

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

_____)	
ARTHREX, INC. and)	
ARTHREX MANUFACTURING, INC.,)	
Plaintiffs and Counterclaim Defendants,)	
)	
v.)	Case No. 2:10-cv-00151-SPC-DNF
)	
PARCUS MEDICAL, LLC,)	
Defendant and Counterclaim Plaintiff.)	
_____)	

PARCUS MEDICAL LLC’S OPPOSITION TO ARTHREX’S MOTION FOR SANCTIONS BASED ON
SPOILIATION OF ELECTRONIC EVIDENCE (Doc. 385)

Martin E. Levin (admitted *pro hac vice*)
mlevin@sswg.com
Max D. Stern (admitted *pro hac vice*)
mdstern@sswg.com
Jonathan Shapiro (admitted *pro hac vice*)
jshapiro@sswg.com
David L. Kelston (admitted *pro hac vice*)
dkelston@sswg.com
Stern Shapiro Weissberg & Garin, LLP 90
Canal Street, Suite 500
Boston, MA 02114-2022
T: 617-742-5800

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*Attorneys for Defendant & Counterclaim Plaintiff
Parcus Medical, LLC*

I. INTRODUCTION

Parcus's duty to preserve and, upon proper request, to produce, relevant evidence is just that—the duty to preserve and produce evidence relevant to the claims made by Arthrex. Yet, with its spoliation motion, Arthrex asks this Court to sanction Parcus for failing to preserve evidence from the Parcus server that, *as Arthrex well knows*, has in fact been preserved and produced; and for failing to preserve materials from old third party computers that include such items as their *music files, family photographs, and other materials* having nothing to do with Arthrex's claims. Additionally, Arthrex has *knowingly* inflated the number of purportedly deleted individual files by orders of magnitude—*knowingly* including in the count *hundreds of thousands of files that Arthrex's expert concluded were duplicates and wholly irrelevant "system" files* Arthrex considered so immaterial that it chose not to have Parcus review them for production. This is one more baseless sanctions motion actuated by Arthrex's ongoing, constant "litigation about litigation" strategy: imposing oppressive and expensive discovery obligations on Parcus and its consultants, followed by burdensome and costly motion practice over fanciful and exaggerated claims of non-compliance. This one has no more merit than the last, and should be denied.

II. FACTUAL BACKGROUND

Mark Brunsvold resigned from Arthrex in May, 2003, about a year after having sold his medical device manufacturing company to Arthrex and assuming with that company the position of V.P. of manufacturing. For more than two years, Brunsvold worked for a boating company. In November, 2005, he moved to Wisconsin and formed Future Machine, Inc., an "open format job shop" that contracted with other companies to manufacture their products. In 2006, Brunsvold began having discussions with various individuals about forming a new medical device company that would develop,

manufacture and sell a small portfolio of high quality, low cost, commodity-like surgical implants and instruments. These individuals included Bart Bracy, who had worked for Arthrex for 5 years until his departure in 1999,¹ and had subsequently worked for other companies, including Smith & Nephew—one of Arthrex’s primary “brand name” competitors—until joining the Parcus effort;² and Dennis Donnermeyer, who had worked for Arthrex for 18 years until he was fired in 2003, and had subsequently formed and/or worked for other companies, such as Aligned, a medical company where he is vice president.³ The other two Parcus founders were Phil Mundy and Jerry Chickillo, who between them had over 50 years experience with Smith & Nephew, and had never worked at Arthrex. Parcus Medical, LLC, was incorporated in April, 2007. Brunsvold personally acquired many of Future Machine’s assets, including its computer server. In January, 2008, Brunsvold sold those assets to Parcus in return for a stake in the company. See Declaration of David Kelston (“Kelston Dec.”), submitted herewith, at Ex. 1, pp. 286-287. Parcus did not start marketing its own products until 2009.

The Parcus server hosts electronic documents and data associated with its business on the G-Drive. The server hosts the corporate email system on the Microsoft Exchange Server (the “E-Drive”). In the spring of 2008, during the transition of the e-mail server from the Future Machine domain to the Parcus domain, emails were lost. When, two years later, Arthrex filed this action, Parcus attempted to recover these old emails, but was unable to do so. Kelston Dec., Ex. 1, pp. 111-116; Sun Declaration (“Sun Dec.”), ¶157, submitted herewith.

Before Bracy worked for Parcus, he owned a personal laptop and a desktop computer that he used in his Smith & Nephew business. He did not own either of these computers while working for

¹ Prior to Arthrex, Bracy worked for 13 years for a prominent competitor of Arthrex.

² Declaration of Barton Bracy, Doc. 214-2, ¶¶5 – 9.

³ The Donnermeyer laptop computer so prominently discussed in Arthrex’s Motion, is designated with an Aligned label. See Regard Declaration, Doc. 442, Ex. 1 (hereafter “Regard Dec.”), at p. 14.

Arthrex. In or about the late summer of 2006—four years before Arthrex commenced this litigation--the laptop crashed. Bracy purchased a new one and disposed of the old one. However, he maintained his desktop, and that desktop and his newer laptop were both searched for relevant documents after Arthrex filed this action. Kelston Dec., Ex. 3. Over a thousand pages of Bracy's emails, including some dating back to 2007, were produced by Parcus as a result of that search. See, e.g., Kelston Dec., Ex. 4; see, generally, Doc. 76-10, p. 6, Category #3.

Donnermeyer was fired by Arthrex owner Reinhold Schmieding when he put his family above Schmieding's demand that he move from New Hampshire to Florida, Kelston Dec., Ex. 5, pp. 116-17, and Ex. 6. Although from 2008 to 2013, Donnermeyer held the title of VP of Research & Development for Parcus, he worked remotely from New Hampshire,⁴ and his primary responsibilities involved going to meetings to introduce Parcus to doctors, and some work on a product line that never came to market. Kelston Dec., Ex. 5, pp. 119-20, Ex. 2, pp. 27-28.

In 2006, at the time discussions about Parcus began, Donnermeyer owned a "Lenovo" brand laptop, which he used for both personal and business purposes. Kelston Dec., Ex. 2, pp. 28-29, 32; Regard Dec., ¶40.⁵ Donnermeyer started having trouble with the Lenovo seizing up. Kelston Dec., Ex. 2, pp. 72, 121-122.⁶ In October, 2009, he installed CCleaner, which he understood could be used "for cleaning out Spyware and getting your performance back on your computer." Kelston Dec., Ex. 2, p. 85; Regard Dec. ¶45.⁷ Notwithstanding his difficulty using his laptop, in response to Arthrex discovery

⁴ Donnermeyer visited Parcus' facility three times (in six years). Kelston Dec., Ex. 2, pp. 24, 28.

