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. Defendants.	Civil Action No. 6:12-CV-00033-JA-DAB **ORAL ARGUMENT REQUESTED**

PACIFIC COAST MARINE WINDSHIELDS' REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS FOR MALIBU'S DESTRUCTION OF EVIDENCE IN VIOLATION OF COURT'S ORDER

Facts Not In Dispute. As the Court considers PCMW's motion for sanctions for violation of a discovery order, it is important to keep in mind the following facts that are not in dispute or that have already been decided by the Court. First, the Court ordered Malibu, in response to discovery requests propounded on Malibu, to produce the hard drives of its contract employee, Neil Gilbert, on June 7, 2012. Doc. No. 175. Thus, by making its order, the Court has already determined that Gilbert is within Malibu's control for purposes of discovery.[1] Second, Malibu admits that it provided Gilbert with notice of the Court's order immediately after it was entered. Doc. No. 294 at 4. Third, despite receiving notice of the Court's order, the night before the hard drives were to be made available for inspection, Gilbert **manually executed** a program called CCleaner and **deleted and/or wiped at least 26 different categories of electronically stored information ("ESI")**, which otherwise would have been available for forensic analysis but for Gilbert's actions. Doc. No. 296-1 at 11-13. Thus, there is no dispute that Malibu violated the Court's order.[2]

Absence Of Gilbert's Declaration. As confirmed by Malibu's own expert report, PCMW satisfied its initial burden of proving that Malibu violated the Court's discovery order. At that point the burden shifted to Malibu to defend its violation. *See In re Chase & Sanborn Corp.*, 872 F.2d 397, 400 (11th Cir. 1989) (once a prima facie showing of a party's violation of court order is made, burden shifts to that party to defend their violation). "To succeed on this defense, however, the respondent must go beyond a mere assertion of inability and satisfy his burden of production on the point by introducing evidence in support of his claim." *U.S. v. Hayes*, 722 F.2d 723, 725 (11th Cir. 1984). One such critical piece of evidence in this case would be a declaration from Gilbert.

[1] Despite the Court's order, Malibu desperately continues to assert that Gilbert and the electronically stored information in his possession are not within its control. But Malibu's consulting agreement with Gilbert makes it clear that all the CAD files Gilbert creates for Malibu and the information contained in the CAD files are the property of Malibu. Paine Decl., Ex. A at ¶¶2(e) & (f). This alone is sufficient evidence to find that Gilbert is within Malibu's control for the purpose of discovery. *See Valentine v. Mercedes-Benz Credit Corp.*, 1999 WL 787657 *4 (S.D.N.Y. 1999) ("When a person has custody of property owned by another and acts at the other's behest, that person is regarded as the agent of the owner of the property").

[2] In a transparent attempt to deflect attention from its violation of the Court's order, Malibu falsely accuses PCMW's expert of violating the inspection protocol. But even if everything Malibu asserts about the onsite inspection is true, there was no violation. The inspection protocol provides that Gilbert or Malibu "may" have a representative monitor the forensic copying of the hard drives. Nothing **required** their presence. Paine Decl. Ex. B (agreed inspection protocol).

Conspicuously absent from Malibu's opposition, however, is a declaration from Gilbert offering any explanation for his inexcusable manual execution of CCleaner in violation of the Court's order. The absence of Gilbert's declaration is particularly telling and significant. For instance, Malibu's expert speculates that Gilbert ran CCleaner in its default settings and did not use the program's advanced setting to wipe, or irretrievably delete, data from his hard drives. Doc. No. 296-1 at 14. But where is the sworn declaration from Gilbert confirming the expert's opinion to be accurate? Malibu's expert also speculates that Gilbert likely ran CCleaner for no other purpose than to delete personal information.[3] Doc. No. 296-1 at 20. But again, Malibu has failed to present a declaration from Gilbert confirming that to be true or offering any reason for his manual execution of CCleaner in violation of the Court's order. Finally, PCMW's expert established that Gilbert's explanation that a series of fortuitously timed hard drive crashes caused the metadata on his relevant CAD files to display incorrect file creation and modification dates is not supported by the evidence.[4] Malibu made no attempt, either through its expert's analysis or a declaration from Gilbert, to controvert this finding. For these reasons alone, Malibu has not satisfied its burden for defending against sanctions.[5]

