IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EAST COAST BROKERS AND
PACKERS, INC.,

Plaintiff, CASE NO.: 8:07-cv-171-T-26MSS

vs.

SEMINIS VEGETABLE SEEDS, INC.

Defendant.
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DEFENDANT SEMINIS VEGETABLE SEEDS, INC.'S MOTION FOR SANCTIONS BASED ON ALTERATION AND SPOLIATION OF EVIDENCE, WITH MEMORANDUM OF LAW

Defendant, Seminis Vegetable Seeds, Inc. ("Seminis"), by its undersigned counsel, hereby moves the Court to dismiss this case or to impose other sanctions against Plaintiff East Coast Brokers and Packers, Inc. ("East Coast") because Plaintiff destroyed, lost, and or otherwise failed to preserve data and other evidence that is critical to Seminis' defense of this action.

Plaintiff sued Seminis for damages arising from crop loss due to allegedly defective tomato seeds from a particular lot of seed. During the course of discovery, it has become clear that Plaintiff has altered critical evidence that would have been used to prove (or disprove) Plaintiff's damages claim. Specifically, Plaintiff has altered computer data used to quantify the amount of tomatoes picked from the fields and the amount of tomatoes packed to be sold. Plaintiff also concealed paper documents or "pick tickets" from which Plaintiff's employees purportedly generated the computer data referenced above.

The undersigned counsel certifies pursuant to Local Rule 3.01(g) that he consulted with counsel for Plaintiff in a good faith effort to resolve or narrow the issues that are the subject of this motion but was unable to agree to a resolution.

I. Introduction

In 2005, Plaintiff purchased tomato seeds from Seminis. Plaintiff claims that the seeds failed to produce the crop Plaintiff expected, due to an unspecified "defect" in the seeds. Plaintiff sued Seminis in a four count Complaint in which it pleads the following theories for relief: Breach of Express Warranty (Count I); Breach of Implied Warranty (Count II); Negligent Misrepresentation (Count III); and Negligence (Count IV). While Seminis vigorously disputes that the seeds were defective, this motion is directed toward Plaintiff's apparent misconduct with regard to Plaintiff's damages evidence.

To establish its damages, Plaintiff must prove that the lot of seeds at issue performed poorly compared to other lots of the same seed type (*i.e.,* that it suffered a loss in yield). Evidence of the seeds' performance would be memorialized in the data maintained by the Plaintiff. Specifically, Plaintiff collected and compiled computerized data regarding the amount of tomatoes picked ("pick data") and the amount of tomatoes packed for sale ("pack data"). This information was entered into Plaintiff's computer system in 2005.[1]

Despite its obvious importance, Plaintiff never backed up the computerized pick data and pack data. Plaintiff also either lost of misplaced the paper pick tickets from

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[1] The "pack data" was entered into Plaintiff's computer in 2005. However, Plaintiff did not enter the bulk of the "pick data" into the computer until 2007-2008, after this lawsuit was filed. *See* Deposition of Roger Glenn, dated August 18, 2008 ("*Glenn Dep.*"), at p. 51. This issue is discussed in greater detail *infra*.

which the computerized pick data was derived.[2] Most shockingly, however, is the fact that after Plaintiff filed this lawsuit, Plaintiff reopened and altered the computerized pick data and pack data and did not preserve the original data as it had existed for almost a year after this lawsuit had been pending. As Plaintiff even admits, Seminis has no way to know what changes were made. *See* Deposition of Robert Meade, dated September 5, 2008 ("*Meade Dep.*"), at pp. 112, 195-201 (attached as Ex. 8 to Declaration of Michael D. Maurer, dated December 1, 2008 *("Maurer Dec.")*[3].

1. <u>*Pick Data and Pack Data*</u>

There are several types of records (or "yield records") that Plaintiff maintained in 2005 to document the tomatoes it harvested. The first type of records is pick tickets. Pick tickets are small paper documents (approximately 3" x 5") that are bound in ticket books, each of which contains approximately 100 pages of "tickets." *See* Exhibits 1, 2, and 3 to *Maurer Dec.*

In 2005, the pick tickets were completed by a crew leader, who recorded the following information contemporaneously with the harvest of tomatoes: (1) the particular variety of tomatoes that were picked; (2) the fields from which they were picked; (3) the date they were picked; (4) and the volume of tomatoes picked. Once the tomatoes were

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[2] Although this will be discussed in greater detail *infra*, on the eve of the close of discovery, Plaintiff finally turned over more than 10,000 pages of documents which it claims are either the missing pick tickets or duplicates thereof. Seminis has not had sufficient time to review these documents, nor was it able to use the documents in depositions of Plaintiff's witnesses.