⁵ Donnermeyer testified that he also owned a Compaq computer from his days at Arthrex, but that he did not use that computer once he acquired the Lenovo. Kelston Dec., Ex. 2, pp. 17, 62-63.

⁶ Donnermeyer variously described his computer as "seized," "stuck," "frozen," and, simply, that "it turns on, but it doesn't do anything." Kelston Dec., Ex. 2, pp. 72, 121-122.

⁷ CCleaner is commercially available software that is marketed on the internet as a way to protect online privacy and remove unneeded file systems, not as a way to "shred" or permanently delete computer documents. Sun Dec. ¶43.

requests, Donnermeyer accessed his email account through a different computer to search for responsive emails, and provided to Parcus responsive emails between himself, Bracy and Brunsvold dating back to 2006. A myriad of such emails were produced to Arthrex in 2011. See, e.g., Kelston Dec., Ex. 6; see also *id.* at Ex. 11, ¶11.⁸

In October, 2011, Arthrex “acknowledge[d] that Parcus has produced many documents in this case.” Doc. 103, p. 2 of 7. However, Arthrex pressed for a forensic inspection. *Id.*, at 5 of 7. Parcus agreed to the inspection of its server, as well as the Donnermeyer and Bracy laptops to the extent they still existed. Parcus also agreed that Arthrex’s computer expert would be permitted to conduct a keyword search for all relevant documents. Doc. 108, pp. 5-6.

The parties encountered difficulty when Arthrex proposed a keyword search that Parcus cautioned was “extremely broad and not reasonably calculated to retrieve relevant information.” Kelston Dec., Ex. 8, p. 4. Parcus proposed not only refining the search terms, but using Boolean proximity operators to improve the likelihood of a keyword search that might reasonably be relied on to assist in identifying potentially relevant documents. *Id.*, pp. 4-5. (Arthrex rejected much of what Parcus proposed.) For reasons largely of Arthrex’s own making, Arthrex’s computer expert, SRR, did not image the Parcus server and Donnermeyer laptop until October, 2012. See, Doc. 442, pp. 2-3.⁹ (The

⁸Also in 2011, Parcus produced an August 2010 email from Donnermeyer to Brunsvold, Bracy, and Mundy. Donnermeyer attached to the email an Arthrex powerpoint presentation showing, among other things, Arthrex annual sales numbers and sales projections. Kelston Dec., Ex. 7. When asked at his deposition how he had obtained this presentation, Donnermeyer explained that it was on a thumb drive he and a number of other fishing buddies, some of whom were Arthrex distributors, were circulating at the end of their fishing trip for the purpose of sharing and downloading photographs from the trip. Kelston Dec., Ex. 5, pp. 240-246; Ex. 2, pp. 110-114. Donnermeyer returned the thumb drive to its owner after downloading the photos along with the PowerPoint. *Id.*, p. 115. Although Donnermeyer has testified that he deleted the contents of the thumb drive after the Arthrex Complaint was filed, the email and associated PowerPoint were produced. Kelston Dec., Ex. 5.

⁹In April, 2013, Arthrex informed Parcus that, despite Parcus’s agreement to two separate imaging processes performed by SRR in October, 2012, SRR had inexplicably failed to image the E-Drive on the server. Parcus immediately agreed to yet a third attempt by SRR, and sought to schedule a time by the end of May; but because Arthrex chose to jettison SRR and

Bracy laptop, having been disposed of in 2006, was not imaged.) In December, 2012 and January, 2013, SRR provided to Arthrex's counsel its logs of purportedly deleted files from the Parcus server keyword "hits." In April, 2013, Arthrex identified some 4200 of those files that Arthrex identified as appearing "relevant, non-privileged and responsive to at least one of Arthrex's document requests." Kelston Dec., Ex. 9, p. 2. Among those were documents that Arthrex described as its own "CNC" manufacturing programs; "ISO/Quality Documents" such as those Arthrex had asserted Mark Nemitz improperly took from Arthrex for use in obtaining ISO certification for Future Machine; "Master Validation Plan Documentation," supposedly pertinent to a then claim of Arthrex's; "Intertek/BSI Documents" related to Arthrex's Quality and ISO certification misappropriation claims; and other miscellaneous documents either referencing Arthrex or concerning such things as Parcus price lists, Parcus financial information, and surgeon correspondence. *Id.* at Ex. 9, pp. 3-5.

After acknowledging, but never explaining, "technical issues" with SRR's work, Arthrex withdrew this identification and put a stop to the agreed-upon review and production process. Arthrex then jettisoned SRR, retained iDiscovery and Daniel Regard in their stead, and sought to "re-do" the review process on which Parcus had already spent considerable time and resources with respect to the now withdrawn files and logs. Parcus agreed to Arthrex's "re-do," and the parties agreed that Arthrex could identify up to 5,000 purportedly "deleted/recovered" files from each of the Parcus server G-Drive and the Donnermeyer laptop. Arthrex then designated only 4,850 of the (supposedly) deleted files from the G Drive for Parcus's review, and only 162 such files from the Donnermeyer laptop. With respect to

retain iDiscovery in their stead, that drive was not imaged until November, 2013. Doc. 442, p. 9, and exhibits cited therein; Doc. 442-1, ¶6.

the Parcus E-Drive, Arthrex identified 6,792 deleted files.¹⁰ These files, which included approximately 1200 music and other types of facially irrelevant files, had all been deleted before this action was commenced. Sun Dec, ¶40.

III. ARGUMENT

A. The Regard Declaration Should be Stricken, and the Motion Denied.

For all the reasons stated in Parcus's Motion (Doc. 442), Mr. Regard's Declaration should be stricken. Had his Declaration been timely disclosed, Parcus could have deposed Regard and been able to evaluate whether his testimony should be challenged through a *Daubert* motion. Furthermore, Mr. Regard relies on evidence collected by Arthrex's prior computer forensic consultants, SRR, and information provided to him by those consultants (see, e.g., Regard Dec. ¶¶38, 65). Arthrex has not identified the individuals who performed the relevant work for SRR as among its intended witnesses in this matter (Doc. 393-4), and Parcus has not deposed them. Moreover, Arthrex has admitted that there were undisclosed "technical issues" with their work, such that they withdrew SRR's work product and jettisoned SRR in favor of Mr. Regard. Finally, Mr. Regard opines that the results of his analysis have raised a host of new fact questions through which both he and Arthrex attempt to undermine the credibility of several witnesses. See, e.g., Regard Dec., ¶¶49, 52-53, 62-63, 69. As argued below, Mr. Regard's "unanswered questions" and purported conclusions based on the absence of evidence are wholly insufficient to support Arthrex's motion for sanctions. Nor should Arthrex be permitted to

