

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

PACIFIC COAST MARINE WINDSHIELDS  
LIMITED, a foreign corporation,

Plaintiff,

v.

MALIBU BOATS, LLC, a California limited  
liability company; MARINE HARDWARE  
INC., a Washington corporation; and  
TRESSMARK, INC. d/b/a LIQUID SPORTS  
MARINE, a Florida corporation, MH  
WINDOW, LLC, a Washington limited liability  
company, and JOHN F. PUGH, an individual,

Defendant.

Civil Action No.: 6:12-CV-00033-JA-DAB

**OPPOSITION OF MALIBU BOATS TO PCMW'S MOTION FOR SANCTIONS**

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## **I. INTRODUCTION**

PCMW vastly overreaches with its misguided Motion for sanctions. PCMW mischaracterizes the facts and its forensic investigation was grossly deficient in failing to recognize that the purportedly deleted files were all recoverable. Hence, PCMW has not been harmed and spoliation sanctions are not warranted.

Malibu Boats took extraordinary steps to comply with the court order, and the actions complained of in PCMW's Motion were outside of Malibu Boats's control. Neil Gilbert is a third party witness and independent contractor of Malibu. Malibu Boats does not control Gilbert and has never had possession of Mr. Gilbert's computer. Malibu Boats specifically advised Mr. Gilbert through his counsel of the discovery order issued by this Court and emphasized the importance of complying with the order by delivering the computer for inspection in an unaltered state. Contrary to those instructions, Gilbert ran a so-called "cleaner program" on the computer before it was delivered for inspection, but Malibu Boats was neither aware of this action by Mr. Gilbert nor condones it. To penalize Malibu Boats for the independent actions of a third party witness would be grossly unfair and unjustified.

Moreover, PCMW wildly overstates the purported destruction of evidence and offers a highly misleading description of the facts. The files on Mr. Gilbert's computer were not permanently deleted. In fact, Malibu Boats's forensic expert was able to restore the files without difficulty. It is inexplicable why PCMW's forensic expert was unable to do the same or failed to acknowledge an ability to do so. And the forensic examination shows that the deleted files were all minor operating system files having nothing to do with the CAD files pertinent to the inventorship issue. Under these circumstances, PCMW has suffered no prejudice to justify its outrageous demands for sanctions. To the contrary, PCMW is seeking to take tactical advantage

from an admittedly improper yet ultimately insignificant action by Mr. Gilbert to try to knock out a defense to its infringement claims that it otherwise cannot defeat on the merits.

In light of the foregoing, PCMW's Motion must be denied in its entirety.

## **II. STATEMENT OF FACTS**

### **A. Malibu Boats Has Consistently Asserted Co-Inventorship Of The PCMW Patents**

Malibu Boats contends that PCMW incorrectly omitted designer Danny Gasper as a co-inventor of the '070 and '510 Patents and that the two patents are therefore invalid under 35 U.S.C. § 102(f). Contrary to PCMW's assertion, abundant corroborated evidence exists to support this contention.

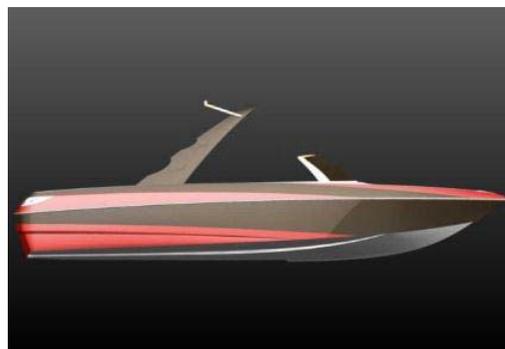
By way of background, Danny Gasper is the Manager of Research and Development for Malibu Boats. He has designed boats for Malibu Boats for over twenty years. Dkt. 207, ¶ 3. In November 2004, Mr. Gasper attended the SEMA car show in Las Vegas, Nevada. Dkt. 207, ¶ 4. At that car show Mr. Gasper saw a new car called the Shelby Cobra Concept Car, which gave him the inspiration for using an automotive style corner post in a marine windshield. *Id.*

In September of 2005, Darren Bach of PCMW requested an opportunity to pitch new windshield designs to Mr. Gasper. Dkt. 207, ¶ 5. Mr. Gasper agreed, and Messrs. Gasper and Bach discussed new windshield designs on a car ride to a boat test in Parker, Arizona. *Id.* Mr. Gasper did not like any of the designs proposed by Mr. Bach, and none of the windshield designs presented by Mr. Bach contained a corner post. Instead, it was Mr. Gasper who proposed to Mr. Bach that PCMW manufacture a new windshield design with an automotive-style pillar or "corner post" based on the Shelby Cobra Concept Car. Dkt. 207, ¶ 6. Mr. Bach was receptive to this idea, and they agreed that Mr. Gasper would create CAD drawings to better illustrate the specific design he had in mind. Dkt. 207, ¶ 6.

