UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-61166-SEITZ/O'SULLIVAN

POINT BLANK SOLUTIONS, INC., a Delaware corporation, and POINT BLANK BODY ARMOR, INC., a Delaware corporation,	)
Plaintiffs,	)
v.	)
TOYOBO AMERICA, INC., a New York corporation and TOYOBO CO., LTD., a Japanese corporation,	)
Defendants.	)

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DETERMINATION OF SPOLIATION OF EVIDENCE AND APPROPRIATE SANCTIONS

Plaintiffs Point Blank Solutions, Inc. and Point Blank Body Armor, Inc. ("Point Blank"), file this Reply to Toyobo Co., Ltd. and Toyobo America, Inc.'s ("Toyobo") Response to Point Blank's Motion for Determination of Spoliation of Evidence and Appropriate Sanctions.

INTRODUCTION

Toyobo attempts to portray Point Blank's motion for spoliation as part of a "new frontier" of manufactured discovery disputes designed to divert the Court's attention from the merits of this action. On the contrary, it is Toyobo who seeks to divert the Court's attention by raising irrelevant issues and arguments.[1] Point Blank is not attempting to divert the Court's attention or expand the boundaries of this jurisdiction's spoliation case law. Rather, Point Blank seeks sanctions to remedy Toyobo's bad faith destruction of documents that directly address the merits of Point Blank's claims — Toyobo's misrepresentations regarding the quality of Zylon. Awarding sanctions to remedy such conduct is neither novel nor controversial.

Parsing through Toyobo's response reveals three primary arguments, each of which misstates the law and/or ignores facts:

First, Toyobo argues that Point Blank fails to show that critical documents were destroyed. Toyobo perversely argues that because Point Blank has copies of some of the missing documents, Point Blank cannot show that it was prejudiced by Toyobo's destruction. Further,

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1 Toyobo argues that it is Point Blank, not Toyobo, that should be viewed with "a jaundiced eye" because three of its former executives were recently convicted in a criminal action. Toyobo fails to mention that those executives were convicted of securities fraud arising from misstated financial statements and insider trading—allegations that have nothing to do with Toyobo's misrepresentations regarding the quality of Zylon. Further, these executives resigned or were terminated years prior to the initiation of this action and years prior to engagement of current counsel. Additionally, Toyobo's reference to the fact that Point Blank's current counsel represented another party years ago in an action against Point Blank has no relevance to this matter. As Toyobo itself notes in its response, "arguments of counsel are not evidence." Toyobo Opp. at 20. Unlike Toyobo's current counsel, the statements by Point Blank's counsel were made on behalf of *another client*, not Point Blank. Statements made by Point Blank's counsel in *another action*, on behalf of *another client*, simply cannot be attributed to Point Blank and are completely irrelevant in this matter.

that for any other missing document Point Blank does not have copies of (because Toyobo destroyed the copies), Point Blank has not established that such documents existed. Under such a standard, a moving party could never show grounds for spoliation. Toyobo simply fails to recognize that the documents Point Blank attaches establish that Toyobo destroyed crucial documents.

Second, Toyobo contends that it had no duty to preserve these records until 2006 when it was notified by the Department of Justice of a governmental investigation into Zylon vests manufactured by companies other than Second Chance Body Armor.[2] This argument strains all credibility particularly in light of the fact that (i) Toyobo recently argued in another matter that "**[a vest manufacturer] cannot legitimately contend that it had not learned or that it should not reasonably have learned of the facts it now contends are the bases for its fraud claims against Toyobo Co., by at least November 18, 2003**" (ii) Toyobo received numerous subpoenas and document requests beginning in January, 2004 for the very documents it deleted; (iii) Point Blank began recalling its Zylon containing products in January, 2005; and (iv) the Department of Justice, National Institute of Justice decertified all Zylon vests in August, 2005

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[2] Toyobo argues that litigation beginning in 2003 regarding Zylon only concerned vests manufactured by Second Chance Body Armor, and did not relate to vests containing Zylon manufactured by other body armor manufacturers. Toyobo ignores that it continued to misrepresent the quality of Zylon to Point Blank, and other body armor manufacturers, even after the Second Chance vest failures. As set forth by Toyobo in a December 2003 press release, "Second Chance has characterized the failure [of its vests] as a Zylon problem. We disagree."