¹⁰ The E-Drive file images were not subject to the agreement capping the number of files for Parcus's review.

introduce an entirely new expert report after the close of discovery to raise such unfounded questions at trial.¹¹

It is for such reasons that Courts look askance at late-filed motions for spoliation sanctions based on allegations raised only after discovery has closed. See *Vanliner Ins. Co. v. ABF Freight System, Inc.*, 2012 WL 750743, at *3 (M.D.Fla. 2012) (party's delay in filing spoliation motion until the eve of trial undermined contention that any allegedly spoliated evidence was "crucial" to party's case; motion denied); *Johnson v. Next Day Blinds Corp.*, 2012 WL 2871418, at *2-*3 (D.Md. 2012) (spoliation motion denied as untimely where plaintiff waited until the close of two years of discovery to file motion); *Permasteelisa CS Corp. v. Airolite Co., LLC*, 2008 WL 2491747, at *2-*3 (S.D.Ohio 2008)(where plaintiff filed spoliation motion on the eve of trial and a year after discovery disclosed the alleged spoliation, motion denied as untimely). Likewise, the Regard Declaration should be stricken, and Arthrex's motion denied.

B. Arthrex Has Failed to Justify Its Claim for Spoliation Sanctions Against Parcus.

1. The Legal Standard.

Sanctions for spoliation "may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation or potential litigation...and destroys such documents or information." *Vanliner Ins. Co.*, 2012 WL 750743, at *1 (citation omitted). Before the Court orders any such sanctions, it is Arthrex's burden to prove all of the following elements:

"(1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in this case; (2) the spoliating party engaged in an

¹¹ In opposing Parcus's Motion to Strike, Arthrex attempts to excuse its tardy disclosure of the Regard report by casting the blame at Parcus's feet. The record simply does not support that assertion. Furthermore, it was solely Arthrex's decision to "change horses in midstream." Arthrex cannot blame anyone but itself for delay that decision occasioned. Nor can Arthrex explain away why, with full knowledge of the use of CCleaner on the Donnermeyer computer by January, 2013, it chose to wait more than a year to depose Donnermeyer on that subject.

affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator.”

Peeler v. KVH Industries, Inc., 2013 WL 3871420, at *4 (M.D. Fla. 2013)(quoting *Floeter v. City of Orlando*, 2007 WL 486633, at *5 (M.D.Fla.2007)) The law of the Eleventh Circuit is clear: even if Arthrex could prove the first three elements of a spoliation claim, sanctions are not justified unless Arthrex also proves that any evidence lost or destroyed was both “crucial” to Arthrex’s proof of its claims, and that its loss or destruction was the result of Parcus’s knowing and intentional conduct. *Id.*, citing *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir.1997), and *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, 2011 WL 1456029, at *10 (S.D.Fla. 2011).

Although Arthrex and Daniel Regard try to buttress Arthrex’s motion by casting their dark gaze on several others who were caught in the wake of Arthrex’s discovery torpedoes,¹² Arthrex’s sights are principally set on purported evidence deleted from the Parcus server G Drive and Donnermeyer’s “Lenovo” laptop and lost thumb drive. Taking each in turn, it is plain that Arthrex has not met its burden for spoliation sanctions.

2. The Notice of Arthrex’s Claims

A spoliation claim may only be made against a party placed on notice of documents in its possession relevant to claims against it. Furthermore, a party cannot be sanctioned for spoliation for loss of evidence that it could not reasonably anticipate would be relevant to such claims, when they

¹² See, Regard Dec., ¶¶73-85, regarding Svoboda files lost 1 – 2 years before Arthrex commenced this action; ¶¶86-89, regarding the damaged Durlacher computer that Regard does not even claim to have inspected; ¶¶88-89, regarding the Windham laptop that Mr. Windham apparently reported “crashed,” but from which (as Arthrex fails to disclose) he nonetheless produced the documents requested by Arthrex, see Kelston Dec., Ex. 10; and Regard Dec. ¶¶90-103, regarding the Peralta USB drives. To the extent Arthrex contends any of these media support its motion for sanctions, they will be addressed below.

were not stated with sufficient specificity at the outset. *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F.Supp.2d 1317, 1326 (S.D. Fla. 2010).

Arthrex's notice to Parcus of its claims has been anything but specific, and has been a moving target as Arthrex has attempted to mold its claims to whatever it could find by trawling through Parcus's records. Arthrex's Complaint, filed on March 8, 2010, gave Parcus no useful information in this regard: the trade secrets, according to the Complaint, included but were "not limited to" the entire universe of Parcus's activities –its "market strategies, manufacturing techniques, cost information, marketing and sales information". Doc. 1, ¶¶12, 33. Six months later, in its September 2, 2010 answers to Parcus's First Set of Interrogatories and Document Requests, Arthrex narrowed somewhat its claims by linking them to Parcus' initial products, but did not then, or later, identify the supposed trade secrets. Doc. 39, p. 3.¹³

3. Parcus's Productions

Through deposition testimony and production of over 250,000 pages of documents and 3.2 GB of unpaginated electronic data,¹⁴ Parcus has produced, among other things, all its pertinent customer information; cost, pricing, volume and profit margin information; and manufacturing and marketing information, as well as Arthrex documents found on the Parcus server that Arthrex has repeatedly claimed were "stolen" by Parcus for improper use. See Kelston Dec., ¶¶12-14; Doc. 457 at pp. 1-5.

¹³ Relying on Arthrex's September, 2010, interrogatory answers, the Court characterized Arthrex's claim as concerning Arthrex's confidential information about its customers, pricing, volume, profit margin, manufacturing, marketing, and sales to compete against Arthrex with the "select Parcus Medical Products." Doc. 39, p. 4. Those select products were defined to be Parcus's PEEK and Titanium Interference Screws, PEEK and Titanium V-LoX Suture Anchors, Drop Tip Guide Pins, Ratcheting Handle, Braid Suture, and Graft Station. See Doc. 26-2, p. 4. Parcus has shown that what Arthrex has claimed to be "confidential" information does not constitute anything in the way of a legally cognizable "trade secrets." See Doc. 373 generally.

¹⁴ These figures include over 227,000 pages of documents and 2.33 GB of additional electronic data in this case alone. Over 38,000 pages, and .87 GB have also been produced in the parallel Patent litigation pending in this Court, which the parties agree may be used in this Trade Secrets case. Kelston Dec., ¶12.