Beginning in or about October 2005, Mr. Gasper began work on models of this new pillar or “corner-post” design. Dkt. 207, ¶ 7. In developing this new design, Mr. Gasper employed the services of Neil Gilbert, an independent contractor residing in Canada who was experienced in the use of computer aided design (“CAD”) software. Mr. Gasper’s first iteration (illustrated below) was closely modeled on the 2004 Shelby Cobra Concept Car. Mr. Gasper further refined this design through a series of iterative changes, including adding side wings, refining the glass shape, and adding vent holes. Dkt. 207, ¶ 8.<sup>1</sup> The final design produced by Mr. Gasper is practically identical to the design claimed in the ’070 patent.



[2004 Shelby Cobra Concept Car]<sup>2</sup>



[early corner post design]<sup>3</sup>

PCMW disputes these designs as not corroborated, but that simply ignores the facts. Mr. Gasper sent a series of emails to Mr. Bach at PCMW in November 2005 containing renderings of these windshield images. *See* Berliner Decl. Exh. J. Mr. Bach acknowledges receiving these emails and conceded that some of these renderings reflect the design claimed in

<sup>1</sup> *See also* Declaration of Brian Berliner (“Berliner Decl.”), Exhs. A-I (Gasper Deposition Exhibits 4-12); Berliner Decl., Exh. J (Gasper Deposition) at 96-97.

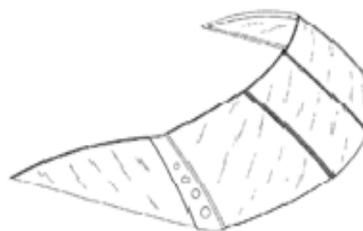
<sup>2</sup> Dkt. 207, Exh. 1; and ¶7.

<sup>3</sup> Dkt. 207, Exh. 2; and ¶7.

the '070 patent.<sup>4</sup> For example, the November 18, 2005 email from Danny Gasper to Darren Bach contains renderings that, according to Mr. Bach, show his patented design.<sup>5</sup>



[November 18, 2005 Rendering]



['070 Patent, Figure 1]

Not long after Mr. Gasper developed these windshield designs, Mr. Bach admitted the obvious -- that Mr. Gasper should have been named as an inventor on the '070 patent. In a January 30, 2006 email to Mr. Gasper, Mr. Bach wrote as follows:

I have a guy that is willing to do the patents for the windshield. He will charge 2000.00 for the design patent, and 5000.00 for the utility patent. His prices are excellent, and much more detailed than anyone else that we have used. **Both you and I will probably have to appear as inventors.**<sup>6</sup>

Contemporaneous emails also show that PCMW believed that the corner post windshield design originated with Mr. Gasper. For example, in a November 21, 2005 email, Anna Dixon of PCMW sought approval from Danny Gasper of Malibu Boats to change the corner post design: “the holes on the corner post have remained in your original position . . . are you okay with

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<sup>4</sup> Berliner Decl., Exh. K (PCMW 30(b)(6) Deposition) at 127:20-22; *id.* at 129-130 (the drawings sent by Mr. Gasper to Bach on Nov. 14 “look very, very similar” to [Bach’s purported] design”); *id.* at 132-133 (Bach received drawings attached to Bach Deposition Exh. 11); *id.* at 136-140 (Bach agrees that he received a Nov. 17, 2005 email from Danny Gasper attaching drawings showing a windshield with a corner post and vent holes, and that these drawings reflected the patented design); *see also* Berliner Decl., Exh. J (Gasper deposition) at 96-97 (stating that he sent various models to PCMW).

<sup>5</sup> Dkt. 207, ¶ 8; and Exh. 3; Berliner Decl., Exh. M (PCMW 30(b)(6) Deposition Exh. 12); Berliner Decl., Exh. K (PCMW 30(b)(6) Deposition) at 136:20-138:9.

