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

SOUTHEASTERN MECHANICAL SERVICES, INC., Plaintiff, v. NORMAN BRODY, JAMES SHEROUSE, KEVIN SMITH, THERMAL ENGINEERING CONSTRUCTION SERVICES, INC. (A/K/A TEI CONSTRUCTION SERVICES, INC.), BABCOCK POWER SERVICES, INC., AND THEODORE MALISZEWSKI, Defendants.	)	CIVIL ACTION FILE NO. 8:08-cv-1151-T-30EAJ

PLAINTIFF SOUTHEASTERN MECHANICAL SERVICES, INC.'S MOTION FOR SANCTIONS DUE TO SPOLIATION OF EVIDENCE AND FOR ORDER TO SHOW CAUSE, OR, IN THE ALTERNATIVE, TO AMEND THE COMPLAINT

Plaintiff Southeastern Mechanical Services, Inc. ("SMS" or "Plaintiff") hereby moves the Court to order Defendants Kevin Smith, Norman Brody, Jimmy Sherouse (the "Individual Defendants"), Theodore Maliszewski, Thermal Engineering Construction Services, Inc. ("TEI") and Babcock Power Services, Inc. ("Babcock") (collectively, "Defendants") to show cause why they should not be held in contempt of this Court's June 13, 2008 Temporary Restraining Order ("TRO"), [Doc. No. 11], because they willfully destroyed or allowed to be destroyed key evidence likely supporting Plaintiff's claims. SMS also moves for sanctions against the Defendants for their destruction of evidence. In the alternative, SMS requests that it be allowed to amend its Third Amended Complaint [Doc. No. 197] to add a cause of action against Babcock Power, Inc. ("BPI") for spoliation of evidence.

INTRODUCTION

Since determining that they no longer wished to work for SMS, the Individual Defendants, in partnership with their new employers, have embarked on a course of conduct that epitomizes duplicity, disloyalty, and bad faith. They conspired for months to leave Plaintiff's employ and when they did, they took Plaintiff's confidential, proprietary, and trade secret documents to a competitor. The latest chapter in this sordid saga involves the intentional deletion of electronically stored documents that would have shed light on Defendants' wrongdoing. The culprit's tracks were covered by the deletion, but the record evidence is clear. The TEI Blackberries issued to Brody, Sherouse and Smith were completely wiped. Likewise, the laptops were also wiped of all e-mails. Either Defendants deleted or were instructed to delete the evidence (meriting contempt and/or sanctions) or Robert Barrett, in his capacity as Chief Information Officer of Babcock Power, Inc., did so (supporting a cause of action for spoliation).

BACKGROUND

The Individual Defendants left their positions as members of SMS's core sales team in late May 2008 and immediately went to work for a competitor, TEI.[1] While still working for SMS, the Individual Defendants used SMS's computers and business information to plan their competition. They took confidential information and trade secrets belonging to SMS and solicited SMS's customers to take their business to TEI. Knowing that what they were doing was at a minimum wrong, and likely illegal, the Individual Defendants attempted to hide their actions from SMS. The deception involved deleting e-mails and other files from various computers, and ultimately resulted in the spoliation of key evidence, not coincidentally to the sole benefit of the Defendants and detriment of Plaintiff.

[1] BPI is a parent company of TEI.

This pattern of electronic chicanery first came to light when, upon his resignation, Sherouse returned his SMS-issued laptop to the company after having used specialized software to delete all the data on the computer. Prelim. Inj. Order [Doc. No. 87] at. 56 ; Sherouse Depo. 69:25-70:3.[2] His only explanation for having deleted every scrap of information on his company-issued laptop was that he had some personal information related to his mother on the computer. Sherouse Depo. 74:23-75:15. Similarly, Defendant Brody intentionally deleted all his Outlook files (including business related e-mails and contacts) on his SMS computer prior to leaving, claiming that he had been instructed by SMS to delete "junk" e-mails. Prelim. Inj. Order [Doc. No. 87] at 52 . Unfortunately, the deletion of SMS e-mails and other data belonging to SMS was just the tip of the iceberg.[3]

This Court's June 13, 2008 TRO ordered Defendants to return all SMS information, including SMS documents on the Individual Defendants' TEI-issued laptops and Blackberries. [Doc. No. 11]. The laptops and Blackberries were likely to contain discoverable evidence showing that the Individual Defendants took confidential documents and trade secrets from SMS and gave them to TEI. It also likely revealed how the Defendants used the SMS information in contacting customers. At the direction of BPI, the Individual Defendants gave their laptops and Blackberries to Robert Barrett, BPI's Chief Information Officer, on or about June 17, 2008. Barrett 30(b)(6) Depo. 48:24-50:22. The laptops and Blackberries were in Mr. Barrett's possession, custody, or control until June 25, 2008 when Mr. Barrett produced the laptops and

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[2] Deposition transcripts cited herein are attached collectively as Exhibit A.