4. There is Absolutely No Basis for Sanctioning Parcus for Spoliation.
 - a. No evidence relevant to this matter was deleted from the Parcus G Drive

Although Arthrex tries to overwhelm the Court with the quantity of so-called deleted G-Drive files identified by Regard, the fact remains that Arthrex could not even identify as potentially relevant as many as the 5,000 such files that the parties agreed Parcus had to review pursuant to the Court's Order of September, 2012 (Doc. 192) (the "E-Discovery Order"). With respect to those "deleted, recovered" files, Arthrex fails to even meet the threshold for showing spoliation, as none of them was actually deleted from the Parcus server. As Parcus previously advised Arthrex, these files were not deleted, but merely moved from one location on the server to another. Sun Dec., ¶¶33-36.¹⁵ Fully a quarter of these allegedly deleted, but in fact intact, files were produced by Parcus months before Arthrex launched this most recent discovery sanctions salvo. Sun Dec., ¶38. These are the ".CNC" and "AMI" files that Arthrex has accused Parcus of having "stolen," and concerning which Arthrex last November sought a Court finding that Parcus had misappropriated Arthrex trade secrets. See, Doc. 313; Doc. 356 (denying Arthrex's motion for sanctions). Moreover, following Parcus's production to Arthrex of virtually all of the remainder of the purportedly deleted files designated by Arthrex, it is clear that they are both unremarkable and were, in large part or perhaps entirely, previously produced.¹⁶

¹⁵ At his February 25, 2014, deposition, Brunsvold testified at length about Parcus's investigation into the approximately 1200 ".CNC" and "AMI" files that Arthrex alleges Parcus deleted. Kelston Dec., Ex. 1, pp. 80-110. Parcus's consultant, David Sun, confirmed that these files had been moved, and not deleted, in his Declaration submitted by Parcus in opposition to Arthrex's last (and again unsuccessful) effort to have Parcus sanctioned for alleged discovery violations. Doc. 341-3, ¶¶9 – 12.

¹⁶ It is virtually impossible for Parcus, with its limited resources, to determine whether each of the 4,850 files is also contained somewhere in the voluminous Parcus files produced in four years of litigation in this and the Patent Case. But Arthrex will not deny that the supposedly (but not) deleted files include, in major part, repetitious quality management documents previously produced, documents contained in Peralta's production, the previously produced ".CNC" and "AMI" files, and a host of materials not pertinent to issues in this case. E.g., Kelston Dec. at ¶14.

While Arthrex purports to rely on Regard's preposterous generation of over 340,000 purportedly deleted files, over 42,000 of which Arthrex claims were deleted after the E-Discovery Order issued, this is nonsense. In the first place, as Arthrex well knows, the number of purportedly deleted files it has cited is grossly overstated. Mr. Regard himself, upon producing the purportedly deleted files, acknowledged that his results included duplicate files such that the number of purportedly deleted files was half the number represented by Arthrex (and, inexplicably, by Regard himself in his Declaration). Furthermore, Regard gives no account of the types of files purportedly deleted—which include system files¹⁷ and other similar files automatically generated and deleted by the computer itself as a normal operational function, and which can number in the hundreds of thousands over time. Sun Dec. ¶¶29-34. Nor is any such account offered by Regard with respect to the purported 42,000 files deleted after issuance of the E-Discovery Order, some 90% of which have in any event been identified as not actually having been deleted, but simply moved from one location to another on the server. Sun Dec., ¶37.

Finally, the mere deletion of files, no matter the number, type, or whether generated and deleted automatically by the computer or by a user, neither constitutes spoliation, nor grounds for sanctions. To prove spoliation, Arthrex must prove that Parcus destroyed documents or information relevant or potentially relevant to Arthrex's claims. Even if Arthrex was accurate as to the sheer numbers of documents deleted (which it is decidedly not), it has presented no evidence whatsoever that such documents have any bearing on its claims, no less are "crucial" to its ability to prove its claims. Nor has Arthrex presented any evidence whatsoever that anyone at Parcus intentionally

¹⁷ System files include such files that record the computer's background operational activities, such as recording the results of running a virus scan, or automatically saving copies of active word processing documents to prevent loss between user initiated saves. Sun Dec., ¶27.

deleted such documents, knowing them to be relevant or potentially relevant to Arthrex's claims. In short, these large and patently false numbers are but an overzealous advocate's sound and fury, signifying nothing.

- b. There is no evidence sufficient to support Arthrex's requested sanctions based on the loss of emails from the Parcus server's E-Drive.

Despite Parcus's loss of pre-2008 emails from its server, Parcus and others have produced a number of such emails reflecting communications between Brunsvold, Bracy, and Donnermeyer about the formation of the company that would eventually become Parcus. Kelston Dec., Ex. 15, ¶¶12-14. Parcus has produced its emails and other documents concerning that subject that survived the Spring, 2008, transition between the Future Machine and Parcus email exchanges. Arthrex has also deposed Brunsvold, Bracy, and Donnermeyer on multiple occasions covering eight (including Patent Case) days; and has also deposed Parcus co-founder Mundy.

In fact, Parcus has produced full and complete discovery concerning the design, creation, manufacturing and sales of the select Parcus Medical Products, and all its products, dating back to the very beginning. It has produced all of its customer lists and pricing information for those products. This and related discovery was sufficient for Arthrex's experts, no later than July, 2012, to opine that Parcus had gained a 36 month headstart to market (manufacturing expert Ochoa, who compared each and every aspect of Parcus' manufacturing with Arthrex's) or an 18-36 month headstart (sales and marketing expert Weaver, who commented on all aspects of Parcus' sales and marketing).¹⁸ Kelston Dec., ¶14. Thereafter, Parcus, first in response to new discovery requests in the Patent case, produced

¹⁸ It is also worth noting that e-mail resident on Parcus' server was apparently of so little interest to Arthrex that when it first forensically imaged the Parcus server it did not think even to include the E-Drive, but then returned many months later to image it. See note 9, *supra*.

in the summer of 2013 full sales information, by product, customer, and revenue, for all its products, and then, earlier this year in response to a new request for documents in this case, its full manufacturing files –everything, from blueprints to travelers to CNC files to work instructions – for all its products. Doc. 457 at pp. 1-5. Finally, Parcus has produced documents found on its server that Arthrex claims constitute Arthrex trade secret “manufacturing and Quality Management Systems” documents. See, Doc. 417, pp. 3 – 6. See, generally, Doc. 417, illustrating all the discovery Arthrex has obtained through this action that it contends supports its claims.

