

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

SOUTHEASTERN MECHANICAL
SERVICES, INC.,

Plaintiff,

v.

NORMAN BRODY, *et al.*

Defendants.

CIVIL ACTION FILE
NO. 8:08-cv-1151-T-30EAJ

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SANCTIONS DUE TO
SPOILIATION OF EVIDENCE AND FOR ORDER TO SHOW CAUSE
AND INCORPORATED MEMORANDUM OF LAW**

COME NOW Defendants Theodore Maliszewski, Thermal Engineering Construction Services, Inc. ("TEI"), and Babcock Power Services, Inc. ("BPS") (collectively, the "Corporate Defendants") and hereby file their Response to Plaintiff's Motion for Sanctions Due to Spoliation of Evidence and for Order to Show Cause and Incorporated Memorandum of Law (the "Motion").¹

INTRODUCTION

SMS's Motion should be denied for the simple reason that no evidence has been destroyed, by the defendants or otherwise. Instead, all e-mails sent or received from the laptop computers and Blackberries issued to Defendants Kevin Smith, Norman Brody, and Jimmy Sherouse (the "Individual Defendants") were preserved on the e-mail servers of Babcock Power,

¹ SMS's Motion did not contain a certification of compliance with Local Rule 3.01(g), nor could it, as its counsel never conferred with the defendants regarding any of the issues addressed in the Motion. Had Plaintiff complied with Local Rule 3.01(g), the matters set forth in this Response would have been explained to Plaintiff, and this issue could have been resolved without the Court's involvement.

Inc. (“BPI”) at the time those e-mails were sent or received. Those e-mails were subsequently produced to SMS at the outset of this litigation, in accordance with the Court’s expedited discovery order. As a result, even if e-mails were intentionally deleted from the Individual Defendants’ Blackberries’ and laptop computers - an allegation that is completely unsupported by any evidence and which, as addressed below, is highly questionable – all of those e-mails were preserved on BPI’s servers and subsequently produced to SMS. As even SMS must recognize, evidence must be destroyed before there can be spoliation.

The timing of SMS’s Motion should not escape the Court’s notice. Although the Individual Defendants’ laptop computers and Blackberries were examined by SMS’s forensic expert in June 2008, and although those experts prepared affidavits in July 2008 and October 2008 expressing their belief that information had been deleted from those devices, SMS did not file its Motion until March 31, 2009. SMS’s Motion was filed on the same day that it filed its response to TEI’s Motion for Spoliation (Doc. 254), which addresses SMS’s destruction of evidence through its failure to suspend the overwriting of its e-mail backup tapes. If SMS genuinely believed that information had been deleted from the electronic devices issued to the Individual Defendants, the issue would have been raised months ago. SMS certainly has not been hesitant to bring less pressing matters to the Court’s attention. SMS’s Motion should be seen for what it is: an attempt to divert the Court’s attention from SMS’s own destruction of evidence. SMS is fully aware that all e-mails sent or received by the Individual Defendants during their employment with TEI were preserved on BPI’s server, and that they were subsequently produced to SMS. The Motion should therefore be denied.

FACTUAL BACKGROUND

The Individual Defendants personally purchased Blackberries for use during their employment with TEI. Those Blackberries were synchronized with BPI's server on June 4, 2008. [See Affidavit of Norman Brody, attached hereto as **Ex. A**, at ¶ 2; Affidavit of Kevin Smith, attached hereto as **Ex. B**, at ¶ 2; Affidavit of Jimmy Sherouse, attached hereto as **Ex. C**, at ¶ 2.] Because the Blackberries were synchronized with BPI's e-mail server, any e-mails sent to or from the Blackberries were stored on that server. [See Affidavit of Travis Klepper, attached hereto as **Ex. D**, at ¶ 7; Affidavit of Robert Barrett, attached hereto as **Ex. E**, at ¶ 11.]

The Individual Defendants were issued laptop computers by TEI on or about June 4, 2008. [Klepper Aff. at ¶ 2.] As with the Blackberries, the laptops were synchronized with BPI's e-mail server, so that any e-mails sent to or from the laptops would be stored on BPI's server. [Klepper Aff. at ¶ 7; Barrett Aff. at ¶ 12.] In addition, the laptops were configured so that e-mails would not be stored locally on the laptop's hard drive. [Klepper Aff. at ¶¶ 4-6; Affidavit of Lacey Walker, Jr., attached hereto as **Ex. F**, at ¶ 9.] As a result, e-mails would only be accessible on the laptop if it was connected to BPI's server. [Klepper Aff. at ¶¶ 3-4.]