[3] Amazingly, Defendants have moved for sanctions against Plaintiff for spoliation of evidence, arguing that Plaintiff is somehow responsible for the loss of evidence that ***Defendants intentionally deleted*** from SMS computers. While Plaintiff responds more fully to this ridiculous argument elsewhere, it bears noting that Defendants acknowledge they engaged in destruction of evidence.

Blackberries to an independent entity, Esquire Litigation Services. Barrett 30(b)(6) Depo. 49:4-50:22. Esquire Litigation Services then provided these computer devices to Plaintiff's expert in computer forensics, Jon Kessler, Manager of Data Acquisitions and Forensics for The Oliver Group. Forensic Expert Report at 5, attached hereto as Exhibit B.

Upon examination of forensic images of the hard drives, Mr. Kessler discovered that all three of the Blackberries had been completely "wiped" and were uniformly devoid of any information. Id. at 7. Mr. Kessler opined that there were two possible explanations for the wiped state of the Blackberries. Id. at 8. First, someone could have intentionally selected a command on the Blackberry that deletes all the information on the device, a process that requires confirmation of the user's intent to delete the information. Id. Second, someone could have repeatedly entered an incorrect password, and continued doing so after receiving a warning that deletion will result from additional incorrect password entries. Id. These particular methods restore a Blackberry to the same state as when it left the factory – a far more thorough and tech-savvy wiping than manually deleting files. Id. In short, there is no explanation for the "wiped" state of the Blackberries other than the intentional deletion of all information.

With respect to the TEI-issued laptops, Mr. Kessler determined that they were conspicuously devoid of any e-mail contents. Id. ("The hard drive images did not contain any email files or email container files; although they did have Lotus Notes installed. Some of the recovered file fragments may have been part of an email but there is no way to confirm this since the data does not reside in an email container or an email formatted individual file."). That is, despite being loaded with an e-mail program, not a single e-mail was present or discoverable through Mr. Kessler's forensic analysis of any of the three laptops. All the Blackberries and

laptops (at least as to e-mails) had been intentionally "wiped" and whatever information had been on them before they were produced was now irretrievably destroyed.

All the Individual Defendants testified that they used their laptops and Blackberries between the time they were hired by TEI and the time they were placed on administrative leave – a span of approximately two weeks.[4] Indeed, there are several hard copies of e-mails produced by Defendants that show e-mails being sent to and from the Individual Defendants' TEI e-mail accounts during that timeframe.[5] However, by the time the laptops and Blackberries were examined by Plaintiff's expert, there was not a single identifiable e-mail on any of the six devices. In essence, Plaintiff received nothing but empty shells, virtually stripped of their evidentiary value. There are only two explanations for the state of the devices as received by Mr. Kessler: (1) the Defendants uniformly deleted the information before giving the devices to BPI's CIO, Mr. Barrett, or (2) Mr. Barrett deleted the information on all six devices before turning them over to Esquire Litigation Services. If the former, the Court should sanction the Defendants for their spoliation of this evidence as set forth below. If the latter, the Court should

[4] Sherouse Depo. 81:8-85:2 (admitting that Sherouse's TEI Blackberry had been used for at least internet access, and may have had a record of e-mails); Sherouse Depo. 145:19-146:13 (admitting that Sherouse had received voicemail on the phone number associated with his TEI Blackberry); Sherouse Depo. 161:16-161:24 (admitting he received e-mail from Smith after June 2, 2009); K. Smith Depo. 255:9-10 (admitting he created ABC Strategy document on TEI laptop); Preliminary Injunction Order, para. 59 (finding that Sherouse, Smith, and Naughton e-mailed electronic copies of the Paragon bid among themselves); Brody Dep. 13:11-14:14 (admitting that Brody sent and received e-mails on TEI Blackberry, which was synchronized with TEI laptop).

[5] See e-mails among Sherouse, Brody, Smith, and Naughton using TEI-issued e-mail accounts, June 4, 2008, attached hereto as Exhibit C; e-mail among Sherouse, Brody, Smith, and Joffrion using TEI-issued e-mail accounts, June 5, 2008, attached hereto as Exhibit D; e-mail from Smith to Sherouse and Naughton using TEI-issued e-mail accounts, June 5, 2008, attached hereto as Exhibit E; e-mail from Sherouse to Brody, Smith, Naughton, Joffrion, and prospective customers using TEI-issued e-mail accounts, June 5, 2008, attached as Exhibit F.

permit Plaintiff to amend its complaint to set forth a cause of action against BPI for spoliation of evidence.

