

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

STEVEN SALAITA,

Plaintiff,

v.

CHRISTOPHER KENNEDY, Chairman of the Board of Trustees of the University of Illinois; RICARDO ESTRADA, Trustee of the University of Illinois; PATRICK J. FITZGERALD, Trustee of the University of Illinois; KAREN HASARA, Trustee of the University of Illinois; PATRICIA BROWN HOLMES, Trustee of the University of Illinois; TIMOTHY KORITZ, Trustee of the University of Illinois; EDWARD L. MCMILLAN, Trustee of the University of Illinois; PAMELA STROBEL, Trustee of the University of Illinois; ROBERT EASTER, President of the University of Illinois; CHRISTOPHE PIERRE, Vice President of the University of Illinois; PHYLLIS WISE, Chancellor of the University of Illinois at Urbana-Champaign; THE BOARD OF TRUSTEES OF ILLINOIS; and JOHN DOE UNKNOWN DONORS TO THE UNIVERSITY OF ILLINOIS,

Defendants.

Case No. 15-cv-00924

Honorable Harry D. Leinenweber

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR  
ENTRY OF AN ORDER TO PRESERVE EVIDENCE**

Plaintiff's Motion is overly broad, unnecessary and potentially prejudicial. Based on one e-mail from September 2014 -- nearly five months before Plaintiff filed his lawsuit -- Plaintiff seeks an order directed against every Defendant in this case. Plaintiff seeks this broad order despite the fact that the e-mail about which he complains was recovered and produced by the University of Illinois (the "University") in *Steven Salaita, et al. v. The Board of Trustees of the University of Illinois*, Case No. 2014-MR-920 (the "FOIA Litigation"). Despite the lack of any harm, Plaintiff asks the Court to enter an order directing Defendants and their agents to preserve evidence in the present matter. Such relief is unnecessary. In September 2014, months before Plaintiff filed his January 29, 2015

Complaint, Defendants received a document preservation notice. Moreover, in an effort to ensure full and complete production of relevant materials in both the FOIA Litigation and the present case, the University has collected, searched, and reviewed personal e-mail for all University officials who conducted business thereon. The entry of an order to preserve evidence here will only have the effect of imputing a negative inference of destruction of evidence upon all Defendants. Plaintiff's Motion for Entry of an Order to Preserve Evidence (the "Motion") should be denied.

**I. An Order to Preserve Evidence is Unnecessary**

a. Defendants Have Taken Appropriate Steps to Preserve Evidence.

The duty to preserve evidence is not dependent on a court order. *See Jones v. Bremen High Sch. Dist.* 228, No. 08-3548, 2010 WL 2106640, at \*5 (N.D. Ill. May 25, 2010) (citing *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008)). Defendants fully understand their obligations with regard to the preservation of evidence under the Federal Rules of Civil Procedure. On September 19, 2014, counsel for the University distributed a document preservation notice. The Document Preservation Notice was directed to all relevant personnel, including Defendants. (A true and correct copy of that notice is attached as Ex. A.) By instruction of counsel, Defendants continue to preserve any evidence that may be relevant to Plaintiff's claims and/or Defendants' defenses to those claims. In sum, Defendants have and will continue to preserve all evidence that is potentially relevant to the present matter irrespective of a Court order.

Notably, the very document that spurred Plaintiff's Motion was preserved and produced to Plaintiff as part of the FOIA Litigation and will be produced to Plaintiff as part of the present matter as well. Based on that e-mail, Plaintiff alleges that Defendants used personal e-mail addresses when communicating about issues pertaining to Plaintiff "in order to evade the University's e-mail preservation and retention obligations, and that at least Defendant Wise destroyed emails relevant to Professor Salaita's case." (Pl.'s Mot. ¶ 2.) Contrary to Plaintiff's representation, however, there is no

indication that any Administrator Defendant, other than Defendant Wise, used their personal e-mail address for University-related communications pertaining to the present litigation. Further there is no indication of any involvement of the Board of Trustees or any individual member of the Board in the e-mail that is the subject of Plaintiff's motion. Beyond this, there is no indication that anyone destroyed any document that is potentially relevant to Plaintiff's claims or the University's defenses. The document in question involves only Defendant Wise and was not, in fact, destroyed. Plaintiff's Motion is merely an attempt to submit all Defendants to implicit criticism by the Court. There is simply no basis for the broad order sought by the Plaintiffs.

b. If An Order is Appropriate, It Should Apply to All Parties.