Further, Toyobo cites to the Declaration of Masakazu Saito, a manager in Toyobo's sales and marketing department, who represents that at that time Toyobo was only preparing for litigation with Second Chance. In his Declaration, however, Mr. Saito refers to a document that lists "Documents to be Collected in Connection with Litigation." Strikingly absent from that document is any reference to litigation with Second Chance, let alone just with Second Chance. Rather, that document in fact directs Toyobo to collect the very documents it later destroyed – "**All correspondence**, including emails, letters, memoranda, spreadsheets, charts, or other written information, **between Toyobo and bullet-resistant vest manufacturers**." Remarkably, these are the very documents that were subsequently destroyed.

and issued an advisory notice identifying "Zylon as a material that appears to create a risk of death or serious injury as a result of degraded ballistic performance when used in body armor."

Ignoring all of the above, Toyobo spends considerable time arguing that because Point Blank repeatedly assured its customers that its Zylon containing vests were safe, Toyobo had no reason to anticipate litigation with Point Blank. Point Blank's statements regarding the quality of its vests ***relied*** on Toyobo's misrepresentations and deception regarding the quality of Zylon. Moreover, the issue is *not when Point Blank knew* of its potential claims against Toyobo and notified Toyobo of those claims, but when did Toyobo know, or reasonably should have known, of Point Blank's potential claims, or was otherwise on notice to preserve the documents at issue. Toyobo already provided its answer to that question, indeed by an in-solemn-judicio admission, that "**[a vest manufacturer] cannot legitimately contend that it had not learned or that it should not reasonably have learned of the facts it now contends are the bases for its fraud claims against Toyobo Co., by at least November 18, 2003."**[3]

Third, Toyobo argues, albeit briefly, that there is no evidence of bad faith on its part. Again, Toyobo ignores Point Blank's arguments and completely fails to address that it continued to destroy these documents while under an obligation to preserve these specific records under various document requests and subpoenas, then repeatedly misrepresented to Point Blank *and to this Court* that: (i) it fully produced all such documents; and (ii) that its counsel issued a litigation hold in 2003. Only after multiple hearings before this Court did Toyobo finally admit that it did not have a document retention policy with respect to emails and that it deleted email correspondence and *all* back-up tapes. Further, with respect to its misrepresentation that it issued

[3] Memorandum of Law in Support of Toyobo Co., Ltd.'s Motion to Dismiss, *First Choice Armor & Equip., Inc. v. Toyobo Am., Inc.*, No. 1:09-CV-11380-NMG (D. Mass. Dec. 12, 2009) [D.E. No. 23]. Toyobo further argued that ***by fall 2003***, U.S. vest manufacturers knew of all the information needed to file their complaints against Toyobo "with the specificity required by 9(b)." Hearing Tr. at 9 in *First Choice Armor & Equip., Inc. v. Toyobo Am., Inc.*, No1:09-CV-11380-NMG (D. Mass May 7, 2010)

a *written litigation hold* in 2003, this Court ruled "[t]his is not a litigation hold letter, it's just a letter from an attorney telling his client to provide certain documents that he thinks will be relevant to a lawsuit." There could hardly be a more direct showing of bad faith than destroying evidence while under an obligation to preserve pursuant to subpoenas and then attempting to conceal those actions through misrepresentations.

ARGUMENT

1. POINT BLANK HAS ESTABLISHED THAT TOYOBO DESTROYED CRITICAL DOCUMENTS

Toyobo argues that Point Blank has failed to introduce any evidence that Toyobo destroyed documents critical to any of Point Blank's claims. Toyobo takes the position that Point Blank cannot show that it was *prejudiced* by Toyobo's destruction of documents because Point Blank has copies of the destroyed documents from other sources.[4] Toyobo ignores the fact that the documents Point Blank attached to its motion establish that Toyobo deleted and destroyed critical evidence. Further, the missing documents Point Blank has in its possession, along with Toyobo's representation that it did not maintain a formal document retention policy and that correspondence may have been deleted prior to 2006, are more than sufficient to establish that other responsive documents were destroyed.[5] *See Rimkus Consulting Group v. Cammarata*, 688 F. Supp. 2d 598, 617-18 (S.D. Tex. 2010) (finding contents of recovered emails sufficient to establish destruction of relevant documents).

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[4] Interestingly, Toyobo fails to mention that it has denied to authenticate some of these documents. For instance, a December 2003 Toyobo press release in which Toyobo specifically warrants that "Zylon is not a Defective Product." *See* Toyobo's Amended Response to Point Blank's Request for Admissions, response number 28.