Other Key Facts Not Contested By Malibu. As established in PCMW's motion for sanctions, contrary to Gilbert's sworn testimony, the alleged catastrophic hard drive failure of 2006 does not appear to have wiped out all of Gilbert's emails from the relevant 2005 time period. Malibu does not challenge this finding. The evidence also establishes that Gilbert's hard drives were replaced no earlier than 2010, which contradicts Gilbert's claim that his hard drives failed and

[3] The opinion of Malibu's expert is of marginal evidentiary value. Rubin does not offer his opinions on a more probable than not basis, but instead offers little more than rank speculation with his repeated use of the term "suggests." *See, e.g.*, Doc. No. 296-1 at 18. The problems with Rubin's opinions are identified in the declaration of N. Holmes, which was filed in support of this reply.

[4] Malibu asserts that this conclusion by PCMW's expert is unsupported. Malibu is wrong. PCMW's expert provided his detailed findings, which plainly contradicted Gilbert's testimony, in his report with supporting exhibits. Doc. No. 274-2 at 15-16.

[5] Even Malibu's own expert **never** affirmatively states with any degree of certainty that **all** ESI deleted by Gilbert was recovered or even can be recovered. Malibu's expert merely states in general terms, "when a file on a computer is deleted, **it is often recoverable** through the use of forensic software, until it has been overwritten with new data." Doc. No. 296-1 at 20 (emphasis added).

were replaced in 2006. Malibu does not contest this finding either. This is important as it establishes Gilbert's explanation for the false dates displayed in the metadata of the files (upon which Malibu's entire inventorship claim is reliant) as pure fabrication. Finally, PCMW's expert found evidence (in the form of keygens, cracks and burned copies of software) on Gilbert's hard drive indicating that he was using unlicensed or pirated copies of CAD software to create the CAD files at issue. Malibu does not dispute this finding. In sum, the undisputed record clearly establishes that Gilbert's explanation for the incorrect file dates is false[6] and he is a sophisticated computer user, as evidenced by his documented and uncontroverted use of keygens and cracks to use pirated software. Therefore, any potentially "innocent" explanation for the manual execution of CCleaner the night before the hard drives were produced is simply not credible.

Malibu Is Responsible For Its Agent. Malibu argues that because it did not condone Gilbert's violation of the Court's order, it cannot be held responsible. Doc. No. 294 at 16. For obvious reasons, that is not the law. Otherwise, any corporation would escape sanctions by merely laying the blame on one of its agents. Courts have held that an agency-principal is sufficient to establish the requisite control for discovery purposes. *See ANZ Advanced Tech., LLC v. Bush Hog, LLC*, 2011 WL 814663 *9 (S.D. Ala. 2011) (finding that party had duty to produce the hard drives in question due to its "principal agent relationship"). And a party is responsible for its agent's destruction of evidence. *See New Jersey Mfrs. Ins. Co. v. Hearth & Home Techs., Inc.*, 2008 WL 2571227 *7 (M.D. Pa. 2008) ("A party to a law suit, and its agents, have an affirmative responsibility to preserve relevant evidence. A [party] ... is not relieved of this responsibility merely because the [party] did not itself act in bad faith and a third party to whom [the party] entrusted the evidence was the one who discarded or lost it"). Thus, the level of culpability of the agent can be imputed to the principle. *See, e.g., Connor v. Sun Trust Bank*, 546 F. Supp. 2d 1360, 1376-77 (N.D. Ga. 2008)(agent's destruction of email was attributable to defendant). Malibu is responsible for

[6] Gilbert's credibility is relevant in determining the appropriate sanction. *See, e.g., Communications Center, Inc. v. Hewitt*, 2005 WL 3277983 *2 (E.D. Cal. 2005) (finding defendant not credible and striking answer as a sanction for running a program similar to CCleaner after the court had ordered the production of hard drives).

Gilbert's actions especially given Malibu's admission that Gilbert executed CCleaner the night before the inspection even after receiving notice of the Court's order.