If the Court finds that an order to preserve evidence is necessary, despite the paucity of evidence supporting Plaintiff's allegations and the existence of a document preservation notice, the order should be made to apply to all parties. Plaintiff's Motion requests an order "directing the Defendants and their employees and agents to preserve" evidence related to the litigation. (*See* Pl.'s Mot. at 3.) To the extent Court intervention into the document preservation process is necessary, Plaintiff should be under equal instruction to maintain all documents that might be relevant to his claims and/or Defendants' defenses to such claims.

**CONCLUSION**

For all of the foregoing reasons, Defendants respectfully request that this Court enter an Order denying Plaintiff's Motion for Entry of an Order to Preserve Evidence or, in the alternative, to enter an order directing all parties to preserve all potentially relevant materials, and granting any other relief that this Court deems just and proper.

Dated: September 3, 2015

Respectfully submitted,

By: /s/ Christopher B. Wilson  
One of Their Attorneys

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR ENTRY OF AN ORDER TO PRESERVE EVIDENCE** was served upon all counsel of record this 3rd day of September, 2015 via the Case Management/Electronic Case Filing ("CM/ECF") System.

/s/ Christopher B. Wilson

# **EXHIBIT A**

September 19, 2014

**IMPORTANT LEGAL NOTICE  
FOR YOUR IMMEDIATE ATTENTION**

**Failure to comply with this Notice could  
subject you and the University to civil and criminal penalties.**

**THIS LEGAL HOLD DIRECTS YOU  
TO HOLD ALL RECORDS  
RELATING TO THE FOLLOWING MATTER:**

**STEVEN G. SALAITA EMPLOYMENT MATTER**

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**Reason You Are Receiving This Notice**

On August 1, 2014, Chancellor Phyllis M. Wise and Vice President Christophe Pierre wrote to Steven G. Salaita, a professor at Virginia Polytechnic Institute, to inform him that he would not be recommended to the Board of Trustees for a faculty position. On September 11, 2014, by a vote of 8-1, the Board of Trustees of the University of Illinois rejected an offer of a faculty position to Dr. Salaita. On September 16, 2014, legal counsel for the University received written notice from legal counsel for Dr. Salaita indicating that Dr. Salaita intended to file a lawsuit against the University and certain unnamed individuals unless the University settles his claims or offers him a tenured position on the University faculty.

Specifically, the letter from Dr. Salaita's counsel states:

[U]nless good faith efforts are made to resolve this matter, we . . . will proceed with a lawsuit to remedy the University's violations of Professor Salaita's constitutional free speech and due process rights, as well as its breach of its contractual obligations.

. . . Professor Salaita will seek injunctive relief against University officials, demanding that he be appointed to the tenured faculty position promised to him; he will seek monetary damages against certain Board of Trustee members and Administration members including the Chancellor and President.

We are directing this memorandum to you because you have been identified as someone who may have documents, information and other materials potentially relevant to the matters in dispute and the University's defenses thereto.

This memorandum is intended to provide guidance to assist you in implementing the hold policy.

### **Documents to Be Preserved**

Effective immediately and until further notice, all documents potentially pertaining to the matter identified above have been placed on HOLD. You must retain, and must not alter, discard, or destroy, any documents that are potentially relevant to this matter, including but not limited to:

1. Documents related to or in any manner discussing Steven G. Salaita;
2. Documents related to the recommendation by Jodi Byrd, Acting Director of the American Indian Studies Program, to offer a tenured faculty position to Dr. Salaita;
3. Documents related to the efforts by the American Indian Studies Program to recruit additional professors including but not limited to those materials relating to the recommendation to extend an offer to Dr. Salaita;
4. Documents related to the letter from Brian H. Ross, Interim Dean of the College of Liberal Arts and Sciences to Dr. Salaita dated October 3, 2013;
4. Documents related to statements on social media by Dr. Salaita in 2014, including any materials provided to the University by any third party commenting on any such statements by Dr. Salaita;
5. Documents relating to the decision not to recommend Dr. Salaita to the Board of Trustees for approval;
6. Documents submitted to or reviewed by the Board of Trustees in connection with Dr. Salaita.