<sup>6</sup> Berliner Decl., Exh. M (Bach Depo Exh. 12) (emphasis added).

moving the holes in any way?”<sup>7</sup> Similarly, in a January 19, 2006 email from Mr. Bach to Mr. Gasper, Mr. Bach requested permission from Mr. Gasper to modify the positions of the vent holes: “[T]he new corner post windshield is coming along fine. . . . We have had to make some minor changes in the hole positioning in order to allow for the vent operation. I will need your okay on this.”<sup>8</sup>

Even after PCMW threatened to sue Malibu Boats, Mr. Bach conceded privately to a third party, Tom Broy of the boat-builder purchasing organization IBBI, that Mr. Gasper should have been named as a co-inventor on the PCMW patent. Specifically, in a March 20, 2008 conversation with Mr. Broy, which is memorialized in Mr. Broy’s telephone call log, Mr. Bach told Mr. Broy that Danny Gasper of Malibu Boats helped design the patented windshield but Bach was “smarter and put his name on it.”<sup>9</sup>

Notwithstanding this unambiguous record, PCMW’s Motion boldly asserts that Malibu Boats has been unclear in its inventorship claim and lacks corroborating evidence. Nothing could be further from the truth -- Malibu Boats has consistently claimed co-inventorship of the patented windshield design. Two years before PCMW filed this lawsuit, Malibu Boats advised PCMW in a letter dated May 16, 2008, that it considered Mr. Gasper a co-inventor of the ’070 Patent. Berliner Decl. Ex. O. In its Answer to the First Amended Complaint, dated November 29, 2010, Berliner Decl. Ex. Q Malibu Boats asserted a claim for conversion of the ’070 Patent, stating:

33. Malibu is the owner of the Marine Windshield design disclosed in the ’070 Patent. Dan Gasper, Malibu’s research and development manager, first conceived of the windshield design after viewing a Ford Shelby Cobra concept car at the 2004 SEMA auto show in Las Vegas, NV. With the assistance of Neil Gilbert, a Malibu contractor, Mr.

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<sup>7</sup> Berliner Decl., Ex. V (MB0003657) (emphasis added).

<sup>8</sup> Berliner Decl., Ex. W (Exh. 17 to Gasper Deposition); Berliner Decl., Ex. J (Gasper Deposition) at 118.

<sup>9</sup> Berliner Decl., Ex. P (Broy Deposition Exh. D146); Berliner Decl., Ex. R (Broy Deposition) at 30-36; *see also* Berliner Decl., Ex. S (Broy Deposition Exhibit D149); Berliner Decl., Ex. R (Broy Deposition) at 49-56.

Gaspar created CAD drawings of his new windshield design. Mr. Gaspar and Mr. Gilbert completed the CAD drawings on November 16 and 17, 2005. As an employee, Mr. Gaspar's windshield design is exclusively owned by Malibu. Malibu is the owner of Mr. Gaspar's windshield design and has exclusive right to possession of it.

Berliner Decl. Exh. Q, ¶ 33. Later, in a second lawsuit (ultimately consolidated with the first lawsuit), PCMW asserted infringement of the '070 and '510 Patents. In its Answer to the Second Amended Complaint, dated July 22, 2011, Malibu Boats repeated its claim for conversion of the '070 Patent and added claims for conversion of the '510 Patent as well as invalidity and unenforceability of both patents. *See* Berliner Decl. Exh. W. Each of these pleadings unambiguously recites Malibu Boats's contention that PCMW failed to include Mr. Gaspar as an inventor on the '070 Patent.

Malibu Boats has not wavered from this position, and the evidence proffered to date only confirms the merits of these claims. In his deposition on June 10, 2011, Mr. Gaspar made clear the basis for Malibu Boats' inventorship claim as it pertains to the '070 Patent:

Q. Which aspect of the design patent -- let me ask another question. Why did you think you should be listed on the design patent as an inventor?

A. Because the corner post idea I conceived. The idea of having the top frame hidden from a front view I conceived. And created the shape of the glass, the contour of the glass for the whole window. So those are the elements that make that windshield, you know, look good. That's what I do.

Berliner Decl. Exh. J (Gaspar Dep. 146:13-22). If there was any lingering ambiguity of Mr. Gaspar's testimony on this point, PCMW had the opportunity to clear it up when PCMW took a second deposition of Mr. Gaspar on February 10, 2012. But PCMW's counsel neglected to ask a single question regarding Malibu Boats's inventorship claim at that deposition.