[3] For purposes of efficiency, depositions excerpts are attached as exhibits to the *Maurer Dec.* (Only the first occasion each deposition is cited in this memorandum will it include a reference to the Exhibit number to *Maurer Dec.*) This is done to avoid unnecessarily lengthy citations.

picked in the field and the pick tickets were completed, the tomatoes were then transported by truck to a "packing house," which began the next phase in the process. *See* Deposition of Batista Madonia, dated August 7, 2007 *("Madonia Dep."),* at pp. 95-96 (attached as Ex. 5 to *Maurer Dec.*).

At the packing house, each truck was weighed to determine the gross volume of tomatoes on them. *Glenn Dep.*, at p. 15 (attached as Ex. 7 to *Maurer Dec.*); *Meade Dep. I,* at p. 34. The crew leader then gave the pick tickets to another East Coast employee who operated the scale where the trucks were weighed. At some point in time, the data from the pick tickets was entered into a computer system and became pick data, which is essentially an electronic version of the pick ticket because it contains the same essential data as the paper pick tickets. *Meade Dep.,* at p. 28; *See* Deposition of Patricia House, dated October 31, 2008 ("*House Dep.*"), at pp. 8-9 (attached as Ex. 9 to *Maurer Dec.*). The "pick data" is the second type of record that the Plaintiff used to document the tomatoes it harvested in 2005.

After the tomatoes were weighed at the packing house, they went through a "culling" process, during which the tomatoes were sorted for size and quality. *Madonia Dep.*, at pp. 95-96. Tomatoes that were bruised, damaged, or otherwise were of unacceptable quality were discarded. During the culling process, Plaintiff generally expected to discard ten to fifteen percent of the gross amount of tomatoes it picked. *Id.* After the tomatoes were culled and sorted, they were packed into twenty-five pound boxes. The boxes of tomatoes were then shipped and sold to customers as they were ordered. *Id.*

At the packing house, when East Coast employees packed the tomatoes into boxes to be sold, the employees entered data describing the volume of tomatoes packed/boxed into it's computer system where pack data (alternatively referred to as "packout data") was maintained. *House Dep.*, at p. 8. The "pack data" is the third type of record that Plaintiff used to document the tomatoes it harvested in 2005.

The pack data included information showing the volume of boxes sold. *Id.*, at p. 41. A "source number" used during each "run" of tomatoes during the culling process could then be used to correlate the fields where the tomatoes were picked with the numbers of boxes packed from each field. *Meade Dep.,* at pp. 51-53. The pick data and the pack data should always correlate in terms of farms picked, date picked/packed, and the volume picked/packed (less 10%-15% due to culling). *House Dep.,* at pp. 41, 153. There is thus an intricate relationship between the pick data and the pack data insofar as the identification of the volume of tomatoes picked from particular fields is concerned. *Id.*

2. Plaintiff's Computer System

When East Coast employees entered data into a computer, they entered it into a system designed and maintained by KPG Solutions, Inc. (generically referred as "Kirkey" or the "Kirkey system"). The Kirkey system is a proprietary computer system that is particularly well-suited for companies involved in the agricultural industry. The system can take raw data and generate a wide variety of user-specific reports, depending on the type of information one needs. Such reports include: (1) packout reports, generated from the raw packout data entered at the packing house; and (2) pick data reports, generated from the information entered directly from paper "pick tickets."

A packout report allows one to look at production history to determine, for example, the volume of tomatoes that were *packed/boxed* to be sold that came from any particular field at any particular time. A report generated from pick data would enable a person to determine the volume of tomatoes actually *picked* from any given field at any particular point in time. Computerized reports on the Kirkey system thus provide an efficient means of viewing production and making a number of comparisons.

For example, if East Coast sought to compare the volume of tomatoes *picked* from Field X in September 2005 with the volume *picked* from Field X in September 2004, East Coast could generate a report and look at the "pick data" for that date and location.[4] On the other hand, if East Coast sought to compare the volume actually *packed* to be sold from Field X in September 2005 with the volume *packed* from Field X in September 2004, East Coast would generate a "packout" report.

Alternatively, if one simply sought to verify the accuracy of the data in the "packout" report from Field X in 2005, one would check it against the pick data from that same field. One would know the "packout" report was correct, and therefore reliable, if, in each report:

1. the field picked matched;

2. the date picked matched;

3. the variety of tomatoes picked matched; and

4. the only difference in volume was between ten to fifteen percent (due to culling).

