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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Aviva USA Corporation, an Iowa) corporation; and Aviva Brands Limited, a) )  
10 United Kingdom limited company, )

No. CV 11-0369-PHX-JAT

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Plaintiffs, )

**ORDER**

12

vs. )

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14 Anil Vazirani, an individual; Vazirani &) Associates Financial, LLC, an Arizona) limited liability company; Secured) )  
15 Financial Solutions, LLC, an Arizona) limited liability company; James Regan, an) individual; and Regan & Associates, LLC,) an Arizona Limited liability Company )

17

Defendants. )

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19 Anil Vazirani, an individual; Vazirani &) Associates Financial, LLC, an Arizona) limited liability company; and Secured) )  
20 Financial Solutions, LLC, an Arizona) limited liability company, )

22

Counterclaimants, )

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24 Aviva USA Corporation, an Iowa) corporation; and Aviva Brands Limited, a) United Kingdom limited company, )

25

Counterdefendants. )

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27 Pending before the Court are: (1) Plaintiffs’ Motion to Dismiss Vazirani Defendants’  
28 Counterclaims for Failure to State a Claim Upon Which Relief Can be Granted (Doc. 53),

1 (2) Plaintiffs’ Motion for Entry of Partial Final Judgment on Liability as Sanctions for  
2 Spoliation of Evidence (Doc. 66), and (3) Defendant James Regan’s Motion for Sanctions  
3 for Discovery Abuse (Doc. 73). The Court now rules on these Motions.

4 **I. BACKGROUND**

5 Plaintiffs Aviva USA Corporation and Aviva Brands Limited (collectively “Aviva”)  
6 filed an Amended Complaint (Doc. 42) against Defendants Anil Vazirani, Vazirani &  
7 Associates Financial LLC, Secured Financial Solutions, LLC (collectively the “Vazirani  
8 Defendants”), James Regan, and Regan and Associates, LLC (collectively the “Regan  
9 Defendants”) on June 14, 2011.

10 Plaintiff Aviva USA is an Iowa Corporation that serves customers in the life insurance  
11 and annuity sector. (Doc. 42 at 4, ¶ 7). Defendant Vazirani has two limited liability  
12 corporations: Vazirani & Associates, LLC and Secured Financial Solutions, LLC, an  
13 independent marketing organization that contracts with insurance companies to perform  
14 distribution and other marketing functions for one or more of the insurance companies’  
15 products or product lines. (Doc. 75 at 4). From approximately 2005 to January 2009,  
16 Defendant Vazirani and his companies worked as agents of Aviva, marketing Aviva’s life  
17 insurance and annuity products. (*Id.*). Defendant Regan worked with Defendant Vazirani  
18 and his company, Defendant Secured Financial Solutions, LLC, and also worked as an agent  
19 marketing Aviva’s life insurance and annuity products. (Doc. 73 at 3).

20 In January 2009, Aviva terminated its contract with Defendants Regan, Vazirani and  
21 Secured Financial Solutions, LLC. (Doc. 75 at 4-5). Thereafter, Defendant Vazirani  
22 initiated lawsuits against Aviva’s executive vice-president, a former Aviva executive, and  
23 an Aviva subsidiary relating to this termination. (Doc. 66 at 5).

24 **A. The Amended Complaint**

25 Plaintiffs allege that, in July 2010, Defendant Vazirani’s lawyer emailed Aviva  
26 claiming that Defendants would hire a public relations firm to launch an internet smear  
27  
28

1 campaign if Aviva did not pay Defendant Vazirani off. (Doc. 42 at 7, ¶ 20).<sup>1</sup> Plaintiffs  
2 allege that when Aviva did not pay, Defendants hired Eric Starkman and his public relations  
3 firm, Starkman & Associates, Inc., to develop a commercial website that infringed Aviva’s  
4 trademark and trade dress rights and disparaged Aviva. (*Id.* at ¶ 21). Plaintiffs allege that  
5 Defendants then made the website available to the public at various domain names, including  
6 insideaviva.com, aviva-exposed.com, avivauncovered.com, and aviva-uncovered.com. (*Id.*  
7 at 8, ¶ 31).