**B. Malibu's Collection and Production of the Gilbert CAD Files**

Because Mr. Gilbert's created some of the drawings in Mr. Gaspar's design of the corner post windshield, Malibu Boats has repeatedly sought to obtain any documents in Mr. Gilbert's

possession that related to the windshield design project. Berliner Decl. ¶ 6. Nevertheless, despite numerous inquiries by Malibu Boats's counsel, Mr. Gilbert steadfastly maintained that he could find nothing from that period. *Id.* Considering that PCMW filed its first lawsuit against Malibu Boats five years after the events leading to the design of the corner post windshield, the fact that Mr. Gilbert, a sole proprietor working out of his home, retained no documents was not surprising, albeit disappointing.

But in March 2012, Mr. Gilbert informed Mr. Gasper that he had found a folder on his computer containing files that might relate to the corner post windshield design. Berliner Decl. ¶ 7. Seeking to minimize the burden on Mr. Gilbert and avoid contamination of the files, Malibu Boats's counsel arranged for a discovery vendor to contact Mr. Gilbert and retrieve a copy of the folder. *Id.* Significantly, at no time did Malibu Boats ever have physical possession of Mr. Gilbert's computer or conduct a search on it -- Mr. Gilbert only authorized a vendor hired by Malibu Boats to copy the folder that he identified. *Id.*

While the retrieved folder initially appeared unrelated to the corner post windshield design, upon further analysis Malibu Boats determined that two CAD files were in fact related to the design: (1) windowtowercomp-c-holes.prt and (2) cornerholes.prt. Malibu Boats produced to PCMW native copies of these and other documents from Mr. Gilbert's folder on March 22, 2012. Berliner Decl. Exh. U. And Mr. Gilbert consented to a deposition on May 15, 2012, in which he was examined concerning his participation in the design of the corner post windshield and his discovery of the folder containing the CAD files. There was never any scheme on the part of Malibu Boats to delay the production of these files -- had they been discovered sooner, they would have been produced sooner because they would further corroborate Malibu Boats' conversion claims. And despite its criticism of the timeliness of Malibu Boats's production,

PCMW never attempted to serve discovery on Mr. Gilbert prior to the production of the CAD files, even though it had known of Mr. Gilbert's involvement in the corner post windshield project for many years. Instead, PCMW improperly attempted to obtain discovery of documents from Mr. Gilbert by serving requests on Malibu Boats, to which Malibu Boats objected on the basis that the documents were not in Malibu Boats's custody or control. *See* Berliner Decl., Exh. CC.

**C. Malibu's Compliance With The Discovery Order and PCMW's Role In Delays**

All parties acknowledge that the date on the produced CAD files is incorrect. They bear a creation date in the metadata of 2002. And Mr. Gilbert was questioned extensively about the origin of the files in his deposition. Malibu Boats contends that the November 18, 2005 email from Mr. Gasper to Mr. Bach containing renderings of the boat design establish a date by which these CAD files were completed (i.e., they obviously had to be completed before they could be emailed to someone else). Alleging that the date discrepancy in the produced CAD files suggested misconduct on the part of Mr. Gilbert and/or Malibu Boats, PCMW sought and the Court granted an order compelling inspection of Mr. Gilbert's computer. Dkt. No. 175, ¶ 2. The order dated June 7, 2012, in pertinent part, reads as follows:

Malibu Boats is ORDERED to produce the documents related to and hard drive of Neil Gilbert as sought in the Motion within 14 days of this Order. If the Gilbert-related discovery or the hard drive is not produced, then Mr. Gilbert will not be allowed to testify at trial.

Immediately after entry of the order, Malibu Boats's counsel contacted Mr. Gilbert's counsel to advise him of the order and to coordinate the delivery of Mr. Gilbert's computer for inspection. Malibu Boats's counsel specifically advised Mr. Gilbert's counsel of the importance of complying with the order and emphasized that the computer must be delivered for inspection in an unaltered state.

The following day, on June 8, Malibu Boats's counsel contacted PCMW's counsel to discuss logistics for the inspection of the computer hard drive. Berliner Decl. Exh. X. PCMW's counsel asked to postpone the discussion until the next week. Berliner Decl. Exh. Y. The parties' respective counsel next spoke on this subject on June 12, 2012, and Malibu Boats's counsel responded later that same day with a specific proposal to make the computer available for inspection in Kelowna, British Columbia, a location that was convenient both for Mr. Gilbert and for PCMW's forensic expert. Berliner Decl. Exh. Z. A few days later, on June 15, 2012, Malibu Boats obtained Mr. Gilbert's permission to make the computer available for inspection, and offered June 21, 2012 as the date for the inspection. Berliner Decl. Exh. AA. Malibu Boats's counsel also circulated a proposed protocol for the parties' respective forensic experts to follow in the conduct of the inspection.

