**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

**SIMON PROPERTY GROUP, INC.,**

**Plaintiff,**

**v.** **Case No. 6:11-cv-01598-GAP-KRS**

**LYNNETTE LAURIA, *et al.*,**

**Defendants.**

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**PLAINTIFF'S OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION**

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**DEFENDANT'S OBJECTION TO REPORT AND RECOMMENDATION AND DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SPOLIATION OF EVIDENCE**

Defendant, LYNNETTE LAURIA ("Lauria"), individually and d/b/a Marketing Resource Network ("MRN"), XLM Marketing ("XLM"), Excell Services ("Excell"), XLM Excell, and PR Works, Defendant RJL SERVICES, LLC ("RJL"), Defendant ARNELL, INC. ("Arnell") and d/b/a XLM, and Defendant SNOUTHOUND ENTERPRISES, LLC ("Snouthound") (collectively the "Lauria Defendants"), by and through counsel, pursuant to 28 U.S.C. § 636, Rule 72 of the Federal Rules of Civil Procedure, and hereby files her objections to the Report and Recommendation of the Magistrate entered December 13, 2012 [Docket Entry 256] recommending that the Plaintiff's Motion of Sanctions be granted, making a finding of spoliation and imposing sanctions against Lauria. In support, Plaintiff would show:

## I. FACTS AND PROCEDURAL HISTORY

Simon is a publicly traded company that owns and operates Malls throughout the United States. Lauria served as Simon's Vice President of Mall Marketing for the Florida and Puerto Rico Regions from approximately June 2007 to August 2011. Simon alleges that Lauria established and/or retained an interest in numerous businesses who charged Simon fees for services. In June 2011, a disgruntled former employee of one of the Defendants contacted Simon and made allegations that Lauria engaged in improper conduct. On August 1, 2011, Simon sent preservation demand letters to all of the businesses having suspect transactions that were awarded under Lauria's supervision. Simon also held an employee interview with Lauria at the Florida Mall on August 1, 2011, wherein it disclosed the disgruntled former employee's allegations and hand-delivered the preservation letter to Lauria. During the interview, Lauria admitted her ownership interest in several businesses that were doing business with Simon. Simon suspended Lauria's employment as a result of the interview, and she retained counsel thereafter. On August 5, 2011, her counsel of record in this lawsuit emailed Simon a letter that reflected an attorney-client relationship. On August 8, 2011, Simon responded to Lauria's counsel with a letter that terminated Lauria's employment retroactively as of August 1, 2011 for a violation of Simon's Code of Conduct and for falsifying records. On September 30, 2011, Simon filed the Complaint. On November 11, 2011, it served its First Requests for Production (the "Requests") on the Lauria Defendants. The Lauria Defendants responded to the Requests. Simon filed an Amended Complaint after the production, which alleged additional claims against the Lauria Defendants. Counts I and III–VIII are against Lauria, while Counts II–V are against Defendants RJL, Arnell, and Snouthound. Simon deposed the Lauria Defendants on September 24 and 25, 2012. Lauria appeared as the corporate representative for RJL, Arnell, and Snouthound. The Lauria Defendants testified that RJL and Arnell both used the same, single laptop computer to conduct their business with Simon. Lauria testified that she threw the laptop "[i]n the river" after she knew Simon was investigating her alleged improper conduct.

On October 26, 2012, Plaintiff filed its MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE AGAINST DEFENDANTS LYNNETTE LAURIA, RJL SERVICES, LLC, ARNELL, INC., AND SNOUTHOUND ENTERPRISES, LLC WITH INCORPORATED MEMORANDUM OF LAW. On December 13, 2012, the Magistrate issued her Report and Recommendation recommending that the Plaintiff's Motion of Sanctions be granted, making a finding of spoliation and imposing sanctions against Lauria.

Lauria does not herein attempt to defend her act of destroying the laptop computer. As the Magistrate correctly asserted, "this is the relatively rare case in which the spoliator admitted that she destroyed evidence." Report and Recommendation P. 14. Lauria was suffering from extreme emotional distress after being confronted by her employer and severely embarrassed over any potential risk she had exposed her husband and daughters to and acted in desperation. Lauria does, however, contend that the Plaintiff has not satisfied its burden to establish spoliation of evidence that was of a nature that warranted the Magistrates recommended sanction of default.

## II. LAURIA'S FAILURE TO FILE A RESPONSE TO MOTION FOR SANCTIONS

As was correctly pointed out by the Magistrate, Lauria did not file a response to the Motion for Sanctions. R&R, P. 2. However, contrary to the Magistrate's conclusion, Lauria would state the the failure to file a response was due to excusable neglect.