BPI received notice of this litigation on or about June 17, 2008. [See Affidavit of Michael McInerney, attached hereto as **Ex. G**, at ¶ 4.] On that date, the Individual Defendants were placed on administrative leave. [*Id.* at ¶ 6.] The Individual Defendants were also instructed on June 17th to preserve all hard copy and electronic data relating in any way to the allegations set forth in SMS's Complaint, and to return their laptop computers and Blackberry devices to BPI in Massachusetts. [*Id.* at ¶¶ 6-7.] BPI also froze the Individual Defendants' e-mail accounts and locked their passwords, which prevented their access to BPI's e-mail servers. [*Id.* at ¶ 5.] As a precaution, and to preserve all relevant data, a backup copy was made of all of

the Individual Defendants' sent and received e-mails, which remained on a company server located in Lyman, South Carolina. [*Id.* at ¶ 5.]

Robert Barrett, BPI's Chief Information Officer, received the Individual Defendants' Blackberries and laptops by Federal Express from the Individual Defendants on or about June 19, 2008. [Barrett Aff. at ¶¶ 6-8.] Barrett stored the Blackberries and laptops in a locked cabinet, where they remained until they were picked up by SMS's forensic expert on June 25, 2008. [*Id.* at ¶ 9.] During the time that the Blackberries and laptops were in BPI's possession, no data was deleted from those devices. [*Id.* at ¶ 10.] Indeed, Barrett testified in his deposition that he did not even turn on the devices while they were in his possession. [Barrett Dep., excerpts attached hereto as **Ex. H**, at p. 50/7-9.]

On June 18, 2008, this Court instructed the defendants to respond to SMS's discovery requests in an expedited fashion. [*See* Doc. 14.] In accordance with the Court's Order, BPI pulled copies of the Individual Defendants' e-mails from its server, and sent those e-mails to TEI's counsel. BPI also reviewed its e-mail backup tapes for any e-mails sent or received by the Individual Defendants, and those documents were provided to counsel as well. TEI produced the Individual Defendants' e-mails to SMS on June 26, 2008, prior to the preliminary injunction hearing. Through that production, TEI produced all e-mails sent or received by the Individual Defendants during their employment, whether those e-mails were sent from Blackberries or the laptops. Those e-mails are attached hereto as **Exhibit I** and are identified by the following Bates-numbers: SMS00036-00040, SMS00450-000454, SMS00532-00536, SMS00580-00583, SMS00695-00696, SMS00802, SMS01188-01196, SMS01249, SMS01254-01257, SMS01309-01310, SMS01340-01343, SMS01363-01369, SMS01463-01476, SMS01712-01739, SMS01900-01912, SMS01991-01993, SMS01997-02012.

In addition to the e-mails produced on June 26th, TEI also produced the entire contents of the Individual Defendants' laptop computers. Those laptop computers did not contain e-mails, as the computers were not configured for local storage of e-mails, but they did contain numerous Microsoft Word and Excel documents, all of which were produced to SMS. Those documents included many of the documents that SMS relies upon in its claims against the defendants, including a copy of the Paragon bid, along with the ABC Strategy memo.²

ARGUMENT AND CITATION OF AUTHORITY

I. Plaintiff Has Failed to Show that Any Electronic Data is Missing Because All Allegedly Destroyed Evidence Was Preserved on BPI's Servers.