8 Plaintiffs allege that these websites create a likelihood of confusion with Aviva’s  
9 marks and trade dress, inflict commercial harm on Aviva, and unjustly capitalize on the  
10 goodwill associated with the Aviva mark and Aviva’s protectable trade dress and other  
11 trademark rights. (*Id.* at 8-9, ¶¶ 35, 36). Plaintiffs allege that Defendants’ websites contain  
12 an identical design of Aviva’s AVIVA mark. (*Id.* at 15, ¶ 75). Plaintiffs allege that  
13 Defendants use the AVIVA mark in close connection with advertising their products and  
14 services in competition with Aviva (*Id.* at ¶ 76). Plaintiffs allege that Defendants copied  
15 Aviva’s Trade Dress by using: (1) a yellow, blue, and green color scheme; (2) the appearance  
16 of a ray of light emanating from the yellow background; and (3) a blue, serif, all capitals font  
17 for the AVIVA mark in close connection with the advertising of Defendants’ products and  
18 services. (*Id.* at 15-16, ¶ 78).

19 Plaintiffs further allege that Defendants impersonated an officer of Creative Marketing  
20 International Corporation, an Aviva affiliate, and electronically submitted false and  
21 fraudulent information corresponding to that officer’s identity to register certain domain  
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23 <sup>1</sup> The email at issue states, “In light of Mr. Tripses’ threat, we plan to send a letter to  
24 all of the insurance carriers that Mr. Vazirani does business with that includes various non-  
25 confidential disclosure documents that demonstrate that it is not Mr. Vazirani who has  
26 engaged in misconduct, but these defendants. We have also retained a PR firm to publicize  
27 the injustices suffered by Mr. Vazirani at the hands of your clients and Aviva. Prior to taking  
28 these actions, we wanted to give your clients the opportunity to discuss a fair and equitable  
settlement with Mr. Vazirani and/or to participate in an early mediation. If we don’t hear  
from you by close of business Monday, August 3, 2010, we will be left with no choice but  
to take the actions outlined above.” (Doc. 66, Exhibit 13).

1 names. (*Id.* at 9, ¶ 39). Plaintiffs allege that Defendants launched a campaign of “blast  
2 emails,” directed at Aviva’s agents, potential agents, and consumers, which disparaged  
3 Aviva. (*Id.* at 11, ¶ 56). Plaintiffs allege that, in an attempt to hide their misconduct,  
4 Defendants failed to preserve evidence and removed aspects of Aviva’s trade dress from one  
5 of the websites. (*Id.* at 11, ¶ 58).

6 Plaintiffs allege that after the lawsuit was filed, Defendants began ten new websites  
7 and registered these domain names with foreign registrars to evade the jurisdiction of the  
8 U.S. Courts. (*Id.* at 12, ¶ 59). Plaintiffs allege that these fraudulently registered domain  
9 names include aviva-lawsuit.com, aviva-problems.com, aviva-litigation.com,  
10 avivacomplaints.com, avivaplcsucks.com, avivasucksusa.com, anilvsaviva.com,  
11 anilvaziranivsaviva.com, avivavsanil.com, and avivavsanilvazirani.com. (*Id.* at 10, 21, ¶¶  
12 110, 118).

13 Based on the above facts,<sup>2</sup> Plaintiffs allege that Defendants have (1) engaged in  
14 trademark infringement in violation of section 32 of the Lanham Act, 15 U.S.C. § 1114  
15 (Count One) (Doc. 42 at 18-19, ¶¶ 90-98); (2) engaged in trademark infringement, trade dress  
16 infringement, and unfair competition in violation of section 43 of the Lanham Act, 15 U.S.C.  
17 §1125(a) (Count Two) (*Id.* at 19-21, ¶¶ 99-108); (3) engaged in Federal Cyberpiracy and  
18 violated § 43(D) of the Lanham Act, Anti-Cybersquatting Protection Act, 15 U.S.C. §  
19 1125(d) (Count Three) (*Id.* at 21-22, ¶¶ 109-124); (4) engaged in unfair competition in  
20 violation of Arizona common law (Count Four) (*Id.* at 22-23, ¶¶ 125-133); (5) engaged in  
21 Federal Racketeering prohibited by 18 U.S.C. § 1964 (Count Five) (*Id.* at 24-25, ¶¶ 134-  
22 142), and (6) Violated Arizona Revised Statutes section 13-2301, *et seq.*(Organized Crime,  
23 Fraud, and Terrorism) (Count Six) (*Id.* at 25-27, ¶¶ 143-154).<sup>3</sup>