ARGUMENT AND CITATION OF AUTHORITY

I. Defendants Should Be Ordered to Show Cause Why They Should Not Be Held in Contempt for Their Violation of the TRO

Defendants' uniform deletion of electronic evidence from the TEI laptops and Blackberries occurred after they had been served in this lawsuit and placed on notice of the Court's TRO entered June 13, 2008. [Doc. No. 11]. The TRO specifically prohibits Defendants from destroying evidence and orders them to "preserve all computer files, data, documents, or similar information on their computers until further notice by this Court." Id. The Defendants had sole possession, custody, and control over the TEI laptops and Blackberries issued to the Individual Defendants between the time they were placed on notice of the TRO and the time those devices were delivered to BPI and Mr. Barrett. Thus, Defendants must have deleted the evidence, whether acting on their own or at the behest of someone else with the technological knowledge to put the deletions beyond the reach of Plaintiff's computer forensics expert.

The Court should therefore order the Defendants to show cause why they should not be held in contempt of the TRO for having "wiped" their Blackberries and deleted files from their laptops after being served with the TRO.[6] There is only one reason why the Defendants should not be held in contempt of the TRO: Mr. Barrett is the one who deleted the information. If Defendants should not be in contempt because Mr. Barrett, acting on behalf of BPI deleted the evidence, then Plaintiff should be permitted to amend its complaint to include a cause of action

[6] Notably, this would not be the only time Defendant Sherouse flaunted the Court's TRO. See Sherouse Depo. at 158:7-159:6 (admitting that, on behalf of TEI, he solicited a customer of SMS on June 24, more than a week after being served with the TRO); see also TRO [Doc. No. 11] at 4 ("Defendants, their agents, and employees are restrained from soliciting any business from any of SMS's clients or customers.").

against BPI for spoliation of evidence. If the Defendants did not violate the TRO because they deleted the evidence before receiving notice, the Court should enter sanctions against Defendants for their intentional spoliation as set forth below.

II. Defendants Engaged in Sanctionable Spoliation of Evidence

A. Defendants' Intentional Destruction of Evidence Constitutes Spoliation

"'Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'" Graff v. Baja Marine Corp., No. 08-10413, 2009 U.S. App. LEXIS 1986 (11th Cir. Feb. 2, 2009) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)). Spoliation undermines the integrity of the judicial process, and is therefore strictly prohibited. For Defendants, spoliation was the best available strategy for covering their tracks.

B. The Court Has Broad Authority to Sanction Defendants for Their Spoliation of Evidence

Whether a party has engaged in spoliation of evidence is a question of federal law for the Court. Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir. 2005) (holding that "federal law governs the imposition of spoliation sanctions"). However, federal law in the Eleventh Circuit does not set forth specific guidelines for dealing with spoliation of evidence; therefore, a federal court's spoliation analysis is informed by the forum state's spoliation law. Id. ("Federal law in this circuit does not set forth specific guidelines, therefore, we will examine the factors enumerated in [the forum state's] law.").[7]

[7] St. Cyr v. Flying J Inc., No. 3:06-cv-13-33TEM, 2007 U.S. Dist. LEXIS 42502, *7 (M.D. Fla. June 12, 2007) (noting that "courts may look for guidance from state law as long as those principles are consistent with federal spoliation principles"); Optowave Co. v. Nikitin, No. 6:05-cv-1083-Orl-22DAB, 2006 U.S. Dist. LEXIS 81345, *24 (M.D. Fla. Nov. 7, 2006) ("Although federal law controls spoliation sanctions, the Court's opinion may be 'informed' by state law, as long as it is consistent with federal law, because federal law in the Eleventh Circuit does not set

"Under Florida law, the remedy for a party failing to produce crucial but unfavorable evidence that is destroyed or inexplicably disappears is an adverse inference or discovery sanctions." Optowave Co. v. Nikitin, No. 6:05-cv-1083-Orl-22DAB, 2006 U.S. Dist. LEXIS 81345, *24 (M.D. Fla. Nov. 7, 2006). Nevertheless, a federal district court retains broad discretion to sanction those who intentionally destroy relevant evidence. Flury, 427 F.3d at 944 ("We have long acknowledged the broad discretion of the district court to impose sanctions. This power derives from the court's inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases."). This Court should use its discretion, under both federal and Florida law, to impose the strictest of sanctions on Defendants for their spoliation of key evidence, or their complicity therewith.

C. Defendants, Acting in Bad Faith, Destroyed Critical Evidence that They Were under a Legal Duty to Preserve

Defendants have unquestionably engaged in spoliation as set forth under relevant case law: (1) the now-missing evidence existed at one time; (2) Defendants had a duty to preserve the evidence; (3) the evidence was critical to Plaintiff's case; and (4) Defendants acted in bad faith.[8] These factors are each satisfied by Defendants' misconduct, which is supported by an abundance of documentary, testimonial, and expert evidence.