Spoliation of evidence is the "intentional destruction, mutilation, alteration or concealment of evidence." *Kimbrough v. City of Cocoa*, 2006 WL 3500873, *3 (M.D. Fla. 2006) (quoting Black's Law Dictionary 1437 (8th ed. 2004)). Although Federal law governs the imposition of sanctions for spoliation, Florida law may be consulted to guide the court in its analysis. *Id.* Federal courts in Florida have held that the party seeking sanctions has the burden to prove (1) that the missing evidence existed at one time; (2) that the alleged spoliator had a duty to preserve the evidence; and (3) that the evidence was crucial to the movant being able to prove its defense. *Id.*

SMS cannot establish spoliation because it cannot show that any evidence is missing. Although SMS's Motion is filled with references to allegedly "missing e-mails," it provides no support for its contention that any e-mails were actually lost or deleted. Instead, SMS merely argues that surely the Individual Defendants sent more e-mails than those that have been

² SMS would apparently have the Court believe that the defendants engaged in a concerted and technologically sophisticated effort to delete electronic information to hide their wrongdoing, but they neglected to delete the documents stored on the laptop hard drives, many of which SMS relies upon in its claims against the defendants.

produced, and surely those e-mails are filled with evidence of wrongdoing. SMS's entire argument is based on pure speculation, and there is no evidence that the allegedly spoliated evidence ever existed.³

As discussed above, the Individual Defendants worked for TEI for approximately two weeks prior to being placed on administrative leave. During that time, they were primarily occupied with human resources matters that are inherent to any new job, and also with items such as purchasing vehicles and locating office space. They had very little contact with customers during that period, and the few customers with whom they had contact have been identified in the defendants' discovery responses and document productions. Simply put, the Individual Defendants did little substantive work for TEI during their approximately two weeks of active employment, and the contents of their e-mail accounts are consistent with that fact. [See, e.g., Dep. of Kevin Smith, excerpts attached hereto as **Ex. J**, at pp. 241-242.]

All e-mails sent or received by the Individual Defendants during their brief employment with TEI were stored on BPI's e-mail server. Once this litigation commenced, the e-mails were pulled from the server, sent to the Corporate Defendants' counsel, and then produced to SMS. Because SMS cannot show that a single e-mail is "missing," it cannot establish spoliation. See *Kimbrough*, 2006 WL 3500873, *3 (M.D. Fla. 2006) (party seeking spoliation sanctions must show that evidence existed at one time).

In addition, assuming *arguendo* that e-mails were deleted from the laptops or the Blackberries, that alone would not be sufficient to establish spoliation, in light of the fact that all

³ Many of the statements in SMS's Motion are not only unsubstantiated, but they are contradicted by the record evidence. SMS contends in its Supplement, for example, that "[t]here are no e-mails from Sherouse to a customer." [Supplement, Doc. 282, at p. 2.] That is not true. Document SMS01343, for example, consists of an e-mail from Sherouse to several employees at Solutia, a prospective customer. [See Ex. I.] This e-mail is among the e-mails produced by TEI to SMS at the outset of this litigation.

e-mails sent to or from those devices were stored on BPI's server. As this Court recognized in *Lockheed Martin Corp. v. L-3 Comm. Corp.*, 2007 WL 3171299, *2 (M.D. Fla. 2007), a case upon which SMS relies, a defendant cannot be sanctioned for spoliation of electronic evidence if the alleged spoliated evidence was ultimately produced in another format. Here, all e-mails sent to or from the electronic devices were stored on BPI's server and ultimately produced to SMS. It is therefore irrelevant whether any information was deleted from those devices.⁴

Aside from the fact that all of the Individual Defendants' e-mails were produced, SMS's contention that the defendants deleted information from the laptops and Blackberries is also unsupported by the facts. As for the laptops, SMS contends that its forensic expert determined that they were "conspicuously devoid of any e-mail contents." [Motion at 4.] SMS takes that finding and then makes the remarkable leap that this demonstrates that the laptops had been "intentionally wiped and whatever information [that] had been on them before they were produced was now irretrievably destroyed." [*Id.* at 4-5.]

SMS, along with its forensic expert, apparently missed a much simpler (and less exciting) explanation. The Individual Defendants' laptops did not contain e-mails on the hard drive because they were not configured to store any e-mails locally. [Klepper Aff. at ¶¶ 4-6; Walker Aff. at ¶ 9.] Instead, e-mails were stored on BPI's server, and would only appear on the laptops if they were connected to the server. [Klepper Aff. at ¶¶ 3-4.] When SMS's forensic expert