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[4] This is, of course, assuming that East Coast entered the information from the pick tickets into the system in the first place, which is one of the issues in this motion.

The pick data and the packout data are closely intertwined because the only way to confirm that the packout data is correct is to compare it with the pick data.[5,6] *Id.* at 39-40.

3. Plaintiff altered its packout data after it filed this lawsuit[7]

In June 2008, Seminis conducted a forensic analysis of Plaintiff's data. Seminis visited the Kirkey headquarters and obtained computer printouts of the data pertaining to Plaintiff's yield for 2005. Seminis discovered multiple irregularities in the data. It soon became clear that the data pertaining to the yields at certain tomato farms at issue had been altered by Plaintiff beginning in 2007 and into 2008. *See Id.*, at pp. 63-65.

In an effort to determine what changes were made and why they were made a year after this lawsuit was filed, Seminis took the deposition of Plaintiff Corporate

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[5] The verification process can be taken one step further by comparing the pick data against the pick tickets themselves, since the pick data is essentially an electronic version of the pick ticket. *Id.*

[6] While East Coast denied that the pick tickets have anything to do with the packout data, it is clear that, just as this example illustrates, East Coast used them to attempt to verify the packout data. *See e.g., Meade Dep.*, at pp. 22-24.

[7] Plaintiff was obviously aware of the importance of the pick data and pack data to its claims at the time it filed this suit since it describes the measure of damages as being yield-dependent. *See* Doc. 2 (Plaintiff's Complaint). Since the inception of this case, counsel for Seminis has gone to extensive efforts to obtain a plain answer from Plaintiff as to the damages it claims and the data it used to support them. Seminis has continually requested planting data, yield data, field maps, and other documents that have never been produced. Moreover, Plaintiff has repeatedly failed to produce documents, failed to answer interrogatories, and refused to provide access to electronic data. *See* Declaration of Charles M. Greene, dated September 28, 2008 (*Greene 9/28/08 Declaration*")(Doc. 22), at ¶ 2 and Exhibit 4 thereto (which evidences the extensive efforts that Seminis went through to obtain discovery from Plaintiff concerning its yields records). Plaintiff's pick data and pack data has been the subject of an ongoing discovery dispute between the parties throughout 2007 and 2008.

Representative, Robert Meade. Mr. Meade is a tomato salesman at East Coast, whose duties also include ensuring that data is entered into Kirkey correctly. *Meade Dep.*, at pp. 6, 72. He is the most knowledgeable employee with regard to the Kirkey system. *Id.*, at 6. In 2007-2008, Mr. Meade conducted an analysis of East Coast's 2005 growing season. *Id.*, at pp. 72-73.

When confronted with the fact that there were irregularities with much of the computer data in the Kirkey system, Mr. Meade first unequivocally testified that he made no changes to computer data. *Id.*, at 26. A bit later, he testified that he might have made certain changes to the data in 2007, but only if he had found an error. *Id.*, at pp. 82-83, 198. He insisted that he could "not remember" whether he found any errors that needed to be changed. *Id.*, at pp. 82-83. Mr. Meade later testified with confidence: "I'm not concerned about changes I made. I know them to be very accurate."[8] *Id.*, at p. 125. Later in the deposition, Mr. Meade said, "I believe the changes we [referring to Roger Glenn] made accurately reflect the harvest tickets." *Id.*, at p. 195. Mr. Meade admitted that he did not keep a record of what he changed and he knows of no way Seminis can ascertain what changes were made to the pack data. *Id.*, at pp. 112, 195-201.

Seminis also took the deposition of Roger Glenn, a former Kirkey employee who is familiar with the Kirkey system and has worked with Kirkey software for 20 years. *Glenn Dep.*, at p. 5. Mr. Glenn now works for East Coast as a consultant, particularly with the Kirkey system. *Id.*, at pp. 6, 82-84. Over the course of many months, Mr. Glenn assisted Mr. Meade with his analysis of the 2005 yield data. *Glenn Dep.*, at pp. 31-33.

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[8] As the Court can see, Mr. Meade was full of contradictions. These passages are just a few of many stories he told.

He testified that the only thing he did was *add* information from the pick tickets into the database. *Id.*, at p. 51. Mr. Glenn clearly testified that he never changed *any* data at all.[9] *Id.*, at pp. 51, 76, 112-114.