The fact is that the emails in question were inadvertently lost, two years prior to Arthrex’s filing of suit in this matter, and more than a year before Parcus came to market with its first implants.¹⁹ Furthermore, Arthrex has failed to provide any proof, anything at all even to suggest that any such emails are crucial to Arthrex’s proof of its claims. These facts defeat any claim by Arthrex that Parcus is responsible for spoliating its records, no less spoliating them in bad faith such that Parcus intentionally deprived Arthrex of evidence crucial to its claims. Insofar as Arthrex’s motion is based on Parcus’s own handling of its own documents and discovery obligations, it must be denied. See, e.g., *McLeod v. Wal-Mart Stores, Inc.*, 515 Fed.Appx. 806 (11th Cir. 2013)(spoliation motion denied where defendant, who had accused plaintiff of theft, deleted video showing discovery of location of bag plaintiff was accused of stealing; evidence was not directly pertinent to plaintiff’s claims, and other available evidence was produced with which plaintiff could present her case); *Peeler*, 2013 WL

¹⁹ Arthrex’s sole argument with respect to the pre-2008 emails lost from the E-Drive is that “the missing emails were not found.” Doc. 385, p. 11. However, this is consistent with, and corroborates, Brunsvold’s sworn testimony that the emails were lost during the server transition and, when Parcus itself tried to find them after Arthrex filed suit two years later, they could not be found. (Surely, the overreaching propensity to find and exaggerate intentional file deletion, as reflected in Arthrex’s motion, would have extended to the lost emails if anything at all could have been used to suggest as much.) Arthrex offers nothing to contradict Brunsvold’s sworn testimony on this matter other than its own speculative “suspicions.” See, Sun Dec., ¶¶57-62; see Kelston Dec., Ex. 1.

3871420, at *5 - *6 (spoliation motion denied where defendant disposed of relevant employment documentation following receipt of plaintiff's letters raising claims regarding his compensation; plaintiff's unsubstantiated charge of bad faith was not sufficient evidence in light of defendant's VP's explanation, at deposition, that he thought any possible dispute had been resolved); *Vanliner Ins. Co.*, 2012 WL 750743, at *2 (spoliation motion denied where, following accident, trucking company failed to preserve electronically recorded vehicle maintenance data; failure was negligent, and movant offered only speculation as to what "crucial" data was lost); *Smith v. Bank of America*, 2014 WL 897032, at *3 (M.D.Fla. 2014)(spoliation motion denied where plaintiffs negligently lost or destroyed records potentially relevant to their claims); *Floeter*, 2007 WL 486633, at *7 (M.D.Fla.2007) (spoliation motion denied where, after plaintiff filed complaint, (1) City defendant's old computer was replaced by new computer, (2) deleted files on the old computer (that were allegedly relevant to the case) were not transferred to the new computer, and (3) hard drive from old computer was irretrievably erased; regardless of the suspicious timing of such events and the failure of City's counsel to issue a litigation hold, evidence was insufficient to establish bad faith where the computer replacement procedure was set in motion by City directive issued prior to filing of Complaint); *Point Blank Solutions, Inc.*, 2011 WL 1456029, at *28 - *29 (spoliation motion denied where defendants deleted or overwrote electronic evidence after notice of claim and failure to implement adequate litigation hold, where defendants produced hundreds of thousands of documents, including those plaintiffs deemed to be "egregious," and plaintiffs were therefore not deprived of evidence crucial to proof of their case.); *Managed Care Solutions, Inc.*, 736 F.Supp. 2d at 1332 (spoliation motion denied even though defendant deleted emails and failed to place a litigation hold on documents).

Moreover, Arthrex's insistence that sanctions are appropriate, even without a showing of prejudice, because Parcus failed to institute a "litigation hold," see Motion at 15, is simply wrong as both a matter of fact and law. While Arthrex acknowledges that Parcus' President, Brunsvold, testified that counsel instructed him to maintain documents, see Doc. 385 at 13,²⁰ Arthrex relies on Mr. Donnermeyer's "unequivocal[ly]" testimony that he was never given "any instruction by Parcus to preserve documents." *Id.* But Mr. Donnermeyer's testimony – assuming he understood the question in what was a heated exchange – was mistaken, as shown by counsel's affidavit, Kelston Dec. at Ex. 11. And in any event, as has been emphasized, the Parcus discovery that matters in this case is full and complete: Parcus has produced all its sales, marketing, customer, and manufacturing documents and information, and those Arthrex documents found on its server that Arthrex now contends were "stolen." Under such circumstances, less than perfect litigation hold instructions, and even no litigation hold at all, have been determined an insufficient basis for sanctioning a party accused of spoliation. *Point Blank Solutions, Inc.*, 2011 WL 1456029, at *28-*29 (spoliation motion denied, notwithstanding failure to timely implement litigation hold); *Floeter*, 2007 WL 486633, at *3 - *7 & fn. 3 (spoliation motion denied, notwithstanding lack of litigation hold); *Managed Care Solutions, Inc.*, 736 F.Supp. 2d at 1332 (same).

c. The loss of the Bracy laptop does not provide a basis for sanctioning Parcus.

As noted above, Bracy's laptop was lost in 2006. This was six years after Bracy left Arthrex, four years before Arthrex commenced this action, and a year before Parcus was even incorporated. Again, such facts add nothing to Arthrex's motion for spoliation sanctions against Parcus.

²⁰ See Kelston Dec., Ex. 1, at pp. 80-81.

Arthrex attempts to buttress its case by aggregating the loss of Bracy's laptop with the loss of various media and/or electronic documents belonging to others who worked for or were associated with Parcus, and characterizing it all as "a wide range of suspiciously missing data." Doc. 385, p. 11. However, there is absolutely nothing unusual about computers and related electronic media falling into disrepair, and/or the loss of electronic data over time. Sun Dec., ¶¶8-15 (citing studies showing how frequent and common computer failures and data loss are – "[o]ne large-scale 2010 study found that 55% of respondents had lost 'important data' in the last 2 years," and concluding, *id.* at para. 14, "it is my opinion that the frequency of data loss in this case does not indicate intentional or negligent destruction of data, ..."). Furthermore, on examination of the individual bases of Arthrex's expressed suspicions, one easily sees how truly vacuous they are.