⁴ In complying with a duty to preserve evidence, a party is free to preserve electronic evidence in any format it chooses, including inaccessible formats, without it resulting in spoliation. *Quinby v. Westlb AG*, 245 F.R.D. 94, 104 (S.D.N.Y. 2006) (denying sanctions for spoliation when evidence was available on email backup tapes); *Ingham v. United States*, 167 F.3d 1240, 1246 (9th Cir. 1999) (denying sanctions for spoliation when mere copies were destroyed); *Flowers v. United Parcel Service*, 2007 WL 141135, *4 (E.D. Ark. 2007) (denying claim of spoliation when documents were made available on "ghost copied hard drives"); *McCadden v. Nat'l R.R. Passenger Corp.*, 2002 WL 32342483, *7 (E.D. Pa. 2002) (denying claim of spoliation where Plaintiff was provided copies of witness' notes and not originals).

examined the laptops, they were not connected to BPI's server, nor could they have been because BPI had locked the Individual Defendants' e-mail accounts. It is therefore not surprising that SMS's forensic expert did not see any e-mails on the laptops, as that is *how they were configured*. SMS's forensic expert either did not consider this possibility (which calls into question his qualifications as this is a very typical Lotus Notes configuration, *see* Walker Aff. at ¶ 9), or he did not include it in his report because it did not fit with SMS's wild spoliation theory.⁵

SMS also contends that its expert concluded that the Blackberries "had been completely wiped and were uniformly devoid of any information." [Motion at 4.] That finding is also incorrect. TEI's forensic expert examined the devices and determined that one of the Blackberries contained 66 contacts, and another contained 208 contacts. [Walker Aff. at ¶ 10.] These items were apparently not discovered by SMS's expert during his review, or at least they were not included in his report. One of the Blackberries also contained five (5) text messages, which SMS's expert also missed in his analysis. [Walker Aff. at ¶ 10.]

SMS is correct that the Blackberries currently contain no e-mails. But SMS, and its expert, are incorrect that the present state of the Blackberries could have resulted from only one of "two possible explanations," namely that "someone could have intentionally selected a command on the Blackberry that deletes all the information on the device [or] . . . someone could have repeatedly entered an incorrect password, and continued doing so after receiving a warning

⁵ Further evidence of SMS's tendency to see conspiracies at every turn, and to create "facts" where none exist, is its reference to an business communications training program given by BPI's counsel to TEI's employees. SMS suggests that this program was somehow related to this lawsuit. [See SMS's Supplement to its Motion, Doc. 282, at p. 3-4.] To ensure a clear record and to counter any suggestion of wrongdoing, attached as Exhibit K is the Affidavit of C. Scott Greene, which sets forth the circumstances of the presentation attended by the Individual Defendants.

that deletion will result from additional incorrect password entries.” [Motion at 4.] Although Mr. Kessler’s expert report identified these as the only two possible explanations, he admitted during his deposition that there was at least one other explanation, namely that the third-party administrator of the Blackberry server could have sent a remote wipe to the devices that resulted in the deletion of all e-mails on the devices. Mr. Kessler further testified that he considered this possibility, but admitted that he did not include it in his report.⁶

BPI utilizes a third party, Internoded, in the administration of its Blackberry server.⁷ As Mr. Barrett testified, Internoded acts as a “Blackberry enterprise service,” and essentially acts as the middle-man between BPI and its internet service provider with respect to the delivery of e-mails sent to or from the Blackberries. [Barrett Dep., 61/11-14.] Mr. Barrett further testified of his belief that Internoded has the capability to remotely wipe the contents of the Blackberries if a user’s e-mail service is terminated. [*Id.*, p. 66/19-23.] Mr. Barrett’s testimony on that point is consistent with that of Mr. Kessler, SMS’s forensic expert, and also with TEI’s forensic expert, Lacey Walker. [Walker Aff. at ¶ 11.]

BPI has inquired as to whether Internoded remotely deleted the contents of the Blackberries when the Individual Defendants’ e-mail accounts were suspended, but it has not received confirmation either way. According to Internoded, such a remote wipe would be

⁶ SMS has designated Mr. Kessler’s deposition testimony as confidential under the Consent Protective Order. When counsel for the Corporate Defendants requested SMS’s permission to file the transcript of Mr. Kessler’s deposition, SMS’s counsel requested that the Corporate Defendants specify the pages upon which they intended to rely. Counsel for the Corporate Defendants provided that information to SMS’s counsel. SMS’s counsel has not responded to that correspondence, and presumably does not consent to the filing of Mr. Kessler’s transcript. [See correspondence between counsel for the parties, attached hereto as **Ex. L.**] The Corporate Defendants will submit the transcript for the Court’s *in camera* review if requested to do so.