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forth specific guidelines on spoliation."); but see Graff v. Baja Marine Corp., No. 08-10413, 2009 U.S. App. LEXIS 1986, *6 (11th Cir. Feb. 2, 2009) ("To determine whether spoliation sanctions are warranted, a court must consider the factors identified in Flury v. Daimler Chrysler Corp., 427 F.3d 939.").

[8] Optowave Co. v. Nikitin, No. 6:05-cv-1083-Orl-22DAB, 2006 U.S. Dist. LEXIS 81345, *25 (M.D. Fla. Nov. 7, 2006) ("Prior to the court exercising any leveling mechanism due to spoliation of evidence, the court must decide: 1) whether the evidence existed at one time, 2) whether the spoliator had a duty to preserve the evidence, and 3) whether the evidence was critical to an opposing party being able to prove its *prima facie* case or a defense."); see also Kimbrough v. City of Cocoa, NO. 6:5-cv-471-Orl-31KRS, 2006 U.S. Dist. LEXIS 87572, *14-15 (M.D. Fla. Dec. 4, 2006).

1. *The TEI Laptops and Blackberries Contained E-mails*

The now-missing documents, consisting, at a minimum, of e-mails on the TEI laptops and Blackberries, existed at some point prior to their deletion.[9] Each Individual Defendant has admitted that he used his TEI-issued e-mail address, laptop, and/or Blackberry: Brody admitted that he sent and received e-mails on his TEI Blackberry, which was synchronized with his TEI laptop; Sherouse admitted that his Blackberry had received voicemail and had been used for internet access; and Smith admitted he created the ABC Strategy document on his TEI laptop and e-mailed it to various other TEI employees. See supra notes 3-4. Yet despite each of the Individual Defendants acknowledging that they used their TEI equipment, there was not a single e-mail on the laptops or Blackberries produced to Plaintiff. Forensic Expert Report, Ex. B at 8. By admission of the Defendants, there is no question that these documents existed, and have now been deleted.

2. *Defendants Knew This Litigation Was Likely When They Destroyed the Evidence*

At the time the Defendants attempted to cover their tracks, they were under a legal obligation not to destroy evidence that would be relevant in this reasonably foreseeable lawsuit.[10] That litigation is reasonably foreseeable is sufficient to create a duty not to destroy evidence. See Flury v. Daimler Chrysler Corp., 427 F.3d 939, 945 (11th Cir. 2005) (noting that "[e]ven absent defendant's unambiguous request for its location, plaintiff should have known that the

[9] Although a few e-mails have been produced as hard copies, see supra note 5, a significant number of documents are still missing. See Lockheed Martin Corp. v. L 3 Communications Corp., No. 6:05-cv-1580-Orl-31KRS, 2007 U.S. Dist. LEXIS 79572, *10 (M.D. Fla. Oct. 25, 2007) (denying motion for sanctions due to spoliation because no allegation that e-mails have not been produced in other format, and therefore no evidence of "missing" documents).

[10] Assuming, of course, that Defendants spoliated evidence before receiving notice of the TRO.

vehicle [the spoliated evidence], which was the very subject of his lawsuit, needed to be preserved and examined as evidence central to his case").[11] Thus, if Defendants had reason to anticipate litigation, they had an obligation not to destroy evidence that would be relevant to that litigation.

But litigation was not just "reasonably foreseeable" to Defendants. The undisputed evidence shows that Defendants in fact anticipated this litigation. Indeed, they even budgeted $100,000 of their anticipated start-up costs to defending this very lawsuit. Prelim. Inj. Order [Doc. No. 87] at 23 (e-mail from Naughton to Maliszewski on February 19, 2008, budgeting $100,000 for "fighting a lawsuit" with SMS, which was predicted by Defendant Smith); see also K. Smith Depo 246:8-14 (Smith admitted he anticipated a lawsuit relating to his leaving SMS "[b]ecause of the nature of Aquilex"). Thus, Defendants had a clear obligation not to destroy evidence that would be relevant to the litigation that they actually anticipated would happen.[12] Yet in the face of this legal obligation, Defendants deleted or allowed to be deleted key evidence in a deliberate attempt to hamper Plaintiff's ability to prove this very case.

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[11] See also St. Cyr v. Flying J Inc., No. 3:06-cv-13-33TEM, 2007 U.S. Dist. LEXIS 42502, *9 (M.D. Fla. June 12, 2007) (noting that "the duty to preserve evidence may arise prior to commencement of litigation"); Floeter v. City of Orlando, No. 6:05-cv-400-Orl-22KRS, 2007 U.S. Dist. LEXIS 9527, *16 (M.D. Fla. Feb. 9, 2007) (holding that duty to preserve evidence may arise "if a party is on notice that documents or tangible items may be relevant or discoverable in pending or imminent litigation"); Optowave Co. v. Nikitin, No. 6:05-cv-1083-Orl-22DAB, 2006 U.S. Dist. LEXIS 81345, *32-33 (M.D. Fla. Nov. 7, 2006) ("Almost five months after being put on notice as to possible litigation . . . Defendant allowed another party to reformat the hard drives of his employees' computers without first preserving relevant files contained on the computers to be reformatted. . . . The Court finds that [Defendant] allowed relevant evidence to be destroyed in bad faith.")