i. The Svoboda computers. Mr. Svoboda, who had previously worked with Brunsvold for 2-3 years at the company he sold to Arthrex, and then at Arthrex, did not join Parcus until November, 2008. Hundreds of Svoboda emails and documents have been produced in response to Arthrex's discovery requests. (Doc. 76-10, p. 4, Category 2) In October, 2011—over two and a half years ago-- Svoboda testified that during his employment with Arthrex as a production scheduler, he occasionally emailed work-related documents to himself at his personal Comcast email address, when he did not have time at the office to complete his work. Kelston Dec., Ex. 12, pp. 260-261. Arthrex presented him with one such email ("Exhibit 23"), sent by Svoboda to himself from his Arthrex email address four days after he had tendered his two-weeks resignation notice to Arthrex.²¹ When asked by Arthrex whether

²¹ Arthrex makes much of the fact that Svoboda emailed this document after resigning from Arthrex to take a job at Parcus. Mr. Svoboda testified this was also a work-related email, Kelston Dec., Ex. 12, pp. 254-256, and it is noteworthy that Arthrex has offered no evidence that the company prohibited taking work home, or moved to prevent Mr. Svoboda from continuing with his normal work after he tendered his notice. Furthermore, Svoboda testified that he did not share the document with Parcus, Kelston Dec., Ex. 12, p. 268, and Arthrex has offered no evidence to the contrary.

he searched his emails for such documents, Mr. Svoboda testified [REDACTED]

[REDACTED] Kelston Dec., Ex. 12, pp. 264-265.

In the two and a half years since, Arthrex has had sufficient time to search its own emails for other such documents sent by Svoboda to himself, but has offered none as evidence of any supposed trade secrets he could have made use of at Parcus. Nor has Arthrex sought such emails by subpoenaing Comcast. Instead, they sought and, with Svoboda's and Parcus's agreement, obtained a Court order to image his personal computers--one purchased in late 2008, and a second purchased several years thereafter. By the terms of the Court order, Mr. Regard was permitted to search not only deleted documents, but the entirety of the computers, for a broad range of keywords. Regard Dec. ¶181. Despite the breadth of his search, Arthrex has pointed to nothing of significance that he found on either computer,²²--leaving only their "suspicions." See, Doc. 385, pp. 11-12.²³

ii. The Peralta media. Peralta, who until 2007 worked for Arthrex in Latin America as a distributor, has never worked for Parcus. Instead, he is an independent distributor who did not start

²² Regard identified a total of 4814 files, and 2,131 "file fragments." Regard Dec. ¶¶81 & 82. The "file fragments" are meaningless, as are the incidence of any "keyword" hits found on any of the computers (see Sun Dec. ¶¶23-26), and courts have determined litigants should not be compelled to review and produce such fragments. See, e.g., *I-Med Pharma Inc. v. Biomatrix, Inc.*, 2011 WL 6140658, at * 5 (D.N.J. 2011)(plaintiff will not be compelled to review and produce file fragments recovered through keyword search of "unallocated space," where defendants failed to demonstrate a likelihood that relevant, non-duplicative evidence would be found in such files). Of the remaining deleted files, Arthrex identified no more than 617 worthy of review, even based on the overbroad, low quality, keyword search conducted by Regard; and among this 617 are "system" and other patently irrelevant files. Sun Dec., ¶¶40-41.

²³ Regard raises question about a possible "gap" in computer usage by Svoboda, based on Regard's inability to obtain data from either computer for the time period 2009 – 2011. Regard Dec., ¶84. That gap is easily explained by the fact that the computer purchased in late 2008 had repeated, serious, operating defects, ultimately requiring its return to the manufacturer and likely replacement of the hard drive or reinstallation of its operating system. Sun Dec., ¶56. Parcus had offered to make Mr. Svoboda available for continued deposition following Regard's analysis, but Arthrex chose to leave Regard's question unanswered, and to spring it after discovery had closed as a basis to question Svoboda's credibility and foment this meritless, and expensive, discovery dispute.

selling Parcus products until 2011. Kelston Dec., Ex. 13. Despite their allegations that Peralta “was providing Parcus with Arthrex information that he himself labeled confidential...,” Regard Dec., ¶91, citing the report of Arthrex’s expert witness, David Weaver, Oct. 7, 2013, p. 46. Arthrex never chose to depose him. Instead, Arthrex sought and, again with Peralta’s and Parcus’s agreement, obtained a Court order permitting Regard to image and analyze two USB hard drives and a damaged computer still in Peralta’s possession. Again, Arthrex has pointed to nothing of significance that Regard found on any of these devices,²⁴ leaving only their “suspicions” based on the fact that some of Peralta’s computer media became damaged. See Doc. 385, p. 12.

iii. The Durlacher computer. Durlacher worked at Arthrex from 1994 to 1998, first as a design engineer and then as director of regulatory affairs and quality assurance. After he left, he began his own regulatory and quality assurance consulting business. Ten years later, in 2008, Parcus retained Durlacher as a business consultant, and he later served as Parcus’s interim manager of regulatory affairs and quality assurance until 2010. Kelston Dec., Ex. 14, pp. 8, 53-54, 86. Durlacher produced documents in response to Arthrex’s subpoenas, including but not limited to emails dating back to February, 2007, concerning communications he had with Bracy and Brunsvold about their plans to form Parcus. See, e.g., PM0059912-0059925, Kelston Dec., Ex. 15. Arthrex also deposed Durlacher and, upon learning that one of his computers “crashed,” and that he unsuccessfully attempted to repair it, Arthrex sought to have a computer consultant (who was not Regard) recover files from the computer. Apparently, Arthrex’s efforts were also unsuccessful. Regard Dec. ¶87; Doc. 385, p. 12.

²⁴ As with Svoboda, Regard included in his report of the Peralta “deleted files” plainly irrelevant files, and file fragments from unallocated space that are meaningless in light of the overbroad keywords and manner in which Regard collected generated such fragments. Sun Dec., ¶¶40-41. As indicated by Arthrex’s silence on the document production generated by Regard’s work, nothing of consequence was found.

iv. The Windham computer. Robert Windham was a regional sales manager for Arthrex until 2000. After leaving Arthrex, he (like Bracy) became a distributor for Smith & Nephew. Nine years after leaving Arthrex, in 2009, Windham became a distributor for Parcus. Doc. 370, Ex. 4, p. 2. Windham was subpoenaed by Arthrex. According to the very document cited by Regard (but not produced by either Regard or Arthrex in connection with this motion), after Windham's laptop "crashed," he purchased a new one, had IT personnel retrieve his data and load it to the new computer, and then produced the retrieved information relevant to Arthrex's document request. See Kelston Dec., Ex. 10, and Regard Dec., ¶89, fn. 7. *In other words, Arthrex got Windham's responsive documents notwithstanding the problem he had with his old computer.* Despite Arthrex's never-ending suspicions and propensity to seek forensic examination of persons' private computers in service thereof, Arthrex apparently pressed Windham no further on the matter. See, Regard Dec., ¶89.

