U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office
1131 M Street, N.E.
Washington, D.C. 20507

[redacted]	
Complainant	**EEOC No.** [redacted]
v.	**Agency No.** [redacted]
JEH JOHNSON, Secretary **U.S. Department of Homeland Security** **(U.S. Secret Service)**	**October 4, 2016**
Agency	

MOTION TO SHOW CAUSE WHY SANCTIONS SHOULD NOT BE IMPOSED FOR SPOLITATION OF EVIDENCE

Complainant [redacted] (hereafter "[redacted] or "Complainant") has brought an action claiming that a conditional offer of employment as a GS-15 information technology expert was withdrawn by Respondent U.S. Secret Service (hereafter "USSS" or "Agency") because of his disability, and not because he ostensibly failed to pass a polygraph examination.

By this motion he is seeking sanctions because the audio recording of that examination (a critical piece of evidence) is no longer available, due to either the intentional act or negligence of the Agency. In either event, for the reasons later set out, he moves for a judgment of default or for those alternative remedies specified below.

1. In the course of discovery Mr. [redacted] sought the audio recording of his polygraph examination conducted by USSS – a request vigorously resisted by USSS. After its objection to providing the recording was overruled, USSS provided Mr. [redacted] with audio files that ostensibly contained the sought after recording.
2. In fact, the audio files proved by USSS were virtually blank and contained nothing of any use or significance.
3. As set forth in the affidavit of Danny Seiler (hereafter "Mr. Seiler" or "Seiler"), an experienced polygraph examiner (formerly a sergeant and supervisory polygraph examiner with the Maryland State Police and now in private practice) the audio recording is critical to performing an assessment of the accuracy and reliability of USSS's conclusion that Mr. [redacted] actually failed the polygraph test -- the sole, proffered and nondiscriminatory reason for withdrawing the conditional offer of employment made to him. Mr. Seiler's affidavit is attached hereto as **Exhibit A** and made a part hereof.
4. As further set out in Mr. Seiler's affidavit there is a significant question as to whether or not Mr. [redacted] was properly found to have failed the test.
5. In significant part, Mr. Seiler declared at Paragraphs "7" and "8":

"7. **Without the digital files of the exam I specifically cannot determine**:

a. If the questions asked of the applicant were framed in a valid manner.
b. What the inflection of the voice of the examiner was to the examinee.
c. If any improper interchange occurred between the examiner and the examinee.
d. If the questions listed in the documentation were asked in the order represented.

"8. Based on the materials provided I made the following observations:

a. The exam lacks congruency. Mr. [redacted] was asked both on his application and during the polygraph examination if he had committed any serious crimes. He scored a "truthful" (+3) that he did not lie on any aspect of his application, which included both questions about illegal drug use and the commission of criminal acts, both of which Mr. [redacted] denied. During his polygraph exam, however, his answer to a question about illegal drug use was interpreted as inconclusive; and his answer to a question about criminal activity was first interpreted as inconclusive, and then as a significant response indicating deception.

Upon playing the CD-ROM, as set forth in his affidavit, Mr. [redacted] discovered that only a few minutes of the approximately five-hour-and-thirty-five-minute session were audible. Mr. [redacted] affidavit is attached hereto as **Exhibit B** and made a part hereof.

6. As further set forth in his affidavit, the only things that can be heard are at the beginning of the recording and consist of the file number, Mr. [redacted] and the polygraph examiner's name and the date and time the

session began. Static is all that can be heard for the remainder of the recording, except that near the end of the recording speaking can be heard in the background for approximately one minute. The words are barely discernable.

7. Upon discovering this, the undersigned, Mr. [redacted] counsel telephoned USSS counsel, who acknowledged that he was aware of the defect in the recording, that he had been told there had been a problem with the microphones and that the disc had been given to "forensics" to see if it could be enhanced, but it could not.

8. By signing this motion counsel affirms under the penalties of perjury that this is a true and accurate account of his conversation with USSS counsel.

9. Among the documents produced in response to Mr. [redacted] discovery requests was the "U.S. Secret Service "Polygraph Program Quality Control Worksheet/Applicant Exam" (hereafter "QCW" and attached hereto as **Exhibit C** and made a part hereof) that was filled out after Special Agent Ellen Ripperger conducted the polygraph examination of Mr. [redacted]

10. The QCW contains a checklist of ten items, the sixth being "Exam Audio Recorded (random checks throughout exam)". A check mark appears

under the "Yes" column; and it is signed by both a "Quality Control Reviewer" and a "Quality Control Supervisor".

11. These random checks establish that an audio recording had been successfully made, and undermine the assertion that the reason virtually nothing is audible is because microphones did not work.