[12] In addition to this general legal obligation not to destroy documents relevant to foreseeable litigation, Defendant Brody was under a contractual obligation not to destroy SMS documents pursuant to his restrictive covenant agreement. Brody Dep. 110:17-111:25 (Mr. Brody states that he understood he was not to delete any files from his SMS computer or SMS Blackberry).

3. *The Spoliated Evidence Would Have Been Central to Plaintiff's Case Against Defendants*

Defendants likely destroyed the smoking gun(s) showing that the Individual Defendants misappropriated Plaintiff's trade secrets and gave them to their new employers, the remaining Defendants. The very time period of the missing e-mails (the first two weeks of their employment) is precisely the time when new, eager-to-please employees share such information with their new employer. See, e.g., K. Smith Depo. at 254:5-257:4 (stating that the Individual Defendants met with Naughton soon after starting to discuss the customers they would target and their business plan for competing with SMS). Moreover, the number of missing documents and their importance to Plaintiff's case is underscored by the fact that **all** the Individuals Defendants thought it necessary to delete **all** their e-mails.[13] Defendants apparently either possessed so many damaging documents that they had to delete all their e-mails, or the documents were so damaging that they were willing to sacrifice everything to hide them.[14]

While Plaintiff has obtained significant documentary and testimonial evidence supporting its claims, the deleted evidence, and more importantly, its location on the Individual Defendants' TEI laptops and Blackberries, would be devastating to Defendants' position. The loss of this evidence seriously hinders Plaintiff's ability to determine the full measure of Defendants' wrongful conduct.

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[13] It is not clear whether the Individual Defendants reached this conclusion independently, as a group, or were advised to delete their e-mails by someone else. The uniformity and irretrievability of the deletions, however, suggests advice or direction from someone with significant technical knowledge.

[14] Assuming, of course, that one or more Defendants have not retained copies of the deleted documents and refused to produce them in this litigation.

4. *Defendants' Bad Faith Actions Are the Sole Reason the Evidence Was Destroyed*

Defendants acted in bad faith when they intentionally deleted the evidence that had been stored on their laptops and Blackberries. With regard to some of the deletions, Plaintiff has direct evidence of Defendants' intentional wrongdoing. See Forensic Expert Report, Ex. B, at 7-8 ("wiped" state of Blackberries can only be explained by deliberate action after warning of imminent deletion). Even if Plaintiff did not have such direct evidence, circumstantial evidence may be sufficient to show bad faith by the spoliator. See Kimbrough v. City of Cocoa, No. 6:05-cv-471-Orl-31KRS, 2006 U.S. Dist. LEXIS 87572, *20 (M.D. Fla. Dec. 4, 2006) (noting that circumstantial evidence is sufficient to establish bad faith, where witness saw document, heard paper being crumpled and torn, and then did not see document afterward).

The thoroughness with which Defendants performed their deletions underscores their intentional bad faith. Defendants apparently would have the Court believe that **three** individuals, all of whom worked remotely, with **three** laptops and **three** Blackberries among them, after at least **two weeks** of employment, ***didn't have a single record of a single e-mail anywhere.***[15] More likely than such an unbelievable coincidence, Defendants possessed evidence that was critical to Plaintiff's claims and then destroyed that evidence, either on their own or at the behest of someone else, in bad faith. The only question remaining is what sanctions the Court should impose on the Defendants for their blatant wrongdoing.

[15] And this, in the face of at least a few hard copies of e-mails clearly showing that the Individual Defendants used their TEI e-mail accounts. See note 5.

III. Sanctions for Spoliation of Evidence Before Notice of TRO

A. The Court Has Discretion to Craft the Appropriate Sanction for Defendants' Spoliation

The Court has broad discretion to sanction Defendants for their spoliation, which has caused unfair prejudice to Plaintiff and undermined the integrity of the discovery process . Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir. 2005) (noting that "sanctions for discovery abuses are intended to prevent unfair prejudice to litigants and to insure the integrity of the discovery process").[16] District courts in the Eleventh Circuit have a variety of sanctions in their arsenal, ranging from default judgments to exclusion of evidence to adverse inference jury instructions to attorneys' fees and costs. Id. at 945 ("As sanctions for spoliation, courts may impose the following: (1) dismissal of the case; (2) exclusion of expert testimony; or (3) a jury instruction on spoliation of evidence which raises a presumption against the spoliator.").[17] Additionally, the Court may exercise its authority under Rule 37 to sanction discovery abuses such as Defendants' spoliation.[18] Optowave Co. v. Nikitin, No. 6:05-cv-1083-Orl-22DAB, 2006 U.S. Dist. LEXIS 81345, *23 (M.D. Fla. Nov. 7, 2006) ("Federal Rule of Civil Procedure 37 also authorizes a panoply of sanctions for a party's failure to comply with the rules of discovery. . . .

