prior statements are evidence of InfoWars' egregious defamatory intent when it later made statements in 2017. We are aware of such notable prior statements from April 2013, March 2014, May 2014, September 2014, December 2014, January 2015, July 2015, and November 2016, although we are sure there are many others as yet unknown. Each of these statements addresses the same core set of false statements conveyed by the 2017 statements, which my client now demands you correct as provided by Sec. 73.055 of the Texas Civil Practice & Remedies Code.

Specifically, my client demands that InfoWars immediately and publicly acknowledge that it has spread false information about him and made false accusations about his conduct following the tragedy. My client demands that InfoWars publicly admit it made false statements about Mr. Heslin holding his son's body and seeing his injury. My client also demands that

InfoWars publicly admit that Mr. Heslin is not a “crisis actor” or otherwise involved in any kind of conspiracy to cover up the truth about the Sandy Hook massacre or the death of his son.

Finally, my client demands that you take immediate steps to ensure the preservation of the following items:

- All communications within InfoWars relating to my client, the above broadcasts, or the Sandy Hook shooting.
- All communications between any employee or representative of InfoWars and any third parties relating to my client, the above broadcasts, or the Sandy Hook shooting.
- All notes, drafts, or documents relating to my client, the above broadcasts, or the Sandy Hook shooting.
- All documents reflecting policies or editorial standards for the factual vetting of information published by InfoWars, as in effect on April 22 – June 26, 2017.

You are further notified that the destruction or loss of these items may constitute spoliation of evidence under Texas law.

I ask that you respond immediately, detailing the steps InfoWars will be taking to comply with each of the above demands.

Most sincerely,

A handwritten signature in black ink, appearing to read 'Mark Bankston', with a stylized, cursive script.

Mark Bankston