[5] In its opposition, Toyobo argues that Toyobo instituted a litigation hold for these and other documents in 2003 and cites to the Declaration of Mr. Saito. The only written instruction or document from 2003 provided with Mr. Saito's declaration, however, was the document that Judge O'Sullivan has already found was "not a litigation hold letter . . ."

Toyobo also argues that "[v]irtually all" of the missing/destroyed documents attached to Point Blank's motion were produced. Toyobo's contention is patently false. For the Court's reference, Point Blank has compared the documents that are missing from Toyobo's production with the documents Toyobo claims it produced, or produced in equivalent form. *See* Ex. A. With the exception of one document, *Toyobo did not produce any of the missing documents*.[6] Instead Toyobo identifies correspondence with third parties, many of which are not located in Florida, or even in the United States, as *substitutes* for some of the destroyed documents.[7] These "substitute" documents, however, do nothing to counter Point Blank's argument that Toyobo destroyed documents relevant to this litigation. Nor does the fact that some of these documents contain the same data or text make them adequate substitutes for the documents Toyobo destroyed.

Toyobo also contends that Point Blank must establish precisely which documents Toyobo destroyed and the circumstances surrounding their destruction, regardless of the fact that these documents no longer exist and Toyobo has destroyed all back-up tapes. Unsurprisingly, courts in this Circuit have rejected these arguments and have squarely held that the moving party in a spoliation motion "*must not*" be held "to too strict a standard of proof regarding" the likely contents of the spoliated evidence. *S.E. Med. Svcs. V. Brod*y, 657 F. Supp. 2d 1293, 1300 (M.D. Fla. 2009); *see also Brown v. Chertoff*, 563 F. Supp. 2d 1372 (S.D. Ga. 2008) ("To require a

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6 Point Blank concedes that one of the many example documents, a September 3, 2003 letter from Tadao Kuroko, of Toyobo, to Edward R. Dovner, of First Choice Armor, was produced. The letter was inadvertently included in Point Blank's original examples exhibit.

7 Several of these "substitute" documents—which supposedly excuse Toyobo's spoliation—were never even produced to Point Blank. These documents, which bear a Barrday Bates Label and contain representations regarding Zylon's safety and suitability, are undoubtedly responsive. However, they were never produced because Toyobo's counsel represented in a May 3, 2010 letter to Point Blank's counsel that these documents were either purportedly protected or "were not relevant to this litigation, not responsive to your documents requests, and in some instances duplicative of documents already produced to you."

party to show, before obtaining sanctions, that *unproduced* evidence contains damaging information would simply turn 'spoliation law' on its head."). Toyobo cannot escape the consequences of its spoliation by exploiting Point Blank's inability to prove the contents of documents that Toyobo itself destroyed.

Toyobo also incorrectly argues that its communications with other body armor manufacturers are not relevant to this action. Toyobo's communications with other body armor manufacturers are relevant in establishing that Toyobo misrepresented the quality of Zylon and made those misrepresentations to others in Florida. As another example, and as set forth in the Amended Complaint, any claimed corporate distinction between Toyobo Japan and Toyobo America should be disregarded by the Court such that both Defendants should be considered as one legal entity. Astonishingly, Defendants' counsel actually represented to this Court "I'm not confident that they'll be able to produce anything that says Toyobo America did anything with regards to Zylon." Many of the documents destroyed by Toyobo include representations directly relating to Zylon, made in Florida *and on Toyobo America letterhead.* Such documents are clearly crucial to counter Toyobo's false statements and arguments.

Furthermore, as Point Blank raises claims under FDUTPA and Florida's false advertising acts, communications from Toyobo to any body armor manufacturer and law enforcement organization in Florida regarding Zylon are relevant to Point Blank's claims.[8] *See* FLA. STAT. §§ 501.204, 817.41. Section 817.41, Florida Statutes, prohibits disseminating false or misleading advertising "before the general public of the state, or any portion thereof." Thus, any statements made within the State of Florida are directly relevant to Point Blank's claims, not substitute

[8] Many of the documents that Point Blank attached as evidence of Toyobo's destruction are correspondence between Toyobo and Point Blank and between Toyobo and Armor Holdings, another body armor manufacturer located in Florida. As "substitute" documents to the destroyed Armor Holdings documents, Toyobo identifies correspondence between Toyobo and Barrday, a weaver located in Canada. Correspondence with a Canadian weaver is inapplicable to Point Blank's Florida state claims. *See* Ex. A.

documents showing similar or the same misrepresentations made to Toyobo customers in Canada. *Id.* § 817.41(1).