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[16] See also St. Cyr v. Flying J Inc., No. 3:06-cv-13-33TEM, 2007 U.S. Dist. LEXIS 42502, *11-12 (M.D. Fla. June 12, 2007) ("Federal courts possess the inherent power to regulate litigation, and broad discretion to sanction litigants for abusive practices. . . . If a court determines that a sanction for spoliation of evidence is warranted, the 'determination of an appropriate sanction . . . is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis.'" (quoting Optowave at *37)).

[17] See also Optowave Co. v. Nikitin, No. 6:05-cv-1083-Orl-22DAB, 2006 U.S. Dist. LEXIS 81345, *22 (M.D. Fla. Nov. 7, 2006) ("The courts have the inherent power to enter a default judgment as punishment for a defendant's destruction of documents.").

[18] Id. at *36 n.15 ("Under Federal Rule of Civil Procedure 37, the analysis is essentially the same as under the Court's inherent power, and the result would be the same.").

Although Rule 37(b) applies when a party fails to comply with a court order, Rule 37(d)'s requirement that a party participate in discovery that is not regulated by the court expressly adopts most of the sanctions in Rule 37(b)(2), including the power to grant a default judgment.").

B. Defendants' High Degree of Culpability Has Caused Significant Prejudice to Plaintiff that Can Be Cured Only by Strict Sanctions

Given the variety of sanctions available, the Court must choose the appropriate level of sanctions necessary to punish Defendants for their reprehensible conduct and to cure the prejudice suffered by Plaintiff as a result. This Court may consider three factors when determining the type of sanctions to issue for spoliation of evidence: (1) the willfulness or bad faith of the Defendant; (2) the degree of prejudice sustained by Plaintiff; and (3) what is required to cure the prejudice. St. Cyr, 2007 U.S. Dist. LEXIS 42502 at *12-13.

1. *Defendants Acted in Bad Faith and Are Highly Culpable*

First, Defendants' willfulness and bad faith, or their "culpability," far outweighs any culpability by SMS. See id. at *13 ("In addressing the bad faith factor in Flury, the Eleventh Circuit 'weigh[ed] the degree of the spoliator's culpability.'" (quoting Flury at 946)); see also Graff v. Baja Marine Corp., No. 08-10413, 2009 U.S. App. LEXIS 1986, *7 (11th Cir. Feb. 2, 2009) ("Even if the plaintiffs did not act with malice when they spoliated evidence, the plaintiffs were the more culpable party and caused the [defendants] substantial prejudice. . . . Accordingly, the district court's decision to [impose sanctions for spoliation of evidence] is affirmed."). In this instance, Defendants are not only the *more culpable* parties, they are the *only* culpable parties. Indeed, Defendants' specific anticipation of this litigation, coupled with their intentional deletion of evidence, shows that they bear an extraordinarily high degree of culpability. No other party bears any culpability for the deletion of documents that were in the sole possession of

Defendants, likely showed that Defendants were liable, and are now conspicuously missing. Thus, weighing culpabilities tilts the scale heavily in favor of Plaintiff's requested sanctions.

2. *Plaintiff Has Been Significantly Prejudiced by Defendants' Spoliation*

Second, Plaintiff has suffered significant prejudice as a result of the destruction of this evidence. Plaintiff alleges that Defendants misappropriated its trade secrets, stole its confidential information, and committed various other illegal acts causing significant damage to Plaintiff. The very documents that would have proved Plaintiff's claims were deleted by Defendants – resulting in prejudice of the worst kind. St. Cyr, 2007 U.S. Dist. LEXIS 42502 at *14 ("'The most obvious and important type of prejudice arises when a party blocks its opponent's access to evidence that the opponent needs to fairly litigate a consequential issue, claim, or defense.'" (quoting 7 Moore's Federal Practice § 37.50[1][a] (3d ed. 2002))).

3. *Significant Sanctions Are Required to Cure the Prejudice to Plaintiff*

Third, only a significant sanction can cure the prejudice caused by Defendants. When the documents that prove liability are intentionally and wrongfully destroyed to avoid that liability, no sanction short of default judgment can fully cure the harm done. See id. at *15 ("'Outright dismissal of a lawsuit . . . is within the court's discretion.'"). Defendants, through their own wrongdoing, have denied Plaintiff the opportunity to present evidence likely showing that the Defendants are undeniably liable as alleged by Plaintiff. The only adequate cure is to establish what Plaintiff could have proved with access to the spoliated evidence – that Defendant engaged in the wrongdoing as alleged. See Flury v. Daimler Chrysler Corp., 427 F.3d 939, 946 n.14 (11th Cir. 2005) (noting that "'a jury charge is insufficient to counter the prejudice to a party who, because of the destruction of evidence, was unable to put on a full defense of its case.'" (quoting Chapman v. Auto Owners Ins. Co., 469 S.E.2d 783, 784 (Ga. App. 1996)). Thus,

striking Defendant's Answer and entering a judgment by default in favor of Plaintiff is the appropriate remedy for Defendants' spoliation of critical evidence.