⁷ Internoded was recently purchased by Tangoe, Inc., and it now does business as Tangoe.

indicated in his log files, but it informed BPI that it only possesses log files dating back to October 2008. The Individual Defendants' e-mail accounts were suspended when they were placed on administrative leave in June 2008, several months before the most recent logs kept by Internoded. Still, the possibility that the contents of the Blackberries may have been deleted by a third party is not addressed in SMS's Motion, likely because it does not fit into its intentional spoliation theory.

There is at least one other possibility for the current state of the Blackberries. Any e-mails existing on the Blackberries could have been inadvertently deleted by SMS's expert during the capture process. [Walker Aff. at ¶ 11.] Considering the numerous demonstrable errors in Mr. Kessler's report, and the lack of any detail about how he secured forensic copies of the devices, that is not out of the realm of possibility.

In addition to showing that evidence is actually missing, SMS must show that any missing evidence was intentionally destroyed by the defendants in bad faith. *See Kimbrough*, 2006 WL 3500873 at *3 (citing *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997)). SMS cannot make that showing as there is absolutely no evidence showing that any of the defendants deleted any information. As discussed above, no e-mails were deleted from the laptops because they were not configured to locally store e-mails. As for the Blackberries, SMS's own expert has conceded that there are possibilities other than those set forth in his report, and that at least one of those possibilities does not involve actions or wrongdoing by any of the defendants. Instead of evidence of intentional evidence destruction by the defendants, SMS only posits theories and speculation.⁸

⁸ SMS's lack of evidence to support its spoliation claim is especially striking given the amount of discovery taken in this action. As the Court is likely aware, discovery in this matter has been extensive. The parties have collectively produced tens of thousands of pages of

But regardless of whether any information was deleted from the Blackberries, the bottom line remains that all e-mails sent to or received from those devices were stored on BPI's server, and produced to SMS in discovery. Plaintiff has produced no evidence that any party destroyed any evidence – intentionally or otherwise – or that the alleged missing evidence ever actually existed.⁹ Similar to the defendants in *Lockheed*, the Corporate Defendants have produced all electronic evidence in their possession to SMS from a source other than the alleged spoliated source. Where there is no destruction of evidence, there is no spoliation, and SMS's Motion should be denied.¹⁰

II. Plaintiff Has Failed to Show that Any Alleged Deletion of Electronic Evidence Resulted from the Conduct of the Corporate Defendants or Non-party BPI.

Assuming *arguendo* that SMS could show that electronic information was intentionally deleted from the laptops or the Blackberries, it has offered no evidence that either the Corporate Defendants or non-party BPI were involved in any way. SMS makes only unsubstantiated allegations against all of the defendants collectively, which is insufficient to

documents, and more than twenty-five (25) depositions have been conducted, including the deposition of Mr. Barrett, who SMS accuses of evidence destruction without any basis. And yet, despite all of that discovery, SMS offers not a shred of evidence in support of its spoliation theory.

⁹ SMS's allegation that there is missing documentation is based solely on rank speculation, and no evidence is offered to support this assertion. In fact, while SMS acknowledges in its Motion that Defendant Smith created the "ABC Strategy document" on his TEI laptop, SMS fails to point out that this document was actually retrieved from the laptop and produced to SMS by the defendants. [*See* Motion at 9.] In essence, the only "proof" offered by SMS that there are missing documents is the fact that the defendants have in fact produced other documents in discovery. SMS's argument makes little sense.

¹⁰ As there are competing motions for spoliation in this case, one brought by the Corporate Defendants and one by Plaintiff, the Corporate Defendants would welcome the appointment of a special master by the Court to investigate the preservation and collection of electronic data by all of the parties.

carry its burden of showing that the Corporate Defendants or BPI intentionally destroyed evidence in bad faith. *See Kimbrough, supra*, 2006 WL 3500873, *3.