Finally, Toyobo takes the astounding position that Point Blank has not established that the missing Zylon lab notebook contained critical information. As cited in our opening brief, evidence is crucial "when it goes to the heart of a party's ability to prove its claim or defense." *Kimbrough*, 2006 WL 3500873, at *5 (M.D. Fla. Dec. 4, 2006); *see also Telectron Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987)(Marcus, J.) (finding that sales correspondence and other sales materials directly relevant to plaintiffs' antitrust claims). The notebook at issue contained results of Toyobo's own Zylon deterioration tests — the crucial issue in this case. Given that only one volume of an eighty-one volume set is missing, that Toyobo had no formal document retention policy, and that Toyobo continued to destroy documents even after it was required to preserve these documents in other actions, there are serious questions regarding this volume's contents and the circumstances surrounding its disappearance.[9] *See Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 748 (8th Cir. 2004) (finding strong inference of intent to destroy relevant evidence where party selectively preserved some documents and destroyed others).

2. TOYOBO DESTROYED DOCUMENTS WHEN UNDER A DUTY TO PRESERVE

Toyobo's duty to preserve the documents at issue, and which were specifically called for in subpoenas and document requests issued as early as January, 2004 arose no later than October 2003 when Toyobo hired a public relations firm to assist in Zylon-related litigation.[10] *See*

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9 Contrary to Toyobo's contentions, Point Blank never claimed the notebook was created any time other than 1995 nor did Point Blank make any representations regarding when the notebook was destroyed or went "missing."

10 Toyobo characterizes this arrangement as the "retention of a public relations firm," but does not address that the firm was specifically retained to prepare for Zylon-related litigation with body armor manufacturers.

Hagopian v. Public Supermarkets, Inc., 788 So. 2d 1088, 1090 (Fla. 4th DCA 2001) (finding duty to preserve triggered by preparation of incident report and assertion of work product protection). Toyobo improperly argues that it could freely destroy documents until Point Blank formally asserted its claims, without addressing the fact that it fraudulently concealed the basis for those claims from Point Blank.[11] In support of its argument, Toyobo extensively references statements made by Point Blank evidencing Point Blank's confidence in its Zylon-containing vests. However, Toyobo fraudulently concealed from Point Blank, and other body armor manufacturers, Zylon's defects and materially misrepresented Zylon's suitability for use in bullet-resistant vests. If Point Blank had known of these defects, it would not have stood behind the quality of those vests. Toyobo also argues that Point Blank incorrectly cites the rule as set forth *Managed Care Solutions, Inc. v. Essent HealthCare, Inc.*, No. 09-60351-CIV, 2010 WL 3368654 (S.D. Fla. Aug 23, 2010). Point Blank does not. *Managed Care* simply stands for the proposition that a party has a duty to preserve documents once litigation is reasonably foreseeable. *See Id.* at *5-10. As Judge Marcus noted in *Telectron*, "'[s]anctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or *potential litigation*." 116 F.R.D. at 127 (emphasis added). Toyobo's duty to preserve here was triggered when Toyobo (not Point Blank) became aware that litigation was "reasonably foreseeable." *See E*Trade Secs. LLC v. Deutsche Bank AG*, 230 F.R.D. 582 (D. Minn. 2005). Toyobo admits in filed pleadings that litigation with Point Blank was unequivocally known to Toyobo from at least November 18, 2003 and that Point Blank had the ability to file fraud claims with particularity required by Rule 9(b) as of that date. *Supra*, pg 3.

[11] It is remarkable that Toyobo argues that its duty to preserve Point Blank-related documents did not arise until February 2006 given that the NIJ decertified all Zylon vests in August 2005.