On November 2, 2012, shortly after the Motion for Sanctions was filed, then counsel for Plaintiff had filed a motion for substitution of counsel and substitution of party [Docs. 232 & 233]. At that time, new counsel for the Plaintiff joined in the case and the Court allowed the Plaintiff's prior counsel to withdraw.

Counsel for Lauria immediately engaged Plaintiff's new counsel in a conversation regarding the Motion for Sanctions that had been filed and asked for on open ended extension of time to

file a response such that Plaintiff's new counsel would have the opportunity to review the file and determine if he wished to move forward on the Motion for Sanction. See November 14, 2012 email correspondence attached as Exhibit A.

Counsel for Plaintiff did not immediately respond to the request so Lauria counsel sent another email requesting an extension on November 15, 2012. See email correspondence attached as Exhibit B. Plaintiff's counsel opposed the open ended extension and Lauria counsel proposed a 30 day extension of time. Counsel for Simon ultimately agreed to a 15 day extension of time to file a response. See Exhibit D attached.

Due to the press of other issues within this litigation, namely 4 solid day s of depositions in this matter and other pressing issues with regard to discovery, counsel for Lauria failed to file the agreed Motion for Extension of Time to file a response and, ultimately, failed to file a response.

At this time, Lauria is not challenging many of the factual assertions related to her conduct in the Plaintiff's Motion. Lauria fully acknowledges, regrettably, that she did indeed throw the laptop computer in the river and thereby denied Simon the opportunity to review any of the data contained therein. However, Lauria does challenge and disagrees with the assertion that there was anything of any evidentiary value on the affected laptop computer. Simon quotes heavily from Lauria's deposition however they never specifically ask, nor does Lauria state, that there was in fact any evidence on that computer that would assist them in proving or establishing its allegations. In fact, Simon is in possession of the hard copies of documents generated by Lauria from which it could ask questions. These documents are not the type that the metadata of the electronic version would provide the smoking gun of guilt.

Lauria respectfully requests that this Honorable Court consider all arguments made in this Objection to the Magistrate's Report and Recommendation regardless of Palintiff's failure to file

a timely Response to the Plaintiff's Motion. The Plaintiff requests that the Court reject the Magistrates finding of Sanctions against Lauria in the form of a default, and if this Court deems sanctions to be warranted, impose an adverse inference instruction in the alternative. This litigation is one based purely on innuendo, supposition and some rather erroneous conclusions on the part of the Plaintiff. This matter is one that should be fully litigated and a jury allowed to decide the case on the merits and the evidence.

## III. STANDARD OF REVIEW

District courts are afforded broad discretion in determining whether to award spoliation sanctions. Appropriate sanctions may include an adverse judgment, the denial of a defendant's motion for summary judgment, issuing jury instructions that raise a presumption against the spoliator, or the exclusion of evidence. In re Delta/AirTran Baggage Fee Antitrust Litig., 770 F. Supp. 2d 1299, 1305 (N.D. Ga. 2011)

"Spoliation" is the 'intentional destruction, mutilation, alteration, or concealment of evidence." *Optowave Co. v. Nikitin*, No. 6:05-cv-1083-Orl-22DAB, 2006 WL 3231422, at 7 (M.D. Fla. Nov. 7, 2006)(quoting Black's Law Dictionary 1437 (8th ed. 2004)). Federal law governs the imposition of spoliation sanctions in this case, but state law may be consulted to guide the Court in its analysis. *See Martinez v. Brink's, Inc.*, 171 F. App'x 263, 268 n. 7 (11th Cir. 2006); *Optowave*, 2006 WL 3231422, at 8 (citing *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005)). The plaintiff, as the moving party on a spoliation motion, has the burden of proof. Point Blank Solutions, Inc. v. Toyobo Am., Inc., 09-61166-CIV, 2011 WL 1456029 (S.D. Fla. Apr. 5, 2011).