12. It is difficult to imagine that one of the most sophisticated law enforcement agencies in the world (a) did not know that a recording was not being made because the microphones weren't working; (b) would twice confirm that the recording was made if, in fact, it had not; and (c) failed to maintain the integrity of the recording. [1]

13. Sanctions are appropriate under these circumstances.

14. The U.S. Court of Appeals for the District of Columbia Circuit in *Grosdidier v. Governors*, 709 F.3d 19 (D.C. Cir., 2013) held that a Title VII claimant is entitled to sanctions on a mere showing that a record keeping requirement was not met, and that no further showing of motive is required. Specifically, the Court declared:

"This court has recognized the negative evidentiary inference arising from spoliation of records. See *Webb v. D. C.*, 146 F.3d 964 (D.C.Cir.1998); *Shepherd v. Am. Broad. Co.*, 62 F.3d 1469 (D.C.Cir.1995). In *Talavera*, 638

[1] It is similarly difficult to imagine that if all that can be heard is static that USSS could not recover or enhance the contents of the audio disk.

F.3d at 311–12, the court held, in accord with other circuit courts of appeals, that a Title VII plaintiff was entitled to an adverse inference jury instruction after the employer negligently destroyed the notes documenting her interview for a vacant position in violation of the same records retention EEOC regulation on which Grosdidier relies. In that case, the employer defended on the ground that the plaintiff's non-selection was based on her poor performance during an interview. See id. at 312. In concluding the plaintiff was entitled to an adverse spoliation instruction, **the court considered [1] whether the plaintiff was a "member of the classes sought to be protected" by the record retention regulation and [2] whether "[t]he destroyed records were relevant" to the challenge to the employer's proffered reason for not selecting the plaintiff. Id. The court did not hold that the spoliation inference is available only upon a showing that the employer destroyed the records in bad faith**. **To the contrary, the spoliation inference was appropriate in light of the duty of preservation notwithstanding the fact that the destruction was negligent. Id.**

"Similarly, the Second and Fourth Circuits do not require evidence of bad faith as a prerequisite to approval of a spoliation inference in the Title VII context. [Citations omitted.] After all, there are instances where the court can determine the likely relevance of destroyed evidence without a showing of bad faith destruction. **Where the evidence is relevant to a material issue, the need arises for an inference to remedy the damage spoliation has inflicted on a party's capacity to pursue a claim whether or not the spoliator acted in bad faith.** [2]

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[2] The Tenth Circuit in *Debra Jones & Arden C. Post v. Norton*, 809 F.3d 564 (10th Cir., 2015) noted:

1. "A spoliation sanction is proper where: '(1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence.'*Turner v. Pub. Serv. Co. of Colorado*, 563 F.3d 1136, 1149 (10th Cir.2009) (quoting *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir.2007)). The entry of default judgment or the imposition of adverse inferences require a showing of bad faith. Id. (adverse inferences); *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1321 (10th Cir.2011) (default judgment).

At 27-28, Emphasis added.

15. Even if a showing of bad faith is required it can be shown that USSS acted with such motive in the case at bar.

16. There is no dispute that the audio recording file was to be maintained per USSS policy and practice (as well as, EEOC regulations regarding preservation) because it was produced in response to a discovery request; nor is there any dispute that two special agents, one a supervisor, confirmed that a proper recording had been made.

17. Yet, after its efforts to deprive Mr. [redacted] of the recording were opposed and the Agency was compelled to provide the recording to him, USSS claims, contrary to the reviewing special agents certification, that nothing was recorded because microphones malfunctioned.

18. This explanation is simply unworthy of credence. The fact that USSS would attempt to persuade the EEOC that a technical "glitch" is the reason that the recording is unavailable only further leads one to the conclusion that USSS is acting in bad faith.

For these reasons and such others as may become known Complainant [redacted] asks that an order be passed requiring USSS to show cause why the following sanctions should not be imposed:

1. Entry of default judgment;

2. Alternatively, if judgment is not ordered, that any testimony or documents concerning the conduct, results or interpretation of the examination be excluded at all aspects of the hearing in this matter, including, but not limited to the Agency's opening statement, closing argument and/or brief, the solicitation of witness testimony, including, but not limited to that of Special Agency Ripperger, and the attempt to introduce any document; and
3. Imposition of monetary sanctions, *viz.*, attorneys' fees and costs incurred as the result of bringing and maintaining this motion.

Respectfully submitted,

s/Thomas J. Gagliardo
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by email and facsimile transmission on the 5th day of OCTOBER 2016 to:

Steven Giballa
Office of Chief Counsel
United States Secret Service
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Facsimile number 202.406.6544

s/Thomas J. Gagliardo