Arthrex's claim that there is anything at all "suspicious" about the problems experienced by the above individuals can be fairly characterized as being wholly unsupported by any evidence, to, in most instances, unmitigated nonsense. Arthrex's claim of any kind of "suspicious pattern" becomes even more frivolous when one considers that this handful of third-parties experiencing computer problems are among the numerous Parcus distributors, vendors, and consultants who produced tens of thousands of pages of documents subpoenaed by Arthrex,²⁵ and concerning whom Arthrex found no "suspicious" computer problems. The only suspicious pattern here is the pattern Arthrex has established throughout this litigation of imposing expensive discovery obligations on Parcus and those with whom it does business, exacerbated by expensive discovery disputes manufactured out of chimerical accusations.

²⁵ See Kelston Dec., ¶14 (Arthrex subpoenaed approximately 70 third parties).

In any event, such suspicions, without any evidence of intentional and knowing destruction of evidence crucial to Arthrex's claims, cannot justify spoliation sanctions against Parcus. Nor, in any event, could Parcus be held responsible for failing to preserve and produce electronic data maintained by such third parties on their own personal computer equipment. See, *McSteel, Inc. v. Eramet North America*, 2006 WL 3334011, at *1 (E.D.Mich. 2006) (defendant corporation could not be sanctioned for destruction of evidence in hands of non-party former employee; spoliation sanctions not appropriate where the evidence destroyed was in the personal custody or control of a third party); *Townsend v. American Insulated Panel Co., Inc.*, 174 F.R.D. 1 (D.Mass. 1997)(party could not be sanctioned for spoliation of evidence in the possession of her non-party employer, absent showing that she was at fault for employer's actions); *Grant v. Salius*, 2011 WL 5826041, at *3 (D.Conn. 2011) ("the spoliation doctrine does not apply...where the opposing party is not responsible for the loss or destruction of the evidence.") (citation omitted).

- d. Arthrex's evidence concerning the Donnermeyer Lenovo laptop and lost thumb drive is insufficient to justify sanctions against Parcus.

As noted above, Donnermeyer, though involved in the initial discussions with Brunsvold and Bracy regarding the formation of Parcus, and subsequently holding, essentially, a very limited position with Parcus, had numerous interests outside of Parcus—including his strong interest in his family that led to his break with Arthrex and Reinhold Schmieding in 2003, and his numerous interests in the development of business having nothing whatsoever to do with Parcus or with the orthopedic medical device industry in which Parcus competes with Arthrex. Arthrex has deposed Donnermeyer on two separate occasions, and issued a document subpoena to him in his individual capacity. Donnermeyer has produced documents to Arthrex, including but not limited to email communications between himself, Brunsvold, and Bracy, dating back to 2006 and concerning the formation of Parcus. See, e.g.,

Kelston Dec., Ex. 6. When Parcus reported that Donnermeyer was having trouble with his personal Lenovo laptop, acquired in 2009, that impeded his ability to search for documents on that device (see, Doc. 76-10, p. 4, Category 1), the parties agreed that Arthrex would be permitted to image the laptop and have it analyzed for deleted files, including a keyword search using words that Parcus had expressly cautioned were overbroad.

i. The Non-CCleaner Files

Based on his analysis, Regard reported 20,872 deleted files on the Donnermeyer Lenovo laptop, including 12,066 files that were deleted using what he characterizes as the CCleaner “shredding” application (referred to hereinafter as the “CCleaner files”). However, of the 8,806 non-CCleaner files, Regard reported only 4,914 remained after deduplication, and of those, only 4,708 were deleted after Arthrex filed this action. Sun Dec., ¶40.²⁶ Although Arthrex was free to designate the entirety of these 4,708 post-suit deleted files for Parcus’s review as potentially relevant, Arthrex identified only 162—strong indication of how few of these files could even be considered potentially relevant under Arthrex’s suspicious glare. Of those 162, only 84 had keyword hits, notwithstanding Arthrex’s decision to proceed with an overbroad keyword search that (by Arthrex’s lights) identified wholly irrelevant deleted files, including family photographs found on the Donnermeyer laptop, as potentially relevant. See Sun Dec., ¶¶16-21. Indeed, four out of the five deleted files that could be opened for review were family photographs.²⁷ Kelston Dec., ¶21 and Ex. 17. In total, about half of the 162 files designated by Arthrex were likely deleted personal photographs. Kelston Dec., ¶20 and Ex. 19. Neither Regard nor Arthrex has presented any evidence that any of the non-CCleaner files were

²⁶ Included among these files are approximately 2500 files that are facially irrelevant to this matter. Sun Dec., ¶40.

²⁷ Most of the deleted files designated by Arthrex were corrupt and not repairable, so Parcus was unable to open them for review. Kelston Dec., Ex. 16.

intentionally deleted, or that they constitute evidence potentially relevant to Arthrex's claims, no less evidence crucial to their claims.

ii. The CCleaner Files and thumb drive.

Arthrex's case for spoliation boils down to the 12,066 CCleaner files found on the Donnermeyer laptop. Contrary to Arthrex's characterization of CCleaner as "an electronic shredding tool" (Doc. 385, p. 6), CCleaner is just another software product widely marketed through the internet as a way to clean up one's computer to make it run faster, and to protect one's online privacy to make one's computer more secure. Sun Dec, ¶¶43-44.²⁸ This is precisely the reason Donnermeyer acquired the product in October, 2009—a half year before Arthrex filed its Complaint.

Moreover, CCleaner does not describe the application used in May, 2011, as "shredding." Rather, it provides a user-friendly Settings menu that gives the user two options for its use: "Normal file deletion (Faster)" and "Secure file deletion (Slower)". With a single, simple, click of the mouse, one can select the "Secure file deletion" option, which is the option resulting in the kind of overwritten CCleaner files that appear on the Donnermeyer laptop. There is nothing inherently suspicious or nefarious about a user, when offered these options, choosing to delete files securely—the menu says nothing about "shredding" of files. See Sun Dec., ¶¶44-46, 49.

CCleaner acts to delete files whether or not they have been intentionally "targeted" by the user for deletion. In other words, it acts to delete files that are automatically created by the computer as part of its normal use and without the user's knowledge or intent, such as "system files" and temporary files created on the computer during the course of surfing the internet—resulting in the secure deletion of

²⁸ Indeed, Regard himself acknowledges that individuals legitimately use such software "to clean up files on a regular basis." Regard Dec., ¶47.

thousands of such files even after light use of the computer, and even though the user has not intentionally deleted any files whatsoever. Sun Dec., ¶¶45-55. There is nothing about the CCleaner files that in any way contradicts Donnermeyer's explanation that he used the product to clean out Spyware, cookies, and other similar files to enable him to use his computer, rather than to intentionally delete anything of potential relevance to this case.