Generally, spoliation is established when the party seeking sanctions proves that: (1) the missing evidence existed at one time; (2) the alleged spoliator had a duty to preserve the evidence; and (3) the evidence was crucial to the movant being able to prove its *prima facie* case or defense. *See Optowave*, 2006 WL 3231422, at 8; *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 781 (Fla. 4th Dist. Ct. App. 2006). In meeting the requirement to demonstrate that the spoliated evidence was **crucial** to the movant's ability to prove its *prima facie* case or defense; it is not enough that the spoliated evidence would have been relevant to a claim or defense. Managed Care Solutions, 736 F.Supp.2d at 1327–28 (S.D. Fla. 2010) (emphasis in original). Plaintiff makes the naked assertion that "[M]etadata of the marketing and advertising and public relations materials saved as electronically stored information ("ESI") on the laptop would have been determinative of when they were created" (Motion for Sanctions, p. 2). Plaintiff attempts to go on and state that this is a critical matter for its case. However, this is not entirely true. Lauria has provided to Simon a list of hotels that the marketing materials at issue were distributed to. The fact is these hotels can testify to either receiving the marketing materials and when, or that these materials were never delivered to them. The metadata of these documents does nothing to assist the Plaintiff's case in this instance. Plaintiff is also in possession of the hard copy of invoices and service agreements that were contained within Lauria's desk at Simon. Plaintiff was able to ask questions of Lauria during the depositions as to the legitimacy of the document, by whom it was created, and if the signatures affixed, if any, therein were legitimate. The metadata of these documents would again do nothing to assist the Plaintiff's case. If anything, the metadata and related ESI would inure to the benefit of Lauria in her defense of these allegations.

There are three different types of adverse inferences, ranging in differing and ever-increasing levels of harshness. One type results in a jury being instructed that certain facts are deemed admitted and must be accepted as true. Another type results in the imposition of a mandatory, albeit rebuttable, presumption. A third type permits a jury to presume that the lost evidence is relevant and favorable to the innocent party. With this third type of adverse inference, the jury also considers the spoliating party's rebuttal evidence and then decides whether to draw an adverse inference. Point Blank Solutions, Inc. v. Toyobo Am., Inc., 09-61166-CIV, 2011 WL 1456029 (S.D. Fla. Apr. 5, 2011).

The highest level of sanction available to the Court is the default judgment. But, before the ultimate sanction of default judgment may be entered, this Court must make the following findings: (1) that Defendant acted willfully or in bad faith; (2) that Plaintiff was prejudiced by Defendant's conduct; and (3) that lesser sanctions would not serve the punishment-and-deterrence goals set forth in *National Hockey League* and its progeny. These prerequisites have been developed as a means of ensuring the proper balance between the need to engender good-faith adherence to the rules of discovery, on the one hand, and a commitment to protecting the parties' constitutional and policy interests in a full and fair adjudication of their claims, on the other. Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 131 (S.D. Fla. 1987) The imposition of a default judgment as a Rule 37 sanction is controlled by the same guidelines as the entry of a dismissal order. *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 488 (S.D.Fla.1984), *aff'd in part, rev'd in part,* 775 F.2d 1440 (11th Cir.1985). Both are extreme remedies which should only be imposed if less drastic sanctions cannot properly redress the wrongdoing. *See Hashemi v. Campaigner Publications, Inc.*, 737 F.2d 1538 (11th Cir.1984); *Aztec Steel Co. v. Florida Steel Corp.*, 691 F.2d 480, 481–82 (11th Cir.1982); *Bryant v. City of*

*Marianna, Florida*, 532 F.Supp. 133, 137 (N.D.Fla.1982). In short, a court has "broad, although not unbridled, discretion in imposing sanctions, including default judgment and dismissal, under Rule 37." *Dorey v. Dorey*, 609 F.2d 1128, 1135 (5th Cir.1980) (citations omitted); *accord, Wilson v. Volkswagen of America, Inc.*, 561 F.2d at 503; *see Joselson v. Lockhart-Bright Associates*, 95 F.R.D. 160, 163 (E.D.Pa.1982); *National Lawyers Guild v. Attorney General*, 94 F.R.D. 600, 615 (S.D.N.Y.1982); *Perry v. Golub*, 74 F.R.D. 360, 364 (N.D.Alabama 1976). Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 129 (S.D. Fla. 1987)

## IV. ARGUMENT

The Magistrate abused its discretion when it recommended that Defendant be sanctioned. Given the complex and expansive counts brought by the Plaintiff, the Magistrate, during its deliberation should go through each individual count and decide whether the party seeking sanctions has proven that: (1) the missing evidence existed at one time; (2) the alleged spoliator had a duty to preserve the evidence; and (3) the evidence was crucial to the movant being able to prove its *prima facie* case or defense. *See Optowave*, 2006 WL 3231422, at 8; *Golden Yachts, Inc. v. Hall*, 920 So.2d 777, 781 (Fla. 4th Dist. Ct. App. 2006) The Magistrate instead used broad sweeping language to include each distinct Count into one analysis per element needed to establish sanctions for spoliation. The Magistrate does this by repeating that Defendants do not dispute [elements or facts]. But the reason for Defenses' silence was its reliance upon an extension to respond given by Plaintiff's attorney. **(See Exhibit A)**.