On October 31, 2008 Seminis deposed Kirkey Corporate Representative Patricia House in an effort to learn more about the data that had been altered. Ms. House confirmed that during late 2007 and early 2008, both Robert Meade and Roger Glenn repeatedly accessed the Kirkey system in "change mode"[10] and that various changes were likely made to yield data from 2005 because the Kirkey system shows "date of last update"[11] which is an indication that a change was saved. *Id.*, at pp. 46-47, 66, 111-113, 122-31. *See* Exhibit 1 (screenshot) for a clear example of data alterations. Ms. House testified that it is impossible to know what changes were made because the original data

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[9] The objective evidence completely contradicts Mr. Glenn's testimony. Indeed, the evidence shows that (in addition to Robert Meade) Roger Glenn *also* made numerous changes to Plaintiff's 2005 packout data. *See* Exhibit 1 (representative "screenshot" clearly showing changes); *see also* Exhibits 2 and 3 (additional representative samples clearly showing changes to packout data by "Roger" at the bottom of ex. 2 and the top of ex. 3).

[10] There are two different modes by which a user can enter the database: "display" mode and "change" mode. In display mode, data cannot be changed; a user is only able to *view* information in the database. On the other hand, a user would enter the Kirkey system in "change" mode if changes were to be made to existing data. *House Dep.*, at pp. 46-47. While it is possible that a user could enter the Kirkey system in "change" mode and not actually change data (by pressing F3 to exit a screen instead of Enter), it is clear that when Plaintiff accessed the Kirkey system in change mode, changes were actually made. *Id.*, at pp. 91-93.

[11] The date of last update is a Kirkey system-generated entry that shows when data was last entered or modified. *Id.*, at p. 46. The computer reports reflect scores of entries reflecting a "date of last update" beginning in October 2007 and continuing into 2008 concerning 2005 yield data. *Id.,* at pp. 63, 99.

was not preserved before any changes were made. *Id.*, at pp. 53-54, 80-83. Additionally, no record exists within the Kirkey system showing the changes. Such changes could have included changes to names of the farms from which tomatoes were picked, the dates they were picked, and even the volume of tomatoes produced. *Id.,* at pp. 66, 111-113, 122-31.

The Kirkey system would not reflect a "date of last update" unless changes were *actually made. Id.*, at p. 93. Changes were made by the user pressing "Enter" after changing certain data. *Id.* If a Kirkey user wanted to simply view information in the database, the user would enter the system in "display mode," or in the alternative, by pressing F3 in "change mode" to exit without saving a change. *Id.*, at pp. 46-47, 91-93.

4. Plaintiff misplaced or concealed its pick tickets

Besides largely destroying the original packout data from 2005, Plaintiff also concealed its 2005 "pick tickets" from Seminis until the close of discovery, at which point they were suddenly "located." *Maurer Dec.*, at ¶¶ 3-9. Further still, Seminis discovered that Plaintiff also altered its "pick data", just as it did its "packout" data.

On August 6, 2008, after making previous arrangements with Plaintiff's counsel, counsel for Seminis travelled to East Coast's headquarters to examine Plaintiff's pick tickets for 2005.[12] In the months leading up to this date, the pick tickets (thousands of them) had been in boxes on the floor in Plaintiff's conference room. When counsel arrived at East Coast, Plaintiff's employees claimed they did not have a key to the

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[12] Seminis sought to examine the pick tickets to verify or otherwise rebut Plaintiff's claims as to which tomatoes were picked from which field, when they were picked, and the volume picked.

conference room. Counsel waited outside in 90 degree heat for over six hours until a locksmith arrived to open the door. When counsel finally entered the conference room, the pick tickets were nowhere to be found. Plaintiff's counsel assured counsel for Seminis that the pick tickets would be located and available on August 18, 2008, the date of Robert Meade's scheduled deposition,[13] but they did not reappear by that time. *Id.* Shortly before the discovery cutoff of November 3, 2008 in this case, Plaintiff's counsel notified counsel for Seminis that East Coast had suddenly discovered some "duplicate" pick tickets. Seminis tried for weeks to determine exactly what had been found and whether the "duplicate" tickets related to this case, what they were duplicates of, and whether the "duplicate" tickets were relied upon by East Coast in its analyses. A firm answer never came. *Id.*

On November 14, 2008, Plaintiff advised counsel for Seminis that the tickets were not really duplicates after all. On November 15, 2008, Seminis travelled to East Coast's headquarters to retrieve thousands of these so called "duplicate" (or not) pick tickets. In a laundry basket, East Coast provided over a hundred ticket books—many containing carbon copies which were indecipherable. East Coast also provided a large box with dozens of folders containing hundreds of other documents that also appear to be some sort of pick tickets. *Id.,* Exhibits 1-4 thereto.