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25 <sup>2</sup> The Court notes that its summary of facts in not intended to be all-inclusive and is  
26 not intended to limit Plaintiffs’ allegations in any way.

27 <sup>3</sup> The Court notes that, in their prayer for relief, Plaintiffs request “a temporary  
28 restraining order, preliminary, and then permanent injunction.” (Doc. 42 at 27, ¶ 1). If  
Plaintiffs seek *immediate* relief, Plaintiffs must file a separate motion for injunctive relief.

1 In their Answer and Counterclaim to Plaintiffs' Amended Complaint (Doc. 50), the  
2 Vazirani Defendants asserted affirmative defenses and counterclaims. The counterclaims  
3 are: (1) Non-Infringement of § 32 of the Lanham Act, 15 U.S.C. § 1114 (Count One) (*Id.* at  
4 10, ¶¶ 8-12); (2) Non-Infringement of Alleged Trade Dress Rights and Unfair Competition  
5 (Count Two) (*Id.* at 11, ¶¶ 13-17); and (3) Lack of Federal Cyberpiracy, Violations of § 43(d)  
6 of the Lanham Act and the Anti-Cyber Squatting Protection Act, 15 U.S.C. § 1125(d) (Count  
7 Three) (*Id.* at 11-12, ¶¶ 18-22). For relief, the Vazirani Defendants request the following  
8 judicial declarations: (1) that counterclaimants have not infringed counterdefendants'  
9 trademark rights or violated § 32 of the Lanham Act, 15 U.S.C. § 1114; (2) that  
10 counterdefendants alleged trade dress rights are not protectable; (3) that counterclaimants  
11 have not infringed counterdefendants' trademark rights in connection with  
12 counterdefendants' alleged trade dress rights and have not violated § 43(a) of the Lanham  
13 Act, 15 U.S.C. § 1125 (a); and (4) that counterclaimants have not infringed upon  
14 counterdefendants' trademark rights, have not violated § 43(b) of the Lanham Act. and have  
15 not violated the Anti-Cyber Squatting Protection Act, 15 U.S.C. § 1125(d). (*Id.* at 12, ¶¶ C-  
16 F).

17 **II. PLAINTIFFS' MOTION TO DISMISS VAZIRANI DEFENDANTS'**  
18 **COUNTERCLAIMS FOR FAILURE TO STATE A CLAIM UPON**  
19 **WHICH RELIEF CAN BE GRANTED. (Doc. 53).**

20 Plaintiffs seek an order dismissing the Vazirani Defendants' counterclaims for failure  
21 to state a claim upon which relief can be granted under Federal Rule of Civil Procedure  
22 12(b)(6). Plaintiffs argue that the Vazirani Defendants' counterclaims seeking declaratory  
23 relief are inappropriate because they "are redundant of their denials and affirmative defenses"  
24 and "ask the Court to decide the same issues as Aviva's first, second, third, and fourth causes  
25 of action." (Doc. 53 at 3, 4). In response, the Vazirani Defendants argue that "finding in  
26 favor of defendants on plaintiffs' principal claims herein would not necessarily constitute an  
27 affirmative declaration on any of the specific items as to which defendants seeks a  
28

1 declaration in their Counterclaims” (Doc. 59 at 3). The Vazirani Defendants also argue that  
2 their counterclaims “may become important for defendants’ protection if plaintiffs seek to  
3 dismiss one or more of their principal claims.” (*Id.*).