The Magistrate does state that the spoliated evidence on the laptop is so crucial to the establishment of the Plaintiff's *prima facie* elements that no lesser sanction can properly redress the wrongdoing. This was an abuse of discretion. In meeting the requirement to demonstrate that the spoliated evidence was **crucial** to the movant's ability to prove its *prima facie* case or

defense, it is not enough that the spoliated evidence would have been relevant to a claim or defense. *Managed Care Solutions,* 736 F.Supp.2d at 1327–28 (S.D. Fla. 2010) (finding that the allegedly spoliated evidence was not crucial to the plaintiff's claims because it could still prove its case through other evidence already obtained elsewhere). *See also Floeter v. City of Orlando,* 6:05–cv–400–Orl–22KRS, 2007 WL 486633, at *6 (M.D.Fla. Feb. 9, 2007) (missing emails may be relevant to Plaintiff's case but they were not critical and would have been cumulative).*Point Blank Solutions, Inc. v. Toyobo Am., Inc.,* No. 09–61166–CIV, 2011 WL 1456029, at *8 (S.D.Fla. Apr. 5, 2011) (emphasis in original). QBE Ins. Corp. v. Jorda Enterprises, Inc., 280 F.R.D. 694, 696 (S.D. Fla. 2012) The Plaintiff had the duty to demonstrate why the spoliation of the Defendant's laptop significantly harms its ability to prove its claim. QBE Ins. Corp. v. Jorda Enterprises, Inc., 280 F.R.D. 694, 697 (S.D. Fla. 2012) The Plaintiff in its motion spends only a total of a page and a half suggesting reasons why they cannot establish their *prima facie* elements for all of the counts. This generalized dart game attempted by Plaintiff is not enough to meet the burden of establishing why they cannot now establish the *prima facie* elements of each count. "[Plaintiff's] failure, to establish that the allegedly spoliated evidence is "crucial" to its defense is alone reason enough to deny the motion. QBE Ins. Corp. v. Jorda Enterprises, Inc., 280 F.R.D. 694, 698 (S.D. Fla. 2012)

The crux of the Magistrates reasoning as to why this spoliation is crucial is "without the information stored on the laptop, Simon does not have evidence necessary to impeach any testimony Lauria or others might give about the work that the Lauria Companies performed. Therefore, Simon has established that electronically stored information on the laptop is crucial to proving its claims against Lauria and the Lauria Companies." (Report and Recommendation Page 13-14) The Magistrate does not address the existence of other witnesses, i.e., hotel

employees, who are able to provide testimony to support or controvert the existence of these alleged facts. In fact, the Plaintiff has been well able to elicit testimony of Lauria herself during deposition who has freely admitted to what services were and were not provided. There are numerous third party witnesses who can support or controvert her assertions.

The Magistrate, in its Report and Recommendation also is silent as to why a lesser sanction than default would not be able to cure the wrong doing that was freely admitted to by Lauria – the destruction of the laptop. The Magistrate states that "Neither Lauria nor the Lauria Companies have objected to Simon's requested sanction." (Report and Recommendation Page 17) Plaintiff concedes that facts alleged in a Motion that has gone without a response are deemed admitted, the requested sanction is still clearly within the discretion of the Court. Lauria would restate that she in good faith relied upon Plaintiff's representation of an extension to the response time; and then, due to excusable neglect failed to file the agreed motion extending the time for response

The burden of proof is on the Plaintiff to demonstrate why the spoliated evidence is not only well beyond relevant to each count raised but is crucial to its ability to prove a *prima facie* claim. To illustrate the Plaintiff's failure to meet this burden, Lauria respectfully states the following items from her unfiled Response.

**A. Count I Breach of Fiduciary Duty**

With respect to Counts I Plaintiff merely states an example of what might have been on the laptop, this violates the first element required to prove spoliation, that evidence exists, this example states nothing about actual evidence it describes hypothetical evidence. Alternatively, any evidence that would be found on Defendant's laptop is not crucial to establish the Defendant breached her fiduciary duty. *See Floeter v. City of Orlando*, 6:05–cv–400–Orl–22KRS, 2007 WL

486633, at 6 (M.D.Fla. Feb. 9, 2007) (missing emails may be relevant to Plaintiff's case but they were not critical and would have been cumulative) Other readily available evidence can prove whether or not Defendant breached her fiduciary duty and there is no evidence alleged to have been on the computer that would establish if Lauria had a fiduciary duty to Plaintiff, and, if so, how that duty was breached. Plaintiff does not mention how the evidence that was in the computer is crucial and that other available evidence will not suffice. Accordingly, default by Defendant of Count I was an abuse of discretion.