Plaintiff does not contend that the recently located pick tickets are the same tickets it used when it entered 2005 pick ticket information into the Kirkey system in

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[13] The deposition would ultimately have to be rescheduled to Sept. 5, 2008 due to a hurricane threatening the area.

2007-2008.[14] In fact, Seminis does not know exactly what they are. Seminis is prejudiced because *even if* these recently discovered pick tickets are the same tickets that disappeared during discovery and *even if* Plaintiff did not rely on them, Seminis does not have adequate time prior to trial to conduct a meaningful analysis of the thousands of documents.[15] Had these pick tickets been provided sooner and not concealed by Plaintiff, Seminis would have had an opportunity to use them to verify Plaintiff's packout data and attempt to determine what changes were made. The resulting prejudice to Seminis is great because Plaintiff has deprived Seminis of an opportunity to rebut Plaintiff's damage analysis.

5. *Plaintiff altered the pick data after it filed this lawsuit*[16]

Roger Glenn and Robert Meade accessed the Kirkey database multiple times in 2007-2008 and either added to existing pick data from 2005 or altered existing pick data from 2005. Both Mr. Glenn and Mr. Meade testified that they only *added* to existing data. During Mr. Meade's deposition, at first he denied that he had made *any* changes to the 2005 pick data after this lawsuit was filed. *Meade Dep.*, at pp. 26-27. Seconds later, however, he testified that *if* there were changes made, there was a good reason for it, but

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[14] Plaintiff has never explained why it could not produce the pick tickets to Seminis sooner than just before trial when it had been in continual possession of them for almost three years.

[15] The importance of the information concerning the interrelation between pick tickets/pick data on the one hand and packout data on the other was not known until Patricia House's deposition which occurred on October 31, 2008, just days before the discovery cutoff. *Maurer Dec.*, at ¶ 10. This is because Plaintiff testified that pick tickets have nothing to do with packout data. *Meade Dep.*, at 73.

[16] The manner in which Plaintiff altered its "pick data" is substantially similar to its alteration of the "pack data". To avoid redundancy, only key facts are set forth herein.

he knew of no *specific* changes. *Id.*, at pp. 27, 68. Mr. Meade testified that most of his and Mr. Glenn's work in 2007-2008 concerned entering 2005 pick data into the system for the first time. *Id.*, at pp. 26-28. Mr. Glenn testified that he only assisted Mr. Meade in entering the pick ticket data from 2005 and that if he found something that was incorrect and needed to be changed, he gave it to Mr. Meade. *Glenn Dep.*, at pp. 33-34, 51, 48-50, 75-76.

As noted previously, neither Mr. Glenn nor Mr. Meade made any effort to utilize the journaling feature to track or otherwise preserve the original data, so that Seminis could determine what changes were made. Accordingly, it is impossible for Seminis to determine whether data was supplemented or changed entirely and Mr. Meade and Mr. Glenn could not say what changes were made.

II. Argument

A litigant has a duty to preserve what it knows, or reasonably should know, is relevant in an action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request. *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 127 (S.D. Fla. 1987), *citing Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F.Supp. 1443, 1455 (C.D.Calif.1984).[17] Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or

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[17] The court in *Thompson* found that a corporate defendant had "knowingly and purposefully" permitted its employees to destroy key documents and records, thereby depriving Plaintiff of access to objective evidence needed to build its case against the defendant. Acting upon its inherent powers as well as Rule 37, Fed.R.Civ.P., the court imposed default judgment as a sanction. *Id.*, at pp. 1455-56.

potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information. *Id.*

"Spoliation" of evidence is the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *Nuccor Corp. v. Bell*, 2008 WL 2721264 (D.S.C. 2008). "Generally, spoliation is established when the party seeking sanctions proves: (1) that the missing evidence existed at one time; (2) that the alleged spoliator had a duty to preserve the evidence; and (3) that the evidence was crucial to the movant being able to prove its prima facie case or defense." *Floeter v. City of Orlando,* 2007 WL 486633 at *5 (M.D.Fla. Feb. 9, 2007)(*citing Optowave v. Nikitin,* 2006 WL 3231422, at *7 (M.D.Fla. Nov. 7, 2006); *Golden Yachts, Inc. v. Hall,* 920 So.2d 777, 781 (Fla. 4th DCA 2006)).