But, on June 19, PCMW's counsel advised that its forensic expert was unable to conduct the inspection on June 21, and requested a further postponement of the inspection. Berliner Decl. Exh. BB. The parties spent the next several weeks negotiating the terms of the protocol initially proposed by Malibu Boats, with an agreement finalized on July 5, 2012. Thereafter, the next available date convenient for each of the parties' forensic experts and for Mr. Gilbert was July 19, 2012, and the inspection occurred that day. According to the agreed protocol, the forensic experts created a duplicate image of Mr. Gilbert's computer hard drive for their analytical use in connection with the CAD files. Notably, PCMW's forensic expert began the inspection before Malibu Boats' forensic expert arrived at the designated site -- a clear violation of the protocol carefully negotiated between the parties that required both experts to be present to witness the inspection. While no one representing Malibu Boats ever had access to or possession

of Mr. Gilbert's computer at any time prior to or after the inspection, PCMW's forensic expert did have unsupervised access to the computer.

This chronology reflects that Malibu Boats did nothing to delay or hinder the conduct of the inspection. To the contrary, Malibu Boats was diligent in scheduling the inspection and drafting the applicable inspection protocol. In fact, Malibu Boats offered to make the computer available on June 19, 2012, within the fourteen day period defined in the order, but PCMW rejected that date and willingly accepted the later date in July. If any party is responsible for delaying the inspection, it was PCMW.

**D. Analysis Of The Gilbert Computer Image**

PCMW's motion includes a declaration of its forensic expert Nigel Holmes, which makes some rather inflammatory -- and factually inaccurate -- conclusions regarding the image of the Gilbert hard drive. Mr. Holmes claims that Mr. Gilbert ran an anti-forensic software program called CCleaner on the computer on July 18, 2012, the evening prior to the scheduled inspection, and that the program was used to "wipe the hard drives." Holmes Decl. ¶ 8. According to PCMW, this action by Mr. Gilbert permanently destroyed evidence on the hard drive rendering it impossible to investigate the creation and modification dates of the two produced CAD files.

Mr. Holmes' conclusions are incorrect in many important respects, as explained in the attached Declaration of Samuel S. Rubin ("Rubin Decl"), Malibu Boats's forensic expert. While Mr. Holmes was correct that CCleaner was manually operated on July 18, 2012, Mr. Holmes failed to correctly account for the way in which was CCleaner was configured to operate. Rubin Decl. ¶ 3. Specifically, CCleaner was not configured to permanently wipe files from the hard drive, but instead was operated in its default setting, which only "cleaned" (i.e., marked for deletion) certain limited areas of the hard drive while leaving the marked files in a forensically recoverable state. Rubin Decl. ¶¶ 10-15. Moreover, the types of files deleted by CCleaner

included only operating system and application components such as temporary Internet files, references to recently accessed files, browsing history, and cookies; however, these file types do not include any specific user-created files or folder locations. Rubin Decl. ¶ 9. In other words, no CAD files were deleted or modified in any way by the operation of CCleaner.

Based upon the information provided in Mr. Rubin's declaration and expert report (attached as an exhibit to the declaration), the following key observations are directly pertinent to the present Motion:

- The CCleaner application was installed on Mr. Gilbert's computer on April 21, 2011, roughly one year prior to Mr. Gilbert's discovery of the corner post windshield design folder on his computer and his ensuing deposition. This should dispel any notion that Mr. Gilbert had installed CCleaner for reasons pertaining to this lawsuit. Rubin Decl. ¶ 11.
- Use of CCleaner to selectively wipe (permanently delete) specific user-created files or folders is considered a feature for "Advanced users only," and it is not part of the application's default set of functions. Additionally, when CCleaner is configured to wipe files in the advanced setting, the application leaves traces in the Windows registry of what files or folders it was configured to wipe. Such evidence does not exist here. Rubin Decl. ¶ 10.
- When it ran on July 18, 2012, CCleaner was configured to delete only certain Windows operating system and application-specific items, not specific user-created files or folders. The program was NOT configured to wipe these items, thus leaving them in a forensically recoverable state. Rubin Decl. ¶ ¶ 10-12.
- By identifying backup copies of the Windows registry, Mr. Rubin was able to review "snapshots" of how the CCleaner application was configured over time, which showed that CCleaner was not used to target and wipe any individual files or folders. Rubin Decl. ¶ 12.
- The backup copies on the hard drive contain ten separate snapshots of the system settings and files at various points in time dating back to June 15, 2012. These backups, combined with the forensically recoverable deleted items that remain on the drive, are more than adequate for Mr. Holmes to conduct his forensic examination. Rubin Decl. ¶ 12.