#### 4 **A. Legal Standard & Analysis**

5 “The Declaratory Judgment Act provides courts with discretion to either grant or  
6 dismiss a counterclaim for declaratory judgment.” *Southwest Windpower, Inc. v. Imperial*  
7 *Electric, Inc.*, No. CV-10-8200-SMM, 2011 WL 486089 (D. Ariz. Feb. 4, 2011). There is  
8 a split among district courts in the Ninth Circuit as to how to handle counterclaims for  
9 declaratory relief if such claims are repetitious of issues already before the court via the  
10 complaint or affirmative defenses. *See id.* (citing cases that dismiss such counterclaims); 6  
11 CHARLES ALAN WRIGHT, ET. AL., FEDERAL PRACTICE AND PROCEDURE § 1406 (3d ed. 2011)  
12 (discussing the split among courts and citing cases). Some courts have concluded that  
13 Federal Rule of Civil Procedure 41(a)<sup>4</sup> “contains sufficient protection for defendant against  
14 plaintiff’s withdrawal and therefore a counterclaim for a declaratory judgment involving the  
15 same transaction as plaintiff’s claim is wholly redundant and does not serve any useful  
16 purpose.” 6 CHARLES ALAN WRIGHT, ET. AL., FEDERAL PRACTICE AND PROCEDURE § 1406  
17 (3d ed. 2011). However, this conclusion has not been widely accepted because it “ignores  
18 the possibility that it is very difficult to determine whether the declaratory judgment  
19 counterclaim really is redundant prior to trial.” *Id.*

20 It appears that all of the Vazirani Defendants’ requests for declaratory judgment  
21 would be resolved upon the Court’s determination of the issues contained in the Complaint  
22 and the affirmative defenses. However, the Vazirani Defendants have met the 12(b)(6)  
23 standard of stating a claim upon which relief can be granted. The Vazirani Defendants assert

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25 <sup>4</sup> Federal Rule of Civil Procedure 41(a) provides, “the plaintiff may dismiss an action  
26 without a court order by filing: (i) a notice of dismissal before the opposing party serves  
27 either an answer or motion for summary judgment; or (ii) a stipulation of dismissal signed  
28 by all parties who have appeared.” FED. R. CIV. P. 41(a)(1)(A)(i)(ii). Otherwise, “an action  
may be dismissed at the plaintiff’s request only by court order, on terms that the court  
considers proper.” *Id.* at 41(a)(1)(B).

1 that the relief they request will not be duplicative of the issues before the Court and  
2 Plaintiffs' assertion that allowing the counterclaims to proceed will expand discovery bolsters  
3 the Vazirani Defendants' argument that its counterclaims are somehow different than the  
4 issues raised in the complaint and affirmative defenses. *See* Doc. 62 at 2-3. ("In opposition  
5 to Plaintiffs' motion, the Vazirani Defendants suggest that this Court should delay dismissal  
6 until after the Parties—and this Court—have spent substantial time and resources in  
7 discovery and motion practice."). Accordingly, the Court finds that the safest course is to  
8 deny the motion to dismiss the counterclaim. *See* 6 CHARLES ALAN WRIGHT, ET. AL.,  
9 FEDERAL PRACTICE AND PROCEDURE § 1406 (3d ed. 2011) ("the safer course for the court to  
10 follow is to deny a request to dismiss a counterclaim for declaratory relief unless there is no  
11 doubt that it will be rendered moot by the adjudication of the main action.").

12 Perhaps Plaintiffs did not intend to imply that allowing the counterclaims to go  
13 forward would require more discovery than would already be necessary, but, at this stage,  
14 the Court finds that the best course is to deny Plaintiffs' Motion to Dismiss the Vazirani  
15 Defendants' Counterclaims without prejudice. Plaintiffs may re-raise this issue on summary  
16 judgment if the evidence supports their original arguments.

17 **III. PLAINTIFFS' MOTION FOR ENTRY OF PARTIAL FINAL**  
18 **JUDGMENT ON LIABILITY AS SANCTIONS FOR SPOLIATION**  
19 **OF EVIDENCE. (Doc. 66).**

20 Plaintiffs argue that they are entitled to sanctions due to Defendant Vazirani's and  
21 Defendant Regan's alleged spoliation of evidence. Plaintiffs argue that Defendants' actions  
22 entitle them to a determination of liability, leaving their remedies as the only remaining  
23 issues for discovery, dispositive motions, and trial.