**B. Count II Aiding and Abetting Breach of Fiduciary Duty**

By virtue of intentionally destroying the laptop, the Lauria Defendants prejudiced Simon's ability to establish the claims against them. With respect to Counts I and II, RJL and Arnell's recordkeeping on the laptop might have shown, for example, both Lauria's breach of fiduciary duty to Simon and RJL and Arnell's knowledge of the breach. In addition, Lauria admitted that the Excel spreadsheets reflected "business expenses." Ex. A, Lauria Dep. at 107:3–9. The actual expenses, or lack thereof, would have shown that RJL and Arnell were charging Simon "exorbitant fees" for little to no services. There is no documentary evidence, either electronic or hard copy, that would go to establish this Count. The "Lauria companies" are essentially alter egos of Lynnette Lauria. Whether a company can have knowledge of a fiduciary duty and further legal aid and abet in a breach of that fiduciary duty is a question of law.

**C. Count III Fraud**

Likewise, Simon has been prejudiced in establishing Count III for fraud because, among other things, metadata associated with the marketing and advertising materials produced by the Lauria Defendants might have proven that the Lauria Defendants' allegation that valuable services were provided to Simon was no more than a misrepresentation. Stated another way, if

the materials were not yet in existence when they were allegedly distributed, then this would have been a misrepresentation of material fact to Simon.

**D. Count IV Civil Conspiracy**

In the same vein, Counts IV and VIII, both sounding in conspiracy, have been prejudiced as well. Circumstantial evidence may be used to show that an overt act was taken in furtherance of the conspiracy. Here, metadata of ESI on the laptop might have shown that the Lauria Defendants frequently created documents after-the-fact as a cover to give the appearance of legitimacy in an effort to conceal fraudulent acts. Plaintiff is in possession of all of the emails on the Simon server and, in addition, had full benefit of emails between Lauria and the co-defendants as evinced by its use of those emails during depositions.

**E. Count V Conversion**

RJL and Arnell's recordkeeping, consisting of Excel spreadhseets that have been provided to the Plaintiff. Plaintiff is in possession of all invoices provided to it during the course of business dealings at issue in this litigation. Plaintiff has failed to establish that any evidence on the destroyed laptop would have provide any crucial evidence required to prove their claims. Therefore, a default as to count V is an abuse of discretion.

**F. Count VI Florida Statutes Civil Theft**

Similarly, Simon claims it has been prejudiced in establishing Count VI for civil theft because ESI on the laptop might have reflected how Lauria organized, planned, or distributed money fraudulently obtained from Simon. Plaintiff has failed to establish that any evidence on the destroyed laptop would have provide any crucial evidence required to prove their claims. Therefore, a default as to count VI is an abuse of discretion.

**G. Count VII Racketeer Influenced and Corrupt Organizations Act**

Simon claims it has been most prejudiced in its ability establish Count VII for violating the Racketeer Influenced and Corrupt Organizations Act. *See* 18 U.S.C. § 1964(c). Simon alleges, without any further justification, that ESI might have aided Simon in showing how the Lauria Defendants were associated with an enterprise; how Lauria participated in the enterprise's affairs; how Lauria knowingly committed wire fraud by establishing merchant accounts to process payment for fraudulent businesses; and all the ways the enterprise in which Lauria was involved affected interstate commerce.

Plaintiff has failed to allege facts in its complaint sufficient to establish a cause of action under the RICO Act as alleged in this count. Further, Plaintiff has failed to establish that any evidence on the destroyed laptop would have provide any crucial evidence required to prove their claims. Therefore, a default as to count VII is an abuse of discretion.

**H. Count VIII Racketeer Influenced and Corrupt Organizations Act**

For the same reasons as asserted above in Paragraph G, Plaintiff has failed to plead a cause of action under Count VII. Further, Plaintiff has failed to establish that any evidence on the destroyed laptop would have provide any crucial evidence required to prove their claims. Therefore, a default as to count VIII is an abuse of discretion.

## V. CONCLUSION

For the reasons set forth above, Lauria and the Lauria Defendants respectfully requests that this Honorable Court decline to adopt the Report and Recommendation made by the Magistrate relative to the Plaintiff's Motion for Sanctions.

Respectfully submitted this 27th day of December, 2012.

**ECF CERTIFICATE OF SERVICE**

I hereby certify that on December 27, 2012, I electronically filed the foregoing with the clerk of the court by using the CM/ECF System which will send a notice of electronic filing to all counsel and parties of record.

/s/ Thomas A. Sadaka

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# EXHIBIT A