4. *Alternative/Additional Sanctions for Defendants' Spoliation of Evidence*

Should the Court exercise its discretion and not enter a default judgment against Defendants, the Court should rule that it is conclusively established that the Individual Defendants' TEI laptops and Blackberries contained trade secrets and other confidential, proprietary information belonging to Plaintiff; that the remaining Defendants were aware of that fact; and that the Defendants used SMS's confidential information to compete with SMS. Establishing a fact as a sanction is specifically authorized by Fed. R. Civ. P. 37(b)(2)(B). See Optowave Co. v. Nikitin, No. 6:05-cv-1083-Orl-22DAB, 2006 U.S. Dist. LEXIS 81345, *23 (M.D. Fla. Nov. 7, 2006) (noting in spoliation case that "[a]lthough Rule 37(b) applies when a party fails to comply with a court order, Rule 37(d)'s requirement that a party participate in discovery that is not regulated by the court expressly adopts most of the sanctions in Rule 37(b)(2), including the power to grant a default judgment"). This finding, while not curing the prejudice as fully as default, would cure some of the harm by establishing as fact that which could have been proved if not for Defendants' spoliation.

At a minimum, the Court should allow Plaintiff to submit evidence pertaining to Defendants' deletion of their electronic records and instruct the jury that it may draw an inference that the spoliated evidence was adverse to Defendants. Id. at *24 ("Under Florida law, the remedy for a party failing to produce crucial but unfavorable evidence that is destroyed or inexplicably disappears is an adverse inference or discovery sanctions."). Finally, in addition to the other available sanctions the Court may and should enter against Defendants, Plaintiff requests that the Court grant its fees and costs incurred in (1) determining that the evidence at

issue had been spoliated and (2) bringing this action. This sanction is authorized by Federal Rule of Civil Procedure 37.[19]

IV. Plaintiff Should Be Permitted to Amend its Complaint to Add a Claim Against BPI for Spoliation of Evidence

If Defendants did not delete evidence, then the evidence must have been deleted by Mr. Barrett, BPI's Chief Information Officer. After the laptops and Blackberries left the Individual Defendants' hands, they were in Mr. Barrett's sole possession, custody, and control until provided to Plaintiff's experts, when it was discovered the devices had been sanitized. Thus, Plaintiff should be permitted to amend its complaint to add a claim of spoliation of evidence against BPI under Florida law.[20]

Under Federal Rule of Civil Procedure 15(a), leave to amend pleadings should be granted freely where justice so requires. As stated by the Eleventh Circuit, "[U]nless a substantial reason exists to deny leave to amend, the discretion of the District Court is not broad enough to permit denial." Florida Evergreen Foliage v. E.I. Dupont De Nemours & Co., 470 F.3d 1036, 1040 (11th Cir. 2006) (quoting Shipner v. Eastern Air Lines, 868 F.2d 401, 407 (11th Cir. 1989)); see also Kimball v. Publix Super Markets, Inc., 901 So. 2d 293, 296 (2d Dist. Fla. Ct. App. 2005)

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[19] Regardless of the specific sanction issued by the Court, counsel for Plaintiff should be permitted to argue an adverse inference to the jury. Kimbrough v. City of Cocoa, No. 6:05-cv-471-Orl-31KRS, 2006 U.S. Dist. LEXIS 87572, *21-23 (M.D. Fla. Dec. 4, 2006) (holding that counsel must be allowed to argue adverse inference due to spoliation to jury, even if court denies motion for adverse inference instruction).

[20] Plaintiff recognizes that the Court's Amended Case Management and Scheduling Order provided that amendments to the pleadings after March 3, 2009 would be disfavored. [Doc. No. 251]. However, in response to an order to show cause (or this motion for sanctions), Defendants are likely to deny that they deleted any evidence. Since there is no question that evidence was deleted, that denial (if believed) means that BPI and Mr. Barrett must be the spoliators. To deny Plaintiff relief under such facts would work a serious injustice and allow Defendants to accomplish through a corporate parent what they would have been sanctioned for doing themselves.

(holding that trial court abused discretion by denying leave to amend pleading to add spoliation claim). There is no reason not to allow this amendment. Plaintiffs can state a claim and Defendants will not be prejudiced in any way since the amendment seeks to join and add a claim against a third party to the current litigation.