24 **A. Evidence of Spoliation**

25 Plaintiffs argue that Defendants Vazirani and Regan have both perjured themselves  
26 and destroyed evidence. Plaintiffs argue that the following facts show that Defendants  
27 Vazirani and Regan have destroyed or failed to preserve evidence relevant to this litigation:

- 28 • Although Plaintiffs have obtained numerous emails and text messages relevant to the  
litigation from third-parties Eric Starkman and his firm, Starkman & Associates, Inc.  
(collectively "Starkman"), neither Vazirani or Regan has produced any of these

1 emails or texts in response to discovery requests, even though the emails and texts  
2 show that they were either senders or recipients of the emails and texts. (Doc. 66 at  
3, 4).

3 • Before the emails and texts were produced in this litigation, Defendant Regan’s  
4 deposition was taken in another lawsuit. During that deposition, Defendant Regan  
5 swore he never discussed anti-Aviva websites with Starkman, that he never sent anti-  
6 Aviva documents to Starkman, that the first time he saw the emails posted on the  
7 alleged infringing websites was when he looked at those websites, that he first learned  
8 that Defendant Vazirani had surreptitiously recorded Aviva employee, Jordan  
9 Canfield, when he heard the recording on the websites and that he didn’t know of  
10 Greg Lowney doing any work for Defendant Vazirani besides work in 2011 relating  
11 to a virus on Defendant Vazirani’s computer. (Doc. 66 at 9, Exhibit 32). Each of  
12 these assertions was disproved by Starkman’s document production. (*Id.* at 10 (citing  
13 exhibits)).<sup>5</sup>

9 • The emails and texts that were produced by Starkman indicate that Defendant Regan  
10 sometimes avoided email in favor of telephone, fax, and text communications to hide  
11 what was being discussed. (*Id.* at 11 (citing exhibits)).

11 • On February 24, 2011, the same day that Plaintiffs filed their Complaint, Defendant  
12 Regan sent an email to Starkman and Associates requesting that they “remove all  
13 indication of dates for updates on the site.” (Doc. 66 at Exhibit 59).

13 • Defendant Regan produced screenshots of searches of keywords in his google email  
14 account to demonstrate that he did not have any emails that he was not producing in  
15 response to the subpoenas. However, many of the screenshots actually demonstrated  
16 that emails containing the keywords were placed in the “trash” folder of Defendant  
17 Regan’s email account. (*See* Doc. 66 at Exhibit 75 (At the bottom of screenshots  
18 depicting the search results to some “keywords,” a message read, “Deleted messages  
19 match your search **View them**<sup>6</sup> or go to **Trash** to delete forever.”)).

17 • Both Defendant Vazirani and Greg Lowney, an internet computer specialist who  
18 worked on Vazirani’s computer and was involved in registering domain names for  
19 Defendants, displayed significant gaps in their memories during their depositions,  
20 although many of the events they were questioned about occurred within the last two  
21 years. Defendant Vazirani equivocated throughout his deposition and claimed not  
22 even to know his own opinions in answer to various questions.

21 In response to these allegations, Defendants argue that they have not destroyed

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23 <sup>5</sup> Defendant Regan argues that his answers to his deposition only related to one of the  
24 Aviva websites and Plaintiffs have misconstrued his answers to make it seem as if he is lying.  
25 The Court has read the relevant portions of Defendant Regan’s deposition and finds the  
26 assertion that Defendant Regan was only referring to one of the websites unconvincing.  
27 Further, even if Defendant Regan was only referring to one of the websites, many of his  
28 answers are still disproved by the emails produced by Starkman.

<sup>6</sup> The bolded and underlined words are links to the folder containing the emails that  
matched the keyword searches that were placed in the trash folder.