There are a number of sanctions available as a remedy for spoliation of evidence, including any sanction under Fed.R.Civ.P. 37. When critical evidence is destroyed that prevents a defendant from mounting a complete defense and the resulting prejudice is incurable by any lesser sanction, dismissal is the proper sanction. *Flury v. Diamler Chrysler Corp.*, 427 F.3d 939, 947 (11th Cir. 2005). If the moving party is seeking a sanction of dismissal, the court must find that the adverse party acted *willfully* or with *bad faith. Cox v. American Cast Iron Pipe Co.,* 784 F.2d 1546, 1566 (11th Cir. 2006); *accord Telectron v. Overhead Door Corp.*, 116 F.R.D. at 127.

Even *without* a specific finding of bad faith or willfulness, the harsher sanctions of dismissal and default judgment are justified if the spoliation was so prejudicial that it prevents the non-spoliating party from mounting a complete defense. *Flury*, 427 F.3d at 947.

1. Plaintiff breached its affirmative duty to preserve its electronic evidence

Once it became apparent that litigation was foreseeable, Plaintiff had an obligation to preserve any and all relevant evidence related to its claimed loss of yield. This is especially important considering that the touchstone of Plaintiff's claim is proof of a loss in yield. As far back as November 2005, litigation was foreseeable because Plaintiff filed a complaint against Seminis with the Florida Seed Council, alleging defective seed.[18] When Plaintiff filed this lawsuit November 29, 2006,[19] it became critical for Plaintiff to preserve any and all relevant evidence—especially evidence directly related to its claimed damages. When Plaintiff's yield data became subject to numerous discovery requests, beginning on May 22, 2007, it became that much more critical for Plaintiff to preserve its evidence, and Plaintiff's failure to preserve evidence after that point was all the more egregious. "[D]ocument-production requests put the parties on notice that documents should be preserved, regardless of the spoliator's subjective intent." Jamie Gorelick, Stephen Marzen, and Lawrence Solum, *Destruction of Evidence,* § 3.11 (1989). However, when considered in context with Plaintiff's other indiscretions, it is clear that Plaintiff willfully[20] failed to preserve or otherwise destroy evidence, and did so in bad faith. The evidence leads to the inescapable conclusion that

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[18] *See* Doc. 2-2 (Plaintiff's letter of complaint to Florida Seed Council).

[19] This suit was initially filed in State Court (Polk Co., FL).

[20] Willfulness, like bad faith, is associated with conduct that is intentional or reckless. *Long v. Steepro,* 213 F.3d 983, 987 (7th Cir. 2000). Fault does not refer to the noncomplying party's subjective motivation, but rather describes the reasonableness of the conduct. *Langley v. Union Elec. Co.,* 107 F.3d 510, 514 (7th Cir.1997). Fault may be evidenced by negligent actions or a flagrant disregard of the duty to preserve potentially relevant evidence. *Diersen v. Walker,* No. 00 C 2437, 2003 WL 21317276, at *5 (N.D. Ill. June 6, 2003).

this was not simple negligence on the part of Plaintiff, rather it was an intentional manipulation of the very data that Plaintiff says that it exclusively relied on for its damage calculations. *See Meade Dep.*, at pp. 85-86; *See* Deposition of Joyce Eastridge, dated October 17, 2008, at pp. 29-31, and Exhibit 1 thereto (Eastridge Deposition and accompanying exhibit attached as Ex. 6 to *Maurer Dec.*).

2. Plaintiff knew how to and easily could have preserved the evidence

Patricia House testified that there were three different ways Plaintiff could have preserved the original packout data before it was altered. First, Plaintiff could have turned on a "journaling" feature which would have tracked all changes that were made. *House Dep.*, at p. 20. Second, a hard copy of the original data could have been printed and preserved before changes were made. *Id.*, at p. 88. Finally, the information within the database could have been backed up to a disk before it was modified. *Id.*

Roger Glenn, a 20 year veteran of the Kirkey system, was aware of the journaling feature. *Glenn Dep.*, at p. 56. He testified that he made no effort to use the feature while working for East Coast, and he did not even consider it. *Id.* Robert Meade was also aware that the Kirkey system contained a journaling feature. *Meade Dep.,* at p. 70.