3. TOYOBO ACTED IN BAD FAITH

Toyobo in cursory fashion argues that Point Blank has not provided any of the circumstantial indicia of bad faith, such as proof that evidence material to a claim existed, that evidence was destroyed, a duty to preserve that evidence existed, and the affirmative act of destruction cannot be credibly explained as not involving bad faith. Point Blank, however, has established all of these factors. First, Toyobo has admitted it destroyed documents and Point Blank has attached evidence of documents that were destroyed. These documents go to the heart of this case—the misrepresentations made by Toyobo regarding the quality of Zylon as well as Toyobo's own Zylon test results. Further, Point Blank has established that Toyobo was under a duty to preserve these records as early as October 2003, when it was preparing for Zylon-related litigation. Other than arguing that it was not under a duty to preserve these records because it did not anticipate litigation with Point Blank, Toyobo has not explained, and completely ignored, that it destroyed these documents while under a duty preserve these documents pursuant to several subpoenas and document requests. Toyobo cannot dispute its obligations to preserve these documents pursuant to subpoenas which directly requested them. In fact, it bears noting that in Mr. Saito's declaration, Mr. Saito contends that Toyobo's counsel instructed Toyobo employees to preserve records, including all correspondence regarding Zylon and Zylon's quality, in November 2003. As shown by Point Blank in Ex. A, several of the documents "missing" from Toyobo's production date after that purported November 2003 hold letter. The destruction of these and other documents, and Toyobo's recent misrepresentations to Point Blank *and this Court* that (i) it fully produced all such documents and (ii) that its counsel issued a litigation hold in 2003, cannot be credibly explained as anything other than bad faith and a continued attempt to conceal those bad faith actions.

CONCLUSION

For the reasons set forth above and in Point Blank's initial brief, Point Blank respectfully request the Court find that Defendants spoliated evidence and to issue sanctions, including an adverse inference jury instruction and an award of fees and costs associated with this motion and related hearings.

Respectfully submitted January 6, 2011

/s/ Charles H. Lichtman
Charles H. Lichtman (FBN 501050)
CLichtman@bergersingerman.com
BERGER SINGERMAN
350 East Las Olas Blvd., 10th Floor
Ft. Lauderdale, Florida 33301
Telephone: (954) 525-9900
Facsimile: (954) 523-2872

W. Pitts Carr (admitted *pro hac vice*)
pcarr@carrpalmer.com
David M. Cohen (admitted *pro hac vice*)
dcohen@carrpalmer.com
CARR & PALMER, LLP
10 North Parkway Square
4200 Northside Parkway
Atlanta, Georgia 30327
Telephone: (404) 442-9000
Facsimile: (404) 442-9700

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was filed electronically with the Clerk of the Court using CM/ECF on January 6, 2011. As such, the foregoing was served electronically upon all counsel of record.

/s/ Charles H. Lichtman
Charles H. Lichtman
Florida Bar No. 501050
clichtman@bergersingerman.com
BERGER SINGERMAN
350 East Las Olas Boulevard, Tenth Floor
Fort Lauderdale, Florida 33301
Telephone: (954) 525-9900
Facsimile: (954) 523-2872

SERVICE LIST

United States District Court for the Southern District of Florida
Point Blank Solutions, Inc. et al. vs. Toyobo America, Inc., et al.
CASE NO. 09-61166-CIV-SEITZ/O'SULLIVAN

Edward Soto
Weil Gotshal & Manges
1395 Brickell Avenue
Suite 1200
Miami , FL 33131
305-577-3177
Fax: 374-7159
Email: edward.soto@weil.com

Paullette Christine Deruelle
Weil Gotshal & Manges
1395 Brickell Avenue
Suite 1200
Miami , FL 33131
305-577-3100
Fax: 577-3290
Email: christine.deruelle@weil.com

Konrad L. Cailteux
Weil Gotshal & Manges
767 5th Avenue
New York , NY 10153-0119
212-310-8000
Email: konrad.cailteux@weil.com

Eric C. Lyttle
Weil Gotshal & Manges, LLP
1300 Eye Street NW, Suite 900
Washington, DC 20005
202-682-7000
Email: konrad.cailteux@weil.com

Brian Keith Gibson
Weil Gotshal & Manges
767 5th Avenue
New York , NY 10153-0119
212-310-8000
Email: keith.gibson@weil.com

Jed P. Winer
Weil Gotshal & Manges
767 5th Avenue
New York , NY 10153-0119
212-310-8000
Email: jed.winer@weil.com

Jeremy T. Grabill
Weil Gotshal & Manges
767 5th Avenue
New York , NY 10153-0119
212-310-8000
Email: jeremy.grabill@weil.com

Michael J. Lyle
Weil Gotshal & Manges, LLP
1300 Eye Street NW, Suite 900
Washington, DC 20005
202-682-7000
Email: konrad.cailteux@weil.com

Stephen A. Gibbons
Weil Gotshal & Manges, LLP
1300 Eye Street NW, Suite 900
Washington, DC 20005
202-682-7000
Email: konrad.cailteux@weil.com