1 evidence relevant to the case. They further argue that the alleged spoliation does not hamper  
2 Plaintiffs' ability to prosecute their case because they have the emails and texts that were  
3 allegedly destroyed.<sup>7</sup> The Vazirani Defendants further argue that because Defendant  
4 Vazirani admits to being involved in creating at least one of the websites, Plaintiffs have  
5 enough information to prosecute this case. The Vazirani Defendants finally argue that, if the  
6 Court believes Vazirani engaged in wrongdoing, an appropriate sanction would be a ruling  
7 that Defendant Vazirani is responsible for the anti-Aviva messages on the websites on which  
8 Defendant Vazirani disputes ownership.

### 9 **B. Legal Standard and Analysis**

10 The Court has discretion under its inherent powers to sanction a party who causes the  
11 spoliation of evidence. *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). This  
12 discretion is broad and can range from minor sanctions, such as the awarding of attorneys'  
13 fees, *Leon*, 464 F.3d at 961, to more serious sanctions, such as dismissal of claims, *Id.* at 958,  
14 or instructing the jury that it may draw an adverse inference, *In re Oracle Corp. Sec. Litig.*,  
15 627 F.3d 376, 386-387 (9th Cir. 2010). Sanctions under these "inherent powers must be  
16 exercised with restraint" and should be appropriate to the conduct that triggered the sanction.  
17 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991).

18 Destruction of evidence or the failure to preserve property for another's use as  
19 evidence in pending litigation constitutes spoliation. *See United States v. Kitsap Physicians*  
20 *Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002). Specifically, failure to "preserve electronic or  
21 other records, once the duty to do so has been triggered, raises the issue of spoliation of  
22 evidence and its consequences." *Surowiec v. Capital Title Agency, Inc.*, 790 F.Supp.2d. 997,  
23 1005 (D. Ariz. 2011) (quoting *Thompson v. U.S. Dep't. of Hous. & Urban Dev.*, 219 F.R.D.  
24 93, 100 (D. Md. 2003)); *see also Leon*, 464 F.3d at 959 (noting willful destruction of  
25 electronic files constituted spoliation).

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26  
27 <sup>7</sup> Plaintiffs respond that they were only able to obtain *some* of the destroyed emails  
28 from Starkman.



1 have made a showing that at least some of the spoliation occurred after Defendants’ duty to  
2 preserve had arisen.

3 **ii. Culpable State of Mind**

4 “Courts have not been uniform in defining the level of culpability—be it negligence,  
5 gross negligence, willfulness, or bad faith—that is required before sanctions are appropriate.”  
6 *Id.* at 1006 (internal quotation and citation omitted). “Nor is there consensus as to how the  
7 level of culpability is to be determined, or what prejudice, if any, may be presumed from  
8 culpable conduct.” *Id.* at 1006-1007. However, it is clear that “[a]n allegedly spoliating  
9 party’s culpability must be determined case-by-case.” *Id.* at 1007.

10 In this case, Defendants have provided no reasonable explanation for their failure to  
11 preserve. The totality of the facts presented shows that Defendants Regan and Vazirani  
12 deleted relevant records relating to this lawsuit. Further, the evidence suggests that as the  
13 lawsuit progressed, Defendants began communicating through telephone and faxes to avoid  
14 creating a record through email and text messaging technology that could later be discovered  
15 through forensic imaging. Moreover, although it appears from the evidence that Defendant  
16 Vazirani and Greg Lowney have significant knowledge that would be responsive to questions  
17 asked during their depositions, both displayed significant, unexplained gaps in memory  
18 regarding the events related to this lawsuit during those depositions. Finally, the evidence  
19 shows that Defendant Regan lied in his deposition about the events relating to this lawsuit.  
20 Accordingly, the Court finds that Defendants acted in bad faith and, thus, with a culpable  
21 state of mind.

22 **iii. Relevance to the Claims**

23 Plaintiffs have shown that the evidence destroyed was likely relevant to their claims.  
24 Starkman produced numerous emails that were also sent to Defendants Regan and Vazirani.  
25 Defendants Regan and Vazirani did not produce any of these emails. Further, the screenshots  
26 of Defendant Regan’s email account show that information related to the relevant “keyword”  
27 searches were placed in the trash folder of his email and never produced. Accordingly, the  
28 Court finds that Defendants destroyed and/or hid information relevant to this case.