Even If Recoverable, The Deletion Of ESI Is Still Sanctionable. Malibu argues that because the deleted data might be recovered through a costly a time consuming forensic investigation and analysis, the willful deletion of at least 26 categories of ESI is not sanctionable. That is clearly not the law. Otherwise unscrupulous litigants would always choose the destruction of potentially damaging ESI over production, and then argue "no harm, no foul" when the destruction is revealed. Indeed, courts have sanctioned parties for destroying ESI that was later recovered. As one court explained the rationale, "plaintiff is prejudiced by Sun Trust's destruction of the February 12 email [which was later recovered] because it raises a question of whether there were other relevant emails in existence at that time but which were also not produced." *Connor*, 546 F. Supp. 2d at 1376. Therefore, even if it is possible to recover every bit and byte of ESI that Gilbert deleted, and Malibu's expert never even asserts that this is indeed possible or that all of the deleted data is even identifiable, Malibu does not escape sanctions. *See NHL v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) ("the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent"); *see also Gratton v. Great Am. Commc'n*, 178 F.3d 1373, 1374 (11th Cir. 1999) ("Rule 37 sanctions are intended to prevent unfair prejudice to the litigants and insure the integrity of the discovery process").

Finding of Bad Faith Not Required. Malibu argues that without evidence of bad faith on its part, sanctions are inappropriate.[7] Again, that is not the law. The cases relied upon by Malibu in

[7] In order to avoid a finding of bad faith, Malibu attempts to deflect the blame by faulting PCMW for not conducting Gilbert related discovery prior to the eleventh hour production of the Gilbert CAD files with the false dates. Doc. No. 294 at 10-11. But based on the unequivocal testimony of Gasper, PCMW reasonably believed that all relevant documents and files in Gilbert's possession had been produced by Malibu. And until after the close of discovery and exchange of expert reports, PCMW had no notice that Malibu intended to claim that Gilbert was a co-inventor of the patents at issue. Nevertheless, soon after PCMW received the Gilbert CAD files, PCMW indeed propounded a set of discovery requests concerning Gilbert and his CAD files. Malibu, however, refused to provide **any** Gilbert related discovery (until later compelled by court order) before his deposition scheduled by the defendants for the last

support of its position concerned the mere spoliation of evidence, not the violation of a court order to produce the very materials later destroyed. The latter, which is the circumstance presented to this Court, is governed by CR 37(b)(2). Under CR 37(b)(2), the only sanction that requires a finding of bad faith is default or dismissal. *See State Exchange Bank v. Hartline*, 693 F.2d 1350, 1352 (11th Cir. 1982). Otherwise, the Court has broad discretion to fashion the appropriate sanction, *id*. ("court has broad powers under the Federal Rules of Civil Procedure to impose sanctions for a party's failure to abide by court orders"), including the striking of Malibu's affirmative defenses and counterclaims, *cf*. Fed. R. Civ. Proc. 37(b)(2)(iii), (iv) & (vi) (identifying the striking of pleadings and the dismissal of an action as distinct sanctions).

Inadmissible Evidence Should Be Stricken. Days after Malibu submitted its opposition, it filed a "supplement" to Samuel Rubin's declaration along with multiple exhibits. Doc. Nos. 299 & 299-1-18. Rubin's declaration, however, only supports five exhibits. The unsupported exhibits should be stricken. Moreover, to establish that Malibu does not control the ESI in Gilbert's possession, it offers the declaration of its attorney Brian Berliner. This declaration, however, is not based on personal knowledge and should be stricken. Moreover, the Berliner declaration contains inadmissible hearsay statements, which should not be considered. Doc. No. 295 at ¶¶6-8.

Conclusion. The full ramifications of Gilbert's actions are not known. What is known, however, is that Gilbert's manual execution of Ccleaner was improper and constituted a violation of the Court's order. With the violation of the Court's order conclusively established, the only question left to resolve is the appropriate sanction. PCMW that the most appropriate sanction under these circumstances is for the Court to strike all affirmative defenses and counterclaims concerning inventorship, and then exclude Gilbert's testimony and documents, including computer files, from trial. Whatever sanction the Court ultimately chooses, PCMW asks that the Court also order Malibu to pay a substantial monetary sanction to PCMW.

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date of discovery. Doc. No. 273 at 16-18. Malibu clearly obstructed PCMW's efforts to obtain the Gilbert related discovery to which it is entitled, and its intransigence should be weighed in favor of harsh sanctions.

Respectfully submitted this 15th day of October 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2012, I electronically filed the foregoing using the Management/Electronic Case Filing ("CM/ECF") system, which will send a notice of electronic filing to the following CM/ECF Participants:

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