Federal and state courts in Florida have repeatedly recognized Plaintiff's proposed cause of action against BPI, a third party as to the current litigation, for spoliation of evidence. See Green Leaf Nursery v. E.I. Dupont De Nemours & Co., 341 F.3d 1292, 1308 (11th Cir. 2003) (recognizing claim against third parties under Florida law for spoliation of evidence); Silhan v. Allstate Ins. Co., 236 F. Supp. 2d 1303, 1308-09 (N.D. Fla. 2002) (recognizing causes of action under Florida law for intentional and negligent spoliation of evidence); Bryant v. Zimmer, Inc., No. 6:06-cv-844-Orl-31DAB, 2006 U.S. Dist. LEXIS 57209 (noting on remand that Florida courts recognize action for spoliation); see also Gayer v. Fine Line Constr. & Elec., Inc., 970 So. 2d 424 (4th Dist. Fla. Ct. App. 2007); Flagstar Cos. v. Cole-Ehlinger, 909 So.2d 320 (4th Dist. Fla. Ct. App. 2005).

Plaintiff can allege and establish each of the six elements of a cause of action for spoliation against BPI.[21] See Green Leaf Nursery, 341 F.3d at 1308 ("The elements of a spoliation claim are (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages."); see also Silhan, 236 F. Supp. 2d at 1308 (noting that "a cause of action for intentional spoliation has been

[21] See Proposed Fourth Amended Complaint, attached hereto as Exhibit G.

recognized by Florida courts" and that the key element of such a claim is "an intent to disrupt the underlying litigation") (cite omitted).

First, the current litigation existed as of the date Mr. Barrett first received the Individual Defendants' TEI laptops and Blackberries. Indeed, the underlying litigation is the only reason Mr. Barrett collected the devices in the first place. Second, Mr. Barrett collected the devices as part of the Defendants' agreement to produce them to Plaintiff's forensic expert as part of discovery. Third, Plaintiff's expert found that none of the devices had any e-mails, despite the Individual Defendants having used the devices for at least e-mail. Indeed, the Plaintiff's expert found that the devices were uniformly devoid of e-mail, and that the deletions were done in a particular way so as to make the deleted documents irretrievable. Fourth, Plaintiff is significantly impaired in its ability to prove that the Individual Defendants sent SMS's trade secrets to the remaining Defendants by e-mail because those e-mails were deleted. Fifth, to the extent Plaintiff is unable to prevail in this litigation, it will be because BPI deleted the evidence to protect its subsidiaries. Sixth, to the extent Plaintiff is unable to prevail in this litigation because of BPI's wrongful spoliation, its damages will be the damages it would have recovered with access to the spoliated evidence. Finally, and to the extent required by Florida law, BPI acted with intent to disrupt the underlying litigation. Indeed, BPI directly benefits if its corporate affiliates are able to avoid the consequences of their wrongdoing.

Finally, it is appropriate to adjudicate Plaintiff's claim of spoliation against BPI in this litigation, rather than require Plaintiff to pursue separate litigation against a corporate affiliate of the current Defendants. See Kimball v. Publix Super Markets, Inc., 901 So.2d 293 (2d Dist. Fla. Ct. App. 2005) (trial court abused discretion in denying motion to amend complaint to add third-party spoliation claim); Miller v. Allstate Ins. Co., 650 So.2d 671, 673-74 (3d Dist. Fla. Ct. App.

1995) (holding that "where a viable means exists to pursue the underlying . . . claim, that cause of action must be pursued prior to, or together with, the spoliation of evidence claim"); see also 41A Fla. Jur. 2d Products Liability § 145 ("For reasons of judicial economy, and to prevent piecemeal litigation, there is no reason to wait for final judgment in the underlying . . . lawsuit before brining an action for the destruction of evidence claim. A jury trying the concurrent claims in a single proceeding may be in the best position to determine issues of causation and damages."). Therefore, Plaintiff's motion to amend its complaint to add a claim for spoliation of evidence against BPI should be granted.

CONCLUSION

After requesting forensic copies of the Individual Defendants' TEI-issued laptops and Blackberries, Plaintiff received sanitized devices, devoid of any e-mails. The e-mails had been intentionally deleted before the devices were produced to Plaintiff's expert. There are only three possible explanations. First, Defendants deleted evidence in violation of the Court's TRO, in which case they should be held in contempt. Second, Defendants deleted evidence before the TRO was issued, in which case they should be sanctions for spoliation of evidence. Or third, Defendants did not deleted the evidence, BPI's Chief Information Officer did, in which case Plaintiff should be permitted to amend its complaint to add a claim against BPI. In any event, Plaintiff has been prejudiced by the loss of this evidence, and such prejudice must be cured.

Respectfully submitted, this 30th day of March, 2009.

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CERTIFICATE OF SERVICE

This is to certify that on this 30th day of March, 2009 the following people were served the foregoing by the Court's ECF system:

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