1 interference with a rightful decision of the case attributed to the spoliation. *See id.* (quoting  
2 *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d at 618 (S.D. Tex. 2010))  
3 (“When a party is prejudiced, but not irreparably, from the loss of evidence that was  
4 destroyed with a high degree of culpability, a harsh, but less extreme sanction than dismissal  
5 or default is to permit the fact finder to presume that the destroyed evidence was  
6 prejudicial.”). Accordingly, the Court finds that a sanction granting judgment for Plaintiffs  
7 on liability would be inappropriate in this case.

8 Plaintiffs have requested alternative sanctions of a determination that Aviva has  
9 established a prima facie case on each of its claims, thereby shifting the burden of proof on  
10 liability on each of those claims to Defendants or a ruling that Aviva is entitled to adverse  
11 inference instructions on each element of each of its claims in this case. The Court finds  
12 adverse inference instructions to be warranted to the extent Defendants’ spoliation affects  
13 Plaintiffs’ ability to prove their claims. The Parties shall submit proposed adverse inference  
14 instructions with the other jury instructions to be filed before trial.

15 If Plaintiffs believe that Defendants’ spoliation affects their ability to dispute summary  
16 judgment, Plaintiffs may propose an appropriate adverse inference in response to any motion  
17 for summary judgment.<sup>8</sup> If Plaintiffs propose inferences in response to a summary judgment  
18 motion, they must specify how Defendants’ spoliation has prevented them from disputing  
19 specific facts, the discovery they have undertaken to obtain those facts, and how an inference  
20 in their favor would prevent summary judgment as a matter of law.

21 Accordingly, Plaintiffs’ Motion for Entry of Partial Final Judgment on Liability as  
22 Sanctions for Spoliation of Evidence is denied with respect to judgment for Plaintiffs on  
23 liability, but granted as to the request for adverse inference instructions.

24 **C. Attorneys’ Fees**

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25  
26 <sup>8</sup> The Court is aware that Defendants have already moved for summary judgment on  
27 Plaintiffs’ Rico cause of action. Accordingly, the Court will strike Plaintiffs’ Response and  
28 Defendants’ Reply in Support of that motion to give Plaintiffs the opportunity to respond in  
accordance with this Order.

1 Plaintiffs also request an award of attorneys' fees and costs incurred in connection  
2 with seeking the spoliated evidence and incurred in connection with this motion. "Under its  
3 'inherent powers,' a district court may also award sanctions in the form of attorneys' fees  
4 against a party or counsel who acts in bad faith, vexatiously, wantonly, or for oppressive  
5 reasons." *Leon*, 464 F.3d at 961 (internal quotation and citation omitted). "Before awarding  
6 such sanctions, the court must make an express finding that the sanctioned party's behavior  
7 constituted or was tantamount to bad faith." *Id.* (citation omitted). "A party demonstrates  
8 bad faith by delaying or disrupting the litigation or hampering enforcement of a court order."  
9 *Id.* (internal citation omitted). "The bad faith requirement ensures that the district court's  
10 exercise of its broad power is properly restrained, and preserves a balance between protecting  
11 the court's integrity and encouraging meritorious arguments." *Id.* (internal quotation and  
12 citation omitted). "Additionally, the amount of monetary sanctions must be reasonable."  
13 *Id.* (internal quotation and citation omitted). The Court has already found that Defendants  
14 Regan and Vazirani acted in bad faith. Accordingly, Plaintiffs are entitled to their  
15 *reasonable* attorneys' fees incurred in connection with this motion and seeking spoliated  
16 evidence.

17 The Parties are directed to confer in good faith to resolve any disputes concerning the  
18 amount of *reasonable* expenses and fees. *See* LRCiv 54.2(d)(1). If the Parties are unable  
19 to agree, Plaintiffs may file a motion pursuant to Local Rule 54.2. Any such motion shall be  
20 filed, with a supporting memorandum, on or before February 6, 2012, with the response and  
21 reply briefs due in accordance with the time periods provided in Local Rule 54.2(b)(3) and  
22 (4).