Roger Glenn and Robert Meade obviously know their way around the Kirkey system. They both knew of the journaling feature, they certainly knew the difference between "change" mode and "display" mode, and surely they knew that whatever changes they made to the packout data would permanently erase the original data. As such, their decision to change the data without preserving it resulted in a spoliation of the

packout data. The only logical conclusion to be reached is that such conduct was intentional and willful.[21]

The prejudice to Seminis here is great. Seminis has no way of knowing what Plaintiff's true packout data from 2005 was because much of the data has been overwritten by whatever changes were made. Even if, in Plaintiff's best scenario, no changes were made that would impact the damage calculations, it was still incumbent upon Plaintiff to provide Seminis with unadulterated data.[22] Seminis now has absolutely no means by which to verify Plaintiff's packout data, and thus, its damage calculations.

A. Dismissal is warranted

Seminis' request for dismissal is supported by *Flury v. Diamler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005). In *Flury*, Plaintiff sued Diamler Chrysler in a crashworthiness case. The vehicle was, in effect, the most crucial and reliable evidence in the case. By the time Plaintiff filed suit, years later, Plaintiff had allowed the vehicle to be sold for salvage, despite a request from Daimler Chrysler to determine the vehicle's location so that it could inspect the vehicle. *Id.*, at p. 943.

At trial, Plaintiff presented expert testimony regarding airbag malfunction—the alleged defect with the vehicle. (In fact, Plaintiff's entire case rested on the expert testimony.) The court was deeply troubled by the fact that Daimler Chrysler was

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[21] While the controlling case law does not mandate a finding of willfulness *and* bad faith (only one or the other), Seminis believes that the Court could find bad faith as well, after considering Plaintiff's other discovery abuses. *See Flury v. Diamler Chrysler Corp.*, 427 F.3d 939, 947 (11th Cir. 2005); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1566 (11th Cir. 2006).

[22] Notwithstanding Plaintiff's other failures, Plaintiff never disclosed the existence of this data in its Rule 26 disclosures. *See* Exhibit 6, at no. 2 (Plaintiff's Rule 26 disclosures).

precluded from obtaining more reliable evidence tending to prove or disprove the validity of the expert's statements. The court noted, "the spoliation of critical evidence-for whatever reason-may result in trial by ambush." *Id.*, at p. 946 (citation omitted).

The *Flury* court found that malice was not required for the court to make a finding of bad faith. The court found it critical that the motorist was the only party in a position to preserve the vehicle and it failed to do so. *Id.*, at p. 946. The court found that *Flury's* spoliation of critical evidence deprived the opposing party of an opportunity to put on a complete defense. *Id.*, at p. 947. Daimler Chrysler's attempt to ascertain the vehicle's location for inspection was inexplicably ignored, and, as a result, Daimler Chrysler was unable to examine the vehicle's condition. The court found that the resulting prejudice was incurable by any sanction other than dismissal. *Id.*

The case at bar has many similarities to *Flury*, and in many respects, is more egregious. Just as in *Flury*, Plaintiff East Coast was the only party in a position to preserve its critical evidence. Worse yet, unlike *Flury*, East Coast destroyed evidence *after* this lawsuit was filed and *after* Seminis had made repeated discovery requests for the information, with these requests being inexplicably ignored. *Flury* involved the disposal of crucial evidence *before* the lawsuit was filed, when litigation was only foreseeable. It is one thing to allow evidence to disappear, as did *Flury*; it is quite another to make it disappear, as did East Coast. If *Flury's* disposal of the vehicle warranted dismissal, surely East Coast's willful concealment, alteration, and destruction of key evidence does as well.

If there were ever a case that warranted dismissal due to willful spoliation of evidence, it is this one. This is not just a Plaintiff with a cavalier attitude toward the rules of discovery, this is a Plaintiff who has repeatedly resisted, obstructed, and manipulated the evidence.

Requests for Plaintiff's yield information began even well before the filing of this lawsuit, as far back as December 2005.[23] Plaintiff did not respond to those requests. Moreover, Plaintiff never mentioned anything about electronic data in its Rule 26 disclosures.[24] In 2007, when Seminis officially requested the yield data in Requests for Production and Interrogatories, Plaintiff failed to provide complete and responsive information.[25] Throughout 2007-2008, counsel for Seminis sent Plaintiff's counsel approximately thirty seven (37) letters and e-mails requesting the data.[26] These requests were largely ignored. Most disturbing, in late 2007 the alterations to the data at issue did not begin until *just after* the third day of depositions of Plaintiff's key representative, Batista Madonia (at a time when Plaintiff's analyses were under scrutiny).