In its Motion, SMS repeatedly makes unsupported allegations regarding the actions of “the Defendants,” making no distinction between the Corporate Defendants, the Individual Defendants, and non-party BPI. As set forth herein, however, it is clear that the Corporate Defendants could not have been involved in any alleged spoliation because they never had custody of the laptops or Blackberries, and had no involvement in the preservation of electronic information on those devices. Instead, the Blackberries and laptops were sent by the Individual Defendants directly to non-party BPI in Massachusetts, without any involvement of the Corporate Defendants. [McInerny Aff. at ¶¶ 6-7.] BPI then turned the electronic devices over to SMS’s forensic expert for analysis. The Corporate Defendants were not in the chain of custody of the laptops or Blackberries, and thus they could not have been involved in the deletion of any electronic information from those devices.

As for BPI, it is clear that it exercised good faith in its attempts to preserve any and all electronic evidence in its possession and in the possession of the Individual Defendants. As detailed above, as soon as BPI was informed of this action, it retained all electronic documents in its possession and immediately instructed the Individual Defendants to return their laptops and Blackberries without making any changes to those devices. [McInerny Aff. at ¶¶ 6-7.] BPI froze the Individual Defendants’ e-mail accounts and locked their passwords, preventing any access to BPI’s network. [McInerny Aff. at ¶ 6.] As an added precaution against evidence spoliation, BPI made a backup copy of the Individual Defendants’ e-mails, which remained on its server. [McInerny Aff. at ¶ 5.] Upon receiving the Blackberries and laptops, BPI stored them in a

locked condition in the same condition as they arrived from the Individual Defendants, where they remained until they were picked up by SMS's forensic expert. [Barrett Aff. at ¶ 9.]

Based on the lack of involvement of the Corporate Defendants in the gathering and preservation of electronic evidence, and BPI's demonstrable good faith, SMS's unsupported allegations against those entities are insufficient to support a finding of spoliation. SMS has not carried its burden of showing any wrongdoing by the Corporate Defendants or BPI and its Motion should therefore be denied.

III. SMS Should be Denied Leave to Add a Claim Against BPI for Spoliation.

SMS should be denied leave to amend its Complaint to add a claim against BPI for spoliation of evidence because such an amendment is untimely, and because Plaintiff has failed to present any evidence that BPI destroyed electronic evidence. This Court provided in its Amended Case Management and Scheduling Order that amendments to the pleadings would be disfavored after March 3, 2009. Although SMS's expert has had possession of the laptops and Blackberries since June 2008, and Plaintiff deposed Mr. Barrett on January 6, 2009, Plaintiff waited to seek leave to amend its Complaint until after the deadline for amendments had passed, and until after TEI filed its own spoliation motion.

In order to prove a standalone claim for spoliation of evidence under Florida law, Plaintiff must show: (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. *Florida Evergreen*, 165 F.Supp.2d at 1359. However, a cause of action for spoliation cannot stand without any proof of intentional destruction of evidence. *See id.* at 1360.

Plaintiff has not provided any proof that BPI or its representatives spoliated any evidence. Instead, Plaintiff makes the unsupported, conclusory allegation that “if Defendants did not delete evidence, the evidence must have been deleted by Mr. Barrett, BPI’s Chief Information Officer.” The evidence outlined *supra* regarding the actions of BPI and Mr. Barrett belie Plaintiff’s unsupported claim that BPI and its representatives participated in the deletion of any evidence from the laptops and Blackberries. In fact, as soon as the litigation commenced, BPI instructed the Individual Defendants to return the laptops and Blackberries to BPI without making any changes to them, denied the Individual Defendants access to BPI’s email system, and took the necessary actions to ensure that the Individual Defendants’ email files were preserved on BPI’s central email server. Moreover, SMS’s argument presupposes that electronic information existed and was actually deleted, which is not supported by any evidence. Due to the untimely and unsupported nature of this request, the Court should deny SMS leave to amend its complaint.

CONCLUSION

For the foregoing reasons, Defendants Maliszewski, TEI and BPS respectfully request that Plaintiff’s Motion for Sanctions due to Spoliation be denied.

Respectfully submitted this 24th day of April, 2009.

/s/ Christopher P. Galanek _____
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**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
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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
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SANCTIONS DUE TO SPOILIATION OF EVIDENCE AND FOR ORDER TO SHOW CAUSE AND INCORPORATED MEMORANDUM OF LAW** was served upon counsel of record by electronic service to the following:

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This 24th day of April, 2009.

/s/ Christopher P. Galanek