#### 23 **IV. DEFENDANT JAMES REGAN'S MOTION FOR SANCTIONS FOR** 24 **DISCOVERY ABUSE (Doc. 73).**

25 Defendant Regan alleges that, in response to discovery requests by Aviva, he allowed  
26 Aviva's computer expert to attempt to obtain discoverable information from the hard drive  
27 of his computer. Defendant Regan alleges that, when Aviva's computer expert returned his  
28 computer to him, it was severely damaged and he had to replace it. Defendant Regan further

1 alleges that he has submitted his \$900 bill for the damage to his computer to Aviva and  
2 Aviva has refused to pay it. Defendant Regan “asks that the Court award him an  
3 immediately payable sanction of \$900 to pay for the computer destroyed by Aviva’s  
4 computer ‘expert.’” (Doc. 73 at 10). In their Response to the request for sanctions,  
5 Plaintiffs argue that their expert did not damage Defendant Regan’s computer. (Doc. 81).

6 This is not the type of situation where a sanction would be appropriate or warranted.  
7 The substance of Defendant Regan’s motion convinces the Court that he is not seeking a  
8 sanction for an abuse of discovery, but is seeking a sanction for damage to property that  
9 allegedly occurred during the discovery process. These two situations are not equivalent.  
10 For example, if Plaintiffs’ expert intentionally destroyed evidence relevant to the case, at  
11 Plaintiffs’ direction or to assist Plaintiffs in obstructing the discovery process, a sanction for  
12 abuse of discovery would be appropriate. Conversely, if Plaintiffs’ expert and Defendant  
13 were involved in a car accident in the parking lot of the law firm where Defendant’s  
14 deposition was to take place, this Court could not order Plaintiffs (or their expert) to pay for  
15 the damage to Defendant’s car as a sanction for abuse of the discovery process. The conduct  
16 at issue here is akin to the latter example.

17 Further, the alleged damage is not attributable to Plaintiffs, but to their expert.  
18 Defendant Regan may have a separate cause of action against Plaintiffs’ expert for the  
19 damage done to his computer, but the Court does not have jurisdiction within this case over  
20 a claim between Defendant Regan and a third-party involving issues and facts distinct from  
21 the issues and facts necessary to the resolution of the dispute in this case. Accordingly,  
22 Defendant Regan’s Motion for Sanctions for Discovery Abuse is denied.

23 Based on the foregoing,

24 **IT IS ORDERED** that Plaintiffs’ Motion to Dismiss the Vazirani Defendants’  
25 Counterclaims (Doc. 53) is denied without prejudice. Plaintiffs may re-raise this issue on  
26 summary judgment if the evidence supports their original arguments.

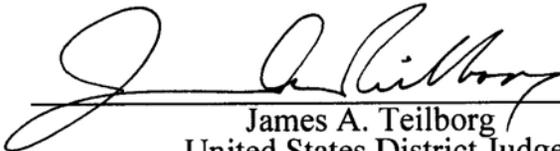
27 **IT IS FURTHER ORDERED** that Plaintiffs’ Motion for Entry of Partial Final  
28 Judgment on Liability as Sanctions for Spoliation of Evidence (Doc. 66) is granted in part

1 and denied in part as set forth in this Order. As set forth in this Order, Plaintiffs must file any  
2 reasonable request for attorneys' fees before February 6, 2012.

3 **IT IS FURTHER ORDERED** that the Clerk of the Court shall strike Plaintiffs'  
4 Response to Vazirani Defendants' Motion for Judgment on the Pleadings (Doc. 84) and the  
5 Vazirani Defendants Reply Memorandum in Support of Motion for Judgment on the  
6 Pleadings on Plaintiffs' RICO Cause of Action (Doc. 87). Plaintiffs shall file their Response  
7 within fourteen days of the date of this Order. If Plaintiffs do not wish to make changes to  
8 their Response, Plaintiffs may re-file their current response. Defendants shall file their Reply  
9 within seven days of Plaintiffs' Response.

10 **IT IS FINALLY ORDERED** that Defendant Regan's Motion for Sanctions for  
11 Discovery Abuse (Doc. 73) is denied.

12 DATED this 10th day of January, 2012.

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17 James A. Teilborg  
18 United States District Judge  
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