Donnermeyer retrieved relevant emails from his personal email account and produced them. Parcus produced its copies of emails received from Donnermeyer, including but not limited to the email forwarding the Arthrex powerpoint presentation that Donnermeyer downloaded onto his computer from the thumb drive that also contained the photographs from his fishing trip with old Arthrex buddies (see fn. 8, above). Other than their suspicions arising from the timing of the use of CCleaner, Arthrex offers nothing regarding any evidence relevant to this matter that Donnermeyer possessed and then securely deleted, no less evidence "crucial" to its claims. Nor has Arthrex offered any evidence that would call Donnermeyer's testimony that he used the CCleaner to clean Spyware and viruses from his computer into question. See Sun Dec., ¶55 ("... my investigation discovered no evidence contradicting Mr. Donnermeyer's testimony that he used CCleaner 'once,' based on his understanding that it 'cleans out viruses. It cleans out spyware. It cleans out cookies. It cleans out temporary files,' and that the 12,066 files were deleted '[b]ecause it did what it was supposed to do, remove information that was clogging the computer'"). Arthrex has failed to sustain its burden in seeking sanctions based on Donnermeyer's deletion of files using CCleaner. *Keen v. Bovie Medical Corp.*, 2013 WL 3832382 (M.D.Fla. 2013)(plaintiff's use of special software to delete and "wipe clean," and thereby render unrecoverable, data from his laptop at time he anticipated initiating claim against defendant held insufficient to justify spoliation sanctions, notwithstanding the suspicious timing of his acts; defendant

failed to show that deleted data was crucial to its case or that the relevant evidence was unavailable from another source); *Peeler*, 2013 WL 3871420, at *5 - *6 (spoliation motion denied where defendant disposed of relevant employment documents following receipt of plaintiff's letters raising claims regarding his compensation; plaintiff's unsubstantiated charge of bad faith was not sufficient evidence in light of defendant's VP's explanation, at deposition, that he thought any possible dispute had been resolved).

Finally, even had Arthrex borne its burden of showing that Donnermeyer intentionally spoliated evidence crucial to Arthrex's claims, this would not justify imposing sanctions on Parcus. The computer at issue is not a Parcus computer, but Donnermeyer's personal computer. Parcus duly instructed the client to provide any and all documents in its possession relevant to this case. Kelston Dec., Ex. 11. Parcus had no control over what Donnermeyer did with materials in his personal possession, and there is no evidence that Parcus had any knowledge that Donnermeyer deleted anything relevant to this case or had failed to take the steps requested to provide all relevant documents to Parcus for review and production. Nor is there any evidence that Parcus had any knowledge of, or made any use of, any confidential trade secrets in Donnermeyer's possession. On these facts, Parcus cannot be sanctioned based on what Arthrex claims Donnermeyer did. *Liberty American Ins. Group, Inc. v. Westpoint Underwriters, L.L.C.*, 199 F.Supp. 2d 1271 (M.D. Fla. 2001) (Defendant employer could not be liable for misappropriation of plaintiff's trade secret computer code, even though employee had used the code to employer's benefit, but employer neither knew employee had retained code nor had made use of it). See, also, *McSteel, Inc. v. Eramet North America*, 2006 WL 3334011, at *1 (E.D.Mich. 2006) (defendant corporation could not be sanctioned for destruction of evidence in hands of non-party former employee; spoliation sanctions not appropriate where the evidence destroyed was in the

personal custody or control of a third party); *Townsend v. American Insulated Panel Co., Inc.*, 174 F.R.D. 1 (D.Mass. 1997)(party could not be sanctioned for spoliation of evidence in the possession of her non-party employer, absent showing that she was at fault for employer's actions); *Grant v. Salius*, 2011 WL 5826041, at *3 (D.Conn. 2011) ("the spoliation doctrine does not apply...where the opposing party is not responsible for the loss or destruction of the evidence.") (citation omitted).

IV. CONCLUSION

For the foregoing reasons, Parcus respectfully requests that Arthrex's Motion for Sanctions Based on Spoliation of Electronic Evidence (Doc. 385) be denied.

Respectfully submitted,
PARCUS MEDICAL, LLC
By its attorneys:

/s/ Martin E. Levin

Martin E. Levin (admitted *pro hac vice*)
mlevin@sswg.com

Max D. Stern (admitted *pro hac vice*)
mdstern@sswg.com

Jonathan Shapiro (admitted *pro hac vice*)
jshapiro@sswg.com

David L. Kelston (admitted *pro hac vice*)
dkelston@sswg.com

STERN SHAPIRO WEISSBERG & GARIN, LLP
90 Canal Street, Suite 500
Boston, MA 02114-2022
Ph: 617-742-5800
Fax: 617-742-5858

Joseph Dee Stewart
fish-on@jdslegal.com
Law Office of Joseph D. Stewart, PA
2671 Airport Road, Suite 302
Naples, FL 34112
Ph: 239-775-4450
Fax: 239-775-8581

Dated: May 29, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 29, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notice of Electronic Filing.

/s/ Martin E. Levin

Martin E. Levin

SERVICE LIST

Anthony P. Cho (admitted *pro hac vice*)
David L. Atallah (admitted *pro hac vice*)
Brian S. Tobin (admitted *pro hac vice*)
CARLSON, GASKEY & OLDS, P.C.
400 W. Maple Rd., Suite 350
Birmingham, MI 48009
Telephone: (248) 988-8360 / Facsimile: (248) 988-8363
DAtallah@cgolaw.com
ACho@cgolaw.com
BTobin@cgolaw.com

Richard D. Raskin (admitted *pro hac vice*)
Michael P. Doss (admitted *pro hac vice*)
Joseph R. Dosch (admitted *pro hac vice*)
Sidley Austin, LLP
One South Dearborn Street
Chicago, IL 60603
Telephone: (312) 853-7000 / Fax: (312) 853-7036
rraskin@Sidley.com
MDoss@Sidley.com
jdosch@Sidley.com

Andrew H. Reiss
CHEFFY PASSIDOMO, P.A.
821 Fifth Avenue South
Naples, FL 34102
Telephone: (239) 261-9300 / Facsimile: (239) 261-9782
ahreiss@napleslaw.com