Plaintiff's clear record of intransigence and contumaciousness throughout the discovery process is precisely the type of situation that the Eleventh Circuit envisions as being appropriate for dismissal or default sanctions. *See, e.g., Ford v. Fogarty Van*

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[23] *See* Exhibit 4 (Letter from Seminis to Plaintiff's counsel dated 12/5/05 requesting certain information); Exhibit 5 (Letter to Plaintiff's counsel from Charles M. Greene dated 1/12/06).

[24] *See* Exhibit 6, at no. 2.

[25] *See* Greene 9/28/08 Declaration, ¶ 2, and exhibit 4 thereto.

[26] *See* exhibit 4 to Greene 9/28/08 Declaration (Doc. 22-6).

Lines, Inc., 780 F.2d 1582, 1583 (11th Cir.1986)(requiring a clear record of intransigence and contumacious conduct in order to justify dismissal). It was absolutely incumbent upon East Coast to preserve all relevant evidence in its original form after this lawsuit began. Considering the fact that Plaintiff is seeking millions of dollars in damages from Seminis, preserving the original data does not seem too onerous a task.

There are three sources of evidence that would enable Seminis to determine Plaintiff's true yield for 2005: (1) pick tickets; (2) pick data; and (3) packout data. As noted throughout this memorandum, every single component is unreliable. It is a circular process: to verify the packout data, one has to examine the pick data, to verify the pick data, one has to examine the pick tickets.

Seminis is left with the word of Plaintiff as to the accuracy of its yield data (data that is demonstrably unreliable). Seminis is now largely unable to cross examine Plaintiff as to key components of its damages claims. Seminis would not be in this position if Plaintiff had played fair and played by the rules. The Eleventh Circuit thought Diamler Chrysler should not have had to rely only on the word of the Plaintiff in *Flury,* when it was *Flury* who was at fault for spoliating the evidence. Likewise, Seminis should not have to rely on East Coast's word when East Coast was the *only* party in a position to preserve the evidence—especially considering the multiple contradictions brought out in certain depositions cited herein.

Plaintiff is not a mom and pop operation which merely made some oversights. Plaintiff is a sophisticated commercial tomato grower with 600 employees and $50 million in annual revenues. *Madonia Dep.*, at 56. It had two employees working on the

pick and pack data project, and it had a service contract with Kirkey. Plaintiff's repeated flagrant violations of the rules of discovery are inexcusable. It is one thing to negligently *allow* evidence to disappear, as a mom and pop shop might; it is quite another to *make* evidence disappear, as did Plaintiff.

If this case is allowed to proceed to trial, and Plaintiff is permitted to use any evidence at all connected with pick data or pack data, Plaintiff's evidence will be presented as something it is not—reliable, and Seminis will be that much more prejudiced. Because each and every source of data for Plaintiff's alleged damages is unreliable,[27] and because Plaintiff's spoliation of the evidence made Plaintiff's records irreconcilable, no sanction less than dismissal will cure the prejudice to Seminis.

III. Conclusion

The evidence clearly shows that significant alterations were made to the pick data and pack pertaining to Plaintiff's yield in 2005. The only logical conclusion to be drawn, especially when considered in context with Plaintiff's pattern of intransigence throughout the discovery process, is that Plaintiff willfully spoliated each of the three components to its 2005 yield data. For the reasons set forth above, Seminis requests the following relief:

1. Because the very foundation of Plaintiff's claim rests on the packout data, which Plaintiff intentionally altered after this lawsuit was filed, and because no lesser

[27]At the appropriate time, Seminis may have additional evidentiary objections concerning reliability and chain of custody issues.

sanction will cure the prejudice to Seminis or enable it to mount a complete defense, Seminis asks this Court to dismiss this action in its entirely with prejudice.

2. In the alternative, this Court should bar Plaintiff from introducing into evidence at trial:

a. paper pick tickets and any evidence whatsoever derived therefrom, including but not limited to electronic pick data, testimony concerning Plaintiff's yield or lack of yield in 2005, summaries, reports, spreadsheets, or other documents tending to show Plaintiff's yield or loss of yield in 2005;

b. packout data and any evidence whatsoever derived therefrom, including but not limited to testimony concerning Plaintiff's yield or lack of yield in 2005, summaries, reports, spreadsheets, or other documents tending to show Plaintiff's yield or loss of yield in 2005.

Pursuant to Local Rule 3.01(j), Seminis respectfully requests oral argument in this matter. Counsel estimates ninety minutes (total) will be required.

Dated this 1st day of December, 2008.

s/Charles M. Greene
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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants: Michael Martin, Esquire, Post Office Box 367, Lakeland, FL 33802-0367.

s/Charles M. Greene