### **III. ARGUMENT**

PCMW's motion for sanctions against Malibu Boats pursuant to Fed. R. Civ. P. 37(b)(2)(a) is completely lacking merit. Malibu Boats worked diligently to comply with the ordered inspection of Mr. Gilbert's computer and ensure that the computer was delivered for inspection at a place and time convenient for PCMW's forensic expert. To the extent that Mr. Gilbert's use of the CCleaner application is deemed to have destroyed any evidence, which Malibu Boats denies, such actions were entirely outside of Malibu Boats's control and were conducted in violation of instructions given by Malibu Boats's counsel. And because the computer files can be recovered to their state before the operation of the CCleaner application, PCMW has suffered no prejudice whatsoever. Under these circumstances, no sanctions are warranted.

#### **A. Malibu Boats Does Not Control Third Party Witness Neil Gilbert**

Under the standards applicable in the Eleventh Circuit, "a party's failure to preserve evidence rises to the level of sanctionable spoliation 'only when the absence of that evidence is predicated on bad faith,' such as where a party purposely loses or destroys relevant evidence." *Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 WL 2927962, at \*2 (S.D. Fla. July 23, 2010) (quoting *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir.1997)). There is no evidence that Malibu Boats directed the destruction of evidence. Instead, PCMW's Motion rests on the fiction that Mr. Gilbert is under the control of Malibu Boats, and that Malibu Boats is therefore responsible for Mr. Gilbert's actions. This is not true -- Malibu Boats does not control Mr. Gilbert.

In the Eleventh Circuit, *control* is the key factor with regard to compelling production of documents. *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984). "Control is defined not

only as possession, but as the legal right to obtain the documents requested upon demand.” *Id.* Malibu Boats had no legal right to demand production of computer files from Mr. Gilbert.

As discussed above, Mr. Gilbert is an independent contractor resident in Canada. Berliner Decl. ¶ 5. He is not now, nor has he ever been, an employee of Malibu Boats. *Id.* The computer that he uses in the course of his contract work for Malibu Boats and other clients is not the property of Malibu Boats, nor does Malibu Boats have any access to or control over the files contained on Mr. Gilbert’s computer. *Id.* At no time in the course of this lawsuit has Malibu Boats ever had possession or control of Mr. Gilbert’s computer. *Id.* Moreover, Mr. Gilbert is not a party to this lawsuit; he is a third-party witness outside the subpoena power of this Court. At the request (but not obligation) of Malibu Boats, Mr. Gilbert voluntarily agreed to produce certain files he found on his computer, to permit his deposition, and to make his computer available for inspection.<sup>10</sup> *Id.*

Malibu Boats does not condone Mr. Gilbert’s use of the CCleaner application prior to the inspection. Malibu Boats had no advance knowledge that Mr. Gilbert was going to use the CCleaner program, and if Malibu Boats had learned that he planned to take such actions, it would have taken steps to prevent them from occurring. Mr. Gilbert’s actions disregarded the plain instructions conveyed to his counsel, placed Malibu Boats in potential jeopardy in this lawsuit, and are generally inconsistent with the manner and standards with which Malibu Boats’s attorneys conduct their practice. *See* Berliner Decl. ¶ 8. Under these circumstances, it is unfair to sanction Malibu Boats for the independent actions of Mr. Gilbert.

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<sup>10</sup> PCMW attempts to exploit a purported inconsistency between Mr. Gilbert’s and Mr. Gasper’s deposition testimony regarding the scope and results of Mr. Gilbert’s search for documents. This is a red herring. Neither Mr. Gilbert nor Mr. Gasper have any familiarity or experience in litigation matters, and counsel’s questions concerning the search for and production of documents are plainly outside of their knowledge. Besides, whether Mr. Gilbert found and produced one email or no emails has no bearing on the merits of PCMW’s Motion.