Please note that we are required to preserve relevant documents wherever they are kept, including:

- on your work and home computers;
- in your files at work and at home;
- on network or shared drives;
- in your email account (including your personal email account, if you have sent or received relevant documents using that account);
- in any social media accounts such as facebook, twitter and the like
- on cell phones, smartphones, PDAs and other similar devices;
- on storage media such as portable hard drives, CDs, DVDs, and USB flash drives;
- Any cloud platforms such as Google docs, dropbox, box.com and the like.

Any question regarding the relevance of a particular document, file, email or other electronic data compilation should be resolved in favor of preservation and retention.

**This document hold will continue to apply to any documents you create or receive at any time prior to receiving notice that the legal hold has been terminated. Nothing defined as potentially relevant in this Legal Hold Notice should be construed as any admission that the Material will become subject to further collection, processing or review**



### **Definition of “Documents”**

The definition of “documents” is broad and comprehensive and includes drafts, notations on documents, graphs, drawings, and other forms of records. The term “documents” also includes electronic documents such as Excel spreadsheets, Word documents, PowerPoint presentations, emails, instant messages (IM), voicemail messages and other forms of computer files and information produced by various electronic hardware and/or software that are not reduced to paper. Please retain documents **in their entirety**, including all attachments, cover memos, appendices, etc., even if only part of the document is potentially relevant to this matter.

### **Preserving Documents Covered By This Notice Is Your Responsibility**

You are responsible for preserving and maintaining these documents while they are subject to legal hold. **Do not alter, discard, or destroy a document that falls within the above categories for any reason**, even if you consider it insignificant, or believe that duplicate copies exist elsewhere. Failure to preserve documents as required by this notice could subject you to discipline, and could also subject you and the University to civil and criminal penalties.

### **PAPER DOCUMENTS**

Care must be taken to ensure that documents subject to legal hold are preserved. This includes any handwritten notes on paper documents, notebooks containing handwritten notes and other documents that are not duplicative of electronic documents. To efficiently manage paper documents and to guard against inadvertent destruction, you may wish to segregate all paper documents subject to legal hold for a particular matter into a separate box or boxes. Or, you may wish to label the folders containing these paper documents as being subject to the legal hold.

If you have sent paper documents subject to the legal hold to off-site storage, you must take all steps necessary to ensure that the documents are not discarded pursuant to the retention/destruction instructions provided at the time of storage. In addition, you will be responsible for retrieving the documents from storage if they are requested in connection with the lawsuit. If you send paper documents subject to legal hold to off-site storage, you must take appropriate steps to ensure their preservation for the duration of the hold.

### **ELECTRONIC DOCUMENTS**

In addition to the information visible on your computer, electronic documents often contain “hidden” or embedded information about the document (e.g., author, date created, date last modified, size of the file, blind copies, etc.) called metadata. ***Special care must be taken to ensure that metadata associated with electronic documents subject to legal hold is also preserved.*** Electronic documents subject to legal hold must be preserved in their original electronic format (e.g., email must be retained in email format) and must not be modified or deleted. Printing a paper copy and then deleting the electronic version is NOT sufficient to preserve an electronic document and its metadata.

### **EMAIL**

You may keep emails subject to legal hold in your “Inbox” or “Sent Items” folders in your mailbox; however, to efficiently manage these emails and to guard against inadvertent

CONFIDENTIAL AND PRIVILEGED  
ATTORNEY/CLIENT PRIVILEGE  
ATTORNEY WORK PRODUCT

destruction, you may wish to move these emails to a subfolder. ***Under no circumstances should you delete potentially relevant emails from your computer or from the network server.*** If you run out of network email storage, you must retain potentially relevant messages locally or on a network drive. Emails NOT subject to legal hold should be managed in accordance with the University's normal records management policy to comply with the storage limitations of your mailbox.

**Documents Not Subject to This Legal Hold**

Documents that are not subject to this legal hold can and should be managed in accordance with the University's standard records management policy.

**Departing or Transferring Employees**

If you leave the University or transfer departments or groups, you are still under an obligation to comply with this Legal Hold Notice. You must provide notice to the contact person identified below who will make arrangements to ensure continued preservation of your computer or electronic equipment, data and paper documents.

**Further Questions Regarding This Notice**

Please preserve this notice for future reference. Please address any questions regarding the litigation, this Notice of Legal Hold, or the document preservation process to Scott Rice, Campus Legal Counsel for the Urbana-Champaign Campus.

Additionally, you may be contacted by a lawyer or legal representative for the University regarding the preservation, collection and/or review of your Material and information.

Thank you for your cooperation in this matter.