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 SUPPLEMENT TO ITS 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 provides supplemental information to clarify and further support its Motion for Sanctions Due to Spoliation of Evidence and for Order to Show Cause, or, in the alternative, to Amend the Complaint (the "Motion"). [Doc. No. 269]. The following information clarifies and provides further information regarding certain hard copies of the spoliated documents referred to in SMS's Motion.[1]

SMS's Motion arose out of the Defendants having deleted the e-mails contained on the TEI laptops and Blackberries issued to Defendants Brody, Sherouse, and Smith, despite this

[1] This Supplement provides additional information and clarification so that the Court has a clear record upon which to make a fully-informed ruling. It does not respond to Defendants' arguments – indeed, Defendants have not yet even filed a Response – and is therefore not a reply brief under the Local Rules.

Court's June 13, 2008 Order requiring the preservation of evidence. [Doc. No. 11]. SMS's Motion contends that as a result of this egregious misconduct, Defendants should be strictly sanctioned by the entry of a default judgment, or at a minimum, a finding of an adverse inference against Defendants that they did, indeed, use the information they stole to the detriment of SMS and for the benefit of the Corporate Defendants. In the context of showing that the spoliated documents existed at one time, SMS's Motion referred to a few hard copies of e-mails produced by Defendants. (See Motion, [Doc. No. 269] at 5 n.5).

First and foremost, the fact that hard copies of a few e-mails have been produced by the corporate defendants does not alter the fact that the electronic copies of those e-mails – and likely many others – have been deleted. (See e-mails to and from TEI/Babcock e-mail accounts assigned to Defendants Brody, Sherouse, and Smith, attached collectively hereto as Exhibit A).

Moreover, the hard copy e-mails produced all share one peculiar trait – they were received or sent by at least another TEI employee besides Brody, Sherouse, or Smith. There are no e-mails from Brody to Smith. There are no e-mails from Sherouse to a customer. There are no e-mails from Smith to either of his two subordinates. There are no e-mails from Brody, Sherouse, or Smith to a family member with their new contact information. In other words, there is not a single e-mail sent by any of the three Individual Defendants to anyone (including potential customers) unless at least one TEI employee besides the other two Individual Defendants was included on the e-mail. And this, despite the fact that Brody and Sherouse both reported directly to Smith (not Naughton) and all three had been conspiring for months to open a Florida office for TEI. Far more likely than such an implausible coincidence, Defendants apparently collected the Individual Defendants' e-mails from other TEI employees and attempted

to pass them off as the e-mails that were deleted from the Individual Defendants' TEI laptops and Blackberries.

Shedding further light on Defendants' attempt to hide their spoliation through selective production, the hard copies produced apparently did not include e-mails that were sent or received on the Individual Defendants' Blackberries. Such e-mails are clearly marked as having been sent from a Blackberry. (See, e.g., SMS 01291, 5/20/08 e-mail from Brody to Schneider, forwarded to Naughton, attached as Exhibit B (stating "Sent via BlackBerry from T-Mobile")).[2] Yet none of the hard copy e-mails produced by Defendants indicates that the Individual Defendants used the Blackberries that had been previously activated. (See SMS 00790-91 (Brody's Blackberry activated 5/30/08); SMS 00800-02 (Smith's Blackberry activated 5/28/08), attached collectively as Exhibit C). Even if Defendants' selective proffer of hard copy e-mails were an excuse for their intentional deletion of e-mails from the laptops, the e-mails from the Individual Defendants' Blackberries remain inexplicably missing.

Defendants' attempts to cover their tracks apparently know no bounds. First, a few days after receiving Plaintiff's cease-and-desist letter, the Individual Defendants met with the Corporate Defendants' legal counsel, Chris Galanek. Mr. Galanek instructed the Individual Defendants, Naughton, and a few other TEI employees regarding the proper use of e-mail and what should not be put into e-mails.[3] (See Brody Dep. 74:20-82:5, attached as Exhibit D). Next,

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[2] Interestingly, at least Brody was apparently sending and receiving e-mails from his TEI Blackberry (although using his private e-mail address) a full week before his last day at SMS on May 27, 2008.

[3] Because of Mr. Galanek's assertion of attorney-client privilege, Plaintiff does not know the substance of his instruction to the Defendants, but must assume that he instructed them to retain relevant evidence and otherwise obey the law. The fact that Defendants intentionally

all Defendants were served with this Court's June 13, 2008 Order requiring that they preserve evidence. Then, the Individual Defendants turned over their TEI laptops and Blackberries to Bob Barrett, the Chief Information Officer of Babcock Power, Inc. After delivery to Plaintiff's expert, it was discovered that there was no information at all on the Blackberries and no e-mails in the regular e-mail storage spaces on the laptops. (See Amended Forensic Expert Report, Exhibit E).[4] The final step in the cover-up was to find other TEI employees who had e-mails from the Individual Defendants, print them out, and pass them off as if all the deleted documents had been produced in hard copy.

The end result is that some of the central evidence in this case – Brody's, Sherouse's, and Smith's e-mails, records of text messages, Blackberry calendars, and Blackberry phone records during a critical period (their first two weeks of employment) – are irretrievably gone. The sole reason those documents are missing is because the Defendants, acting in concert, deleted them. Then, when Defendants realized the deletion might be discovered, they again attempted to cover their tracks by passing off a few hard copies collected from other employees as "all" the e-mails that were wrongfully deleted. Such bad-faith behavior is absolutely unconscionable. An adverse inference is not just reasonable, it is essential. The Defendants have flagrantly disregarded this Court's Order to preserve evidence critical to this case. They should not be allowed to profit from their wrongdoing by arguing that Plaintiff cannot show how confidential information was

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destroyed relevant evidence – in the face of Mr. Galanek's presumed instruction to the contrary – makes their conduct particularly egregious.

[4] The Amended Forensic Expert Report has been marked as Confidential-Attorneys' Eyes Only pursuant to the Protective Order [Doc. No. 129] in this case. Plaintiff has produced a copy of Exhibit E to defense counsel, and is willing to make the document available for the Court's *in camera* inspection.

used in this case. If ever there were a case where a default judgment should be entered as a sanction for misconduct, this is it.

Respectfully submitted, this 17th day of April, 2009.

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CERTIFICATE OF SERVICE

This is to certify that on this 17th day of April, 2009 the following people were served the foregoing by the Court's ECF system:

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