In a similar case, the Eastern District of Ohio refused to impose sanctions on a party when the destroyed evidence was not in that party's custody or control, when the party did not engage in willful conduct resulting in the destruction of the evidence, and when neither that party nor its agents themselves destroyed the evidence. *R.C. Olmstead, Inc. v. CU Interface, LLC*, 657 F. Supp. 2d 878, 888 (N.D. Ohio 2009). Each of those same conditions apply in this case, because: (1) Mr. Gilbert's computer was never in Malibu Boats custody or control; (2) Malibu Boats did not engage in willful conduct; and (3) neither Malibu Boats nor its agents had caused the deletion of files from Mr. Gilbert's computer. The same reasoning should apply here. *See also Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 515-16 (D. Md. 2009) (finding that while a party has "control" over its employees and therefore a duty to preserve their documents, it does not exercise the same control over its consultants).

Moreover, Mr. Gilbert was apparently not attempting to destroy evidence in an effort to help Malibu, but rather was doing so for his own personal reasons. Courts recognize that sanctions are inappropriate under in such situations. *See, e.g., Nucor Corp. v. Bell*, 251 F.R.D. 191, 196 (D.S.C. 2008) (finding that non-party spoliator was "only trying to protect himself by discarding the SanDisk, and his testimony certainly does not require the inference that he discarded the SanDisk to protect [party]."); *see also Hertz Corp. v. Gaddis-Walker Elec., Inc.*, 125 F.3d 862 (10th Cir. 1997) (refusing to impute bad faith to and sanction party when non-party hardware supplier had control of evidence and chose, of its own accord, to destroy it). Malibu Boats's forensic expert Samuel Rubin found evidence of Mr. Gilbert's web browsing of personal, non-work related websites, and opines that individuals often take steps to delete information from their computers that they deem to be personal in nature. Rubin Decl. ¶ 14. In

view of his unfamiliarity with the law, Mr. Gilbert may not have fully appreciated the potential harm of his actions.

PCMW argues that the Court has already found Mr. Gilbert to be under Malibu Boats's control. Malibu Boats disagrees. The Court ordered Malibu Boats to produce Mr. Gilbert's computer hard drive, and if not produced, then Mr. Gilbert would not be allowed to testify at trial. Dkt. No. 175, ¶ 2. But the Court did not make a factual finding that Mr. Gilbert was under Malibu Boats' control, and, indeed, such a finding was unnecessary to the specific relief ordered and would have been inappropriate on the factual record. For the reasons given above, the Court should find that Mr. Gilbert is in fact *not* under Malibu Boats' control, and Malibu Boats is therefore not responsible for Mr. Gilbert's independent actions. Furthermore, because Mr. Gilbert was acting in furtherance of his own personal interests and adversely to those of Malibu Boats, it would be improper to impute his actions to Malibu Boats. *See, e.g., In re Fuzion Techs. Group, Inc.*, 332 B.R. 225, 231 (Bankr. S.D. Fla. 2005) ("When an agent is acting adversely to the interest of the principal, the knowledge and conduct of the agent are no longer imputed to the principal unless the principal benefitted from the wrongdoing.")

The cases relied upon by PCMW are inapplicable to the present facts. In *ANZ Advanced Tech., LLC v. Bush Hog, LLC*, 2011 WL 814663, at \*9 (S.D. Ala. Jan. 26, 2011), the court held that discovery misconduct by two individuals that directed a corporate party's activities were imputable to the corporate party. *Id.* Mr. Gilbert is an independent contractor that never had a role in controlling discovery activities for Malibu Boats. Similarly, in *Desoto Health & Rehab, L.L.C. v. Philadelphia Indem. Ins. Co.*, 2010 WL 4853891, at \*3 (M.D. Fla. Nov 22, 2010), the court held that a party had control over a non-party corporation because there was a showing of

common ownership between the party corporation and the non-party corporation. *Id.* There is no common ownership relationship between Malibu Boats and Mr. Gilbert.

**B. Sanctions Are Not Warranted Because PCMW Experienced No Material Prejudice**

Regardless of whether Mr. Gilbert was under Malibu Boats' control, and regardless of Mr. Gilbert's reasons for acting contrary to instructions and running the CCleaner program, PCMW is unable to establish a claim for spoliation sanctions for the simple fact that the purportedly deleted files were recoverable. Because PCMW is not impaired in its ability to evaluate Mr. Gilbert's computer, PCMW has not been harmed and sanctions are not warranted.

In determining the propriety of spoliation sanctions, the Eleventh Circuit has instructed that courts should consider the following factors: (1) prejudice to the non-spoiling party as a result of the destruction of evidence, (2) whether the prejudice can be cured, (3) practical importance of the evidence, (4) whether the spoiling party acted in good or bad faith, and (5) the potential for abuse if testimony about the evidence is not excluded. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005). Here, all five of the factors definitively weigh against the applicability of spoliation sanctions.

Under the first factor, there has been no prejudice to PCMW because the deleted files are recoverable, and hence, there was no actual destruction of evidence. Rubin Decl. ¶¶ 3, 11-15. Likewise, under the second factor, the prejudice can be cured by recovering the deleted files, which Mr. Rubin has shown to be possible. *Id.* Because the deleted files were all in the nature of operating system and application components such as temporary internet files, recently accessed files, browsing history, and cookies, and not any specific user-created files or folder locations, there is little practical importance of the deleted evidence under the third factor. *Id.* PCMW cannot, and did not, show that the deletion of these files had any bearing on the creation

of the CAD files that were the original objective of the ordered inspection. *See* Rubin Decl. ¶ 13. And, as to the fourth factor, for reasons discussed above, there is no evidence that Malibu Boats acted with bad faith. Finally, the potential for abuse in allowing testimony about the evidence is low because the deleted files can be recovered, and because PCMW would have the opportunity to challenge the testimony through cross-examination. *Id.*

It is inexplicable why Mr. Holmes was unable to discern the settings applied by Mr. Gilbert in the operation of CCleaner and ignored the availability of the recoverable deleted items and the backup copies on the hard drive. Mr. Holmes had access to the Gilbert hard drive image for three weeks (including an extra week beyond the two weeks permitted under the agreed protocol), which was more than sufficient time for him to conduct a thorough examination. In contrast, Mr. Rubin was able to conduct his investigation and reach the above conclusions in barely a week's time. The only reasonable conclusion is that Mr. Holmes conducted a shoddy and incomplete examination of the hard drive and that PCMW presented Mr. Holmes' inflammatory conclusions for the naked purpose of manufacturing a dispute to deny Malibu Boats of evidence at trial.

Moreover, Mr. Holmes was unable to identify any evidence on the Gilbert hard drive image to support PCMW's theory that the CAD files were fabricated for purposes of this litigation. Mr. Holmes offers his opinion that Mr. Gilbert's deposition explanation of the 2002 date of the CAD files is "not supported by the evidence," but points to no actual evidence supporting the opinion. Holmes Decl. ¶ 15. In light of the significant factual deficiencies of Mr. Holmes examination, his opinion on this or any other subject should be afforded no weight.

Lastly, it is important to note that Malibu Boats had no knowledge of Mr. Gilbert's use of the CCleaner application prior to receiving notice from PCMW of its intent to file the present

Motion. Mr. Gilbert's actions were inconsistent with the unambiguous instructions delivered to Mr. Gilbert's counsel to present the computer for inspection in an unaltered state.

For each of these reasons, Malibu Boats urges the Court to find that there has been no material prejudice to PCMW, and that spoliation sanctions are not warranted.

**C. Even If The Court Finds Bad Faith Attributable To Malibu Boats, The Court Has Already Determined The Applicable Remedy**

The harsh remedies proposed by PCMW are all inappropriate under the circumstances. PCMW is essentially seeking a windfall from its fortuitous discovery that Mr. Gilbert foolishly ran the CCleaner application before the inspection. Indeed, PCMW seeks to be placed in a better position than it would have been had the Gilbert computer never been produced for inspection. As discussed above, the evidence of co-inventorship is particularly strong in this case, and PCMW is desperate to keep that evidence away from the jury and is using this Motion as a vehicle to achieve that end.

Nevertheless, the Court need not reach the question of the appropriate remedy because that question was already answered in the original discovery order. The Court ordered that "[i]f the Gilbert-related discovery or the hard drive is not produced, then Mr. Gilbert will not be allowed to testify at trial." Dkt. No. 175, ¶ 2. Hence, if the Court finds that Malibu Boats acted in bad faith, in contradiction of the evidence and argument presented above, the spoliation sanctions should be no harsher than exclusion of Mr. Gilbert's testimony at trial. Anything more punitive would be manifestly unjust under the present circumstances.

**IV. CONCLUSION**

In light of the foregoing, Malibu Boats respectfully requests that PCMW's motion be denied in its entirety.

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